DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 653 and 655

Wage and Hour Division

29 CFR Part 501

[DOL Docket No. ETA–2019–0007]

RIN 1205–AB89

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

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

ACTION: Proposed rule; request for comments.

SUMMARY: The Department of Labor (Department or DOL) proposes to amend its regulations regarding the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. This notice of proposed rulemaking (NPRM or proposed rule) streamlines the process by which the Department reviews employers' applications for temporary agricultural labor certifications to use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2A status. Amendments to the current regulations focus on modernizing the H–2A program and eliminating inefficiencies. The Department also proposes to amend the regulations for enforcement of contractual obligations for temporary foreign agricultural workers and the Wagner-Peyser Act regulations to provide consistency with revisions to H–2A program regulations governing the temporary agricultural labor certification process.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before September 24, 2019.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB89, by any one of the following methods:

Electronic Comments: Comments may be sent via *http://www.regulations.gov,* a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type in '1205–AB89' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

Mail: Address written submissions to (including disk and CD–ROM submissions) to Adele Gagliardi, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5641, Washington, DC 20210.

Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agency's name and the RIN 1205–AB89. Please be advised that comments received will become a matter of public record and will be posted without change to *http://www.regulations.gov,* including any personal information provided. Comments that are mailed must be received by the date indicated for consideration.

Docket: For access to the docket to read background documents or comments, go to the Federal e-Rulemaking Portal at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR part 653, contact Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 513–7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

For further information regarding 20 CFR part 655, contact Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 513–7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

For further information regarding 29 CFR part 501, contact Amy DeBisschop, Acting Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0578 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR Part 655, Subpart B

A. Statutory Framework

The H–2A nonimmigrant worker visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform temporary or seasonal agricultural labor or services where the Secretary of Labor (Secretary) certifies that (1) 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 (2) the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1101(a)(15)(H)(ii)(a); section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1). The Secretary has delegated his authority to issue temporary agricultural labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who in turn has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC). Secretary's Order 06–2010 (Oct. 20, 2010). In addition, the Secretary has delegated to the Department's Wage and Hour Division (WHD) the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to assure employer compliance with the terms and conditions of employment under the H–2A program. Secretary's Order 01–2014 (Dec. 19, 2014).

B. Current Regulatory Framework

Since 1987, the Department has operated the H–2A temporary labor certification program under regulations promulgated pursuant to the INA. The Department's current regulations governing the H–2A program were published in 2010.[1] The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655 and 29 CFR part 501. In addition, the Department has issued special procedures for the

[1] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 75 FR 6884 (Feb. 12, 2010) (2010 Final Rule).

employment of foreign workers in the herding and production of livestock on the range as well as animal shearing, commercial beekeeping, and custom combining occupations.[2] The Department incorporated the provisions for employment of workers in the herding and production of livestock on the range into the regulation, with modifications, in 2015. Those provisions are now codified at §§ 655.200 through 655.235.

C. Need for New Rulemaking

It is the policy of the Department to increase protections for workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of ETA, WHD, and the Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of working conditions in the United States. In addition, these agencies make criminal referrals to the Department's Office of Inspector General to combat visa-related fraud schemes.[3]

The proposed rule furthers the goals of Executive Order (E.O.) 13788, Buy American and Hire American. *See* 82 FR 18837 (Apr. 21, 2017). The E.O. articulates the executive branch policy to ''rigorously enforce and administer'' the laws governing entry of nonimmigrant workers into the United States ''[i]n order to create higher wages and employment rates for workers in the United States, and to protect their economic interests.'' *Id.* sec. 2(b). It directs federal agencies, including the Department, to protect U.S. workers by proposing new rules and issuing new guidance to prevent fraud and abuse in nonimmigrant visa programs. *Id.* sec. 5.

The Department proposes to update its H–2A regulations to ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while maintaining the program's strong protections for the U.S. workforce. The changes proposed in this NPRM would enhance WHD's enforcement capabilities, thereby removing workforce instability that hinders the growth and productivity of our nation's farms, while allowing for aggressive enforcement against program fraud and abuse that undermine the interests of U.S. workers, in accordance with E.O. 13771, Reducing Regulation and Controlling Regulatory Costs. Below is an overview of major proposed changes, followed by a section-by-section discussion of all proposed changes.

1. Mandatory Electronic Filing and Electronic Signatures

a. Mandatory Electronic Filing

The Department proposes to require electronic filing (e-filing) of *Applications for Temporary Employment Certification* and job orders for most employers and, if applicable, their authorized representatives. E-filing will be required for the Form ETA–9142A and appropriate appendices; the Form ETA–790/790A and appropriate addenda; and all applicable documentation required by this subpart to secure a temporary agricultural labor certification from the Department, including the surety bonds required for H–2A Labor Contractors (H–2ALCs). In addition, the Office of Management and Budget's (OMB) approved forms will require employers and, if applicable, their authorized representatives to designate a valid email address for sending and receiving official correspondence concerning the processing of these e-filings by the State Workforce Agency (SWA) and National Processing Center (NPC). The requirement to submit electronic *Applications for Temporary Employment Certification* and job orders would not apply in situations where the employer is unable or limited in its ability to use or access electronic forms as result of a disability or lacks access to e-filing.[4]

This proposal is intended to maximize end-to-end electronic processing of *Applications for Temporary Employment Certification* and job orders, which is an important technological objective of the Department. Although e-filing of applications using OFLC's iCERT Visa Portal System (iCERT System) is not currently mandated, in the Department's experience, employers prefer to use e-filing to request temporary agricultural labor certification in the H–2A program. Based on temporary agricultural labor certification applications processed during fiscal years (FYs) 2016 and 2017, more than 81 percent of employer H–2A applications were submitted electronically to the NPC for processing using the iCERT System. When compared to paper-filed applications, preparing H–2A applications and uploading supporting documentation through the iCERT System resulted in more complete submissions, better quality entries on form fields, and more streamlined processing using email as the primary form of communication with employers and, if applicable, their authorized representatives.[5] Further, the Department's experience indicates that only a handful of H–2A employers did not provide an email address on their H–2A applications.

The Department has determined that mandating e-filing will reduce costs and burdens for most employers and for the Department, reduce the frequency of delays related to filing applications, improve the quality of information collected, and promote administrative efficiency and accountability. For employers and their authorized representatives, the Department's proposal to require e-filing would improve the customer experience by permitting more prompt adjudication of applications and reducing paperwork burdens and mailing costs. E-filing permits automatic notification that an application is incomplete or obviously inaccurate and provides employers with an immediate opportunity to correct the errors or upload the missing documentation. This approach reduces processing delays and costs for employers who would otherwise need to pay for expedited mail or private courier services to submit corrected applications.

Paper-based submissions are more costly for the Department to process than electronic submissions because they require manual data entry of information contained in the required documents and manual uploading of scanned copies of the documents into the iCERT System's electronic case documents repository. As noted in a 2012 Government Accountability Office

[2] *See* TEGL, No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program* (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041;* TEGL, No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program* (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043;* TEGL, No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program* (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040.*

[3] *See* News Release, U.S. Secretary of Labor Protects Americans, Directs Agencies to Aggressively Confront Visa Program Fraud and Abuse (June 6, 2017), *https://www.dol.gov/newsroom/releases/opa/opa20170606.*

[4] The lack of a computer may or may not constitute lack of access to e-filing under the proposed regulation. It depends on the circumstances presented by the employer at the time of filing.

[5] Based on an analysis of 18,775 temporary labor certification records processed during FY 2016 and 2017, approximately 66 percent of H–2A applications mailed to the NPC were issued a Notice of Deficiency (NOD), while approximately 47 percent of H–2A applications filed electronically were issued a NOD.

(GAO) report on the H–2A program, paper-based submissions can result in misplaced or lost documentation, unnecessary communication delays between employers and the Government, and missed opportunities to quickly resolve minor deficiencies in the application process.[6] Electronic submissions, on the other hand, do not require manual data entry by DOL and can be instantaneously categorized and assigned for review by the NPC. If an *Application for Temporary Employment Certification* filed electronically requires amendments or other corrections, often those amendments and corrections are automatically entered into the iCERT System. Furthermore, electronic submissions are more likely to include all necessary documentation and information because the Department can require validation of the form entries and supporting documentation prior to its submission.

The Department acknowledges that there may be opportunity costs associated with transitioning to a new way of filing and costs associated with changing familiar processes and learning new systems. The Department believes that the efficiencies gained in processing by the Department from an increase in electronic filing will outweigh these costs. The Department invites comment on this analysis.

Consistent with its adoption of mandatory e-filing, the Department plans to expand the capabilities of the iCERT System to permit the electronic execution and delivery of surety bonds. As explained more fully in § 655.132, accepting electronic surety bonds would further streamline the application process and reduce unnecessary delays, while preserving the Department's ability to enforce such bonds.

The Department anticipates that requiring e-filing will not require a change of practice for the vast majority of employers. Based on FY2019 data, approximately 94.1 percent of H–2A applications were filed electronically. Almost all of the remaining 5.9 percent of H–2A applications filed by mail also disclosed valid email addresses on the application form, thereby suggesting that employers and, if applicable, their authorized attorneys and agents have access to the internet and are likely capable of filing electronically. Employers without means to file electronically represent a small percentage of all filers, and the Department anticipates the very few employers without access to e-filing will continue to decrease with the growth of information technology and access to the internet in rural areas. However, the Department acknowledges that a small number of employers may be unable to take advantage of the more efficient e-filing process. Therefore, the proposal permits these employers to file using a paper-based process if they lack adequate access to e-filing. In addition, the proposal establishes a process for individuals with disabilities to request an accommodation to allow these employers to use or access forms and communications from the Department.

The Department seeks comments on its proposal to require e-filing. For example, the Department would like to know if there are members of the regulated community, aside from those already identified in the proposal, who would be significantly burdened if the Department requires e-filing. The Department also seeks comments on e-filing methodology, such as the convenience or inconvenience of e-filing and other advantages or disadvantages of the e-filing process compared to other filing processes.

b. Acceptance of Electronic Signatures

The Department proposes to promote greater efficiencies in the application process and establish parity between paper and electronic documents by expanding the ability of employers, agents, and attorneys to use electronic methods to comply with signature requirements for the H–2A program. As a matter of longstanding policy, the Department considers an original signature to be legally-binding evidence of the intention of a person with regard to a document, record, or transaction. Since the implementation of an e-filing option in December 2012, the Department also has considered a signature valid where the employer's original signature on a document retained in the employer's file is photocopied, scanned, or similarly reproduced for electronic transmission to the Department, whether at the time of filing or during the course of processing an *Application for Temporary Employment Certification.* Although acceptance of electronic (scanned) copies of original signatures on documents has generated efficiencies in the application process, modern technologies and evolving business practices are rendering the distinction between original paper and electronic signatures nearly obsolete, and the Department and employers can achieve even greater efficiencies using and accepting electronic signature methods. For instance, the use of electronic signature methods is necessary for the Department to implement its proposal to accept electronic surety bonds.

Under this proposed rule, the Department would permit an employer, agent, or attorney to sign or certify a document required under this subpart using a valid electronic signature method. This proposal is consistent with the principles of two Federal statutes that govern an agency's implementation of electronic document and signature requirements. First, the Government Paperwork Elimination Act (GPEA), Public Law 105.277, Title XVII (Secs. 1701–1710), 112 Stat. 2681–749 (Oct. 21, 1998), 44 U.S.C. 3504 note, requires Federal agencies to allow individuals or entities that deal with the agencies, when practicable, the option to submit information or transact with the agencies electronically and to maintain records electronically. The GPEA also specifically states that electronic records and their related electronic signatures are not to be denied legal effect, validity, or enforceability merely because they are in electronic form, and encourages Federal Government use of a range of electronic signature alternatives. *See* sections 1704, 1707 of the GPEA. Second, the Electronic Signatures in Global and National Commerce (E–SIGN) Act, Public Law 106–229, 114 Stat. 464 (June 30, 2000), 15 U.S.C. 7001 *et seq.,* generally provides that electronic documents have the same legal effect as their hard copy counterparts.

The GPEA and E–SIGN Act adopt a ''functional equivalence approach'' to electronic signature requirements where the purposes and functions of the traditional paper-based requirements for a signature must be considered, and how those purposes and functions can be fulfilled in an electronic context. The functional equivalence approach rejects the precept that Federal agency requirements impose on users of electronic signatures more stringent standards of security than required for handwritten or other forms of signatures in a paper-based environment.

Consistent with the GPEA, the Department proposes to accept an electronic signature on H–2A applications as long as it (1) identifies and authenticates a particular person as the source of the electronic communication; and (2) indicates such person's approval of the information contained in the electronic communication.[7] In addition, OMB

[6] *See* GAO–12–706, H–2A Visa Program: Modernization and Improved Guidance Could Reduce Employer Application Burden (2012), U.S. Government Accountability Office.

[7] Section 1710(1) of the GPEA. The definition of electronic signature in the E–SIGN Act essentially is equivalent to the definition in the GPEA. The

guidelines state that a valid and enforceable electronic signature would require satisfying the following signing requirements: (1) The signer must use an acceptable electronic form of signature; (2) the electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record; (3) the electronic form of signature must be attached to or associated with the electronic record being signed; (4) there must be a means to identify and authenticate a particular person as the signer; and (5) there must be a means to preserve the integrity of the signed record.[8] The Department will rely on best practices for electronic signature safety, such as these five signing requirements. Consistent with the GPEA and E–SIGN Act, the Department proposes to adopt a technology ''neutral'' policy with respect to the requirements for electronic signature. That is, the employer, agent, or attorney can apply an electronic signature required on a document using any available technology that can meet the five signing requirements.

The Department concludes that these standards for electronic signature are reasonable and accepted by Federal agencies. Promoting the use of electronic signatures would enable employers, agents, and attorneys to reduce printing, paper, and storage costs. For employers that need to retain and refer to multiple applications for temporary agricultural labor certification, the time and costs savings can be considerable. For the Department, implementing electronic signatures would help reduce operational costs and improve processing efficiency, including through the acceptance of electronic surety bonds.

2. Revisions to the Adverse Effect Wage Rate and Prevailing Wage Methodologies

The Department also proposes to adjust the methodology used to establish the required wage rate for the H–2A program. Section 218(a)(1)(B) of the INA, 8 U.S.C. 1188(a)(1)(B), provides that an H–2A worker is only admissible if the Secretary determines 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.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring an employer to offer, advertise in its recruitment, and pay a wage that is the highest of the adverse effect wage rate (AEWR), the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. The Department proposes to maintain this wage structure with only minor modifications.

Within this structure, the Department proposes to establish separate AEWRs by agricultural occupation to better protect against adverse effect on the wages of similarly employed workers in the United States. In addition, updates to the prevailing wage methodology would set more practical standards that would allow the Department to establish reliable and accurate prevailing wage rates for workers and employers.

The Department currently sets the AEWR for all H–2A job opportunities at the annual average hourly gross wage for field and livestock workers (combined) for the state or region from the Farm Labor Survey (FLS) conducted by the U.S. Department of Agriculture's (USDA) National Agricultural Statistics Service (NASS). Using this methodology, the Department is currently able to establish an AEWR for every State except for Alaska, which is not covered by the FLS.

The Department proposes to set the AEWR for a particular agricultural occupation at the annual average hourly gross wage for that agricultural occupation in the State or region reported by the FLS when the FLS is able to report such a wage. If the FLS does not report a wage for an agricultural occupation in a State or region, the Department proposes to set the AEWR at the statewide annual average hourly wage for the standard occupational classification (SOC) from the Occupational Employment Statistics (OES) survey conducted by the Department's Bureau of Labor Statistics (BLS). This change to an occupation-based wage is intended to produce more accurate AEWRs than under the current practice of establishing a single rate for all agricultural workers in a state or region. The proposal reflects the Department's concern that the current AEWR methodology may have an adverse effect on the wages of workers in higher-paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of field and livestock workers (combined). This is because the category of field and livestock workers (combined) from the FLS does not include workers who USDA classifies as supervisors; ''other workers,'' such as agricultural inspectors, animal breeders, and pesticide handlers and sprayers; or contract and custom workers. In addition, the use of generalized data for agricultural occupations within the field and livestock (combined) classification could produce a wage rate that is not sufficiently tailored to the wage necessary to protect against adverse effect for those occupations because that category aggregates the wages of workers performing significantly different job duties, such as agricultural equipment operators and crop laborers.

In addition, the Department proposes to modernize the current methodology used to conduct prevailing wage surveys, which applies to both H–2A and other job orders that use the Wagner-Peyser Act agricultural recruitment system. ETA Handbook 385 (Handbook 385 or the Handbook),[9] which pre-dates the creation of the H–2A program and has not been updated since 1981, currently sets the methodology used to establish prevailing wage rates for all agricultural job orders. The Handbook sets standards, including a requirement for in-person interviews, which are inconsistent with available resources at the state and federal levels. Due to the difficulty of implementing these resource-intensive standards, the SWAs are often required to report ''no finding'' from prevailing wage surveys; therefore, the surveys are both costly and fail to meet the aim of producing reliable prevailing wage rates. Accordingly, the Department proposes to update the prevailing wage standards to allow the SWAs and other state agencies to conduct surveys using more practical standards and establish reliable and accurate prevailing wage rates for workers and employers.

3. Incorporation of Certain Training and Employment Guidance Letters Into the H–2A Regulatory Structure

Similar to the Department's approach to incorporate the standards and procedures for sheep herders, goat herders, and the range production of livestock into regulations promulgated in 2015—and following the decision of the United States Court of Appeals for the District of Columbia in *Mendoza* v. *Perez,* 754 F.3d 1002 (D.C. Cir. 2014), explained below—the Department now

E–SIGN Act defines an electronic signature as ''an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.'' 15 U.S.C. 7006(5).

[8] Federal Chief Information Council, Use of Electronic Signatures in Federal Organization Transactions, Version 1.0 (Jan. 25, 2013).

[9] *See* ETA Handbook No. 385 (Aug. 1981), *available at https://www.foreignlaborcert.doleta.gov/pdf/et_385_wage_finding_process.pdf.*

proposes to incorporate into the H–2A regulations, with some modifications, the standards and procedures related to animal shearing, commercial beekeeping, and custom combining in this NPRM. These standards and procedures are currently found in *Temporary and Employment Guidance Letters* (TEGL). The proposed standards and procedures, if adopted, would be incorporated at 20 CFR part 655 subpart B, 655.300 through 655.304.

4. The Definition of Agriculture

The Department proposes to expand the definition of ''agriculture'' under the H–2A program to include reforestation and pine straw activities. As further discussed below, although temporary foreign workers engaged in reforestation and pine straw activities are currently admitted under the H–2B program, these workers share many of the same characteristics as traditional agricultural crews.

5. The 30-Day Rule

The Department proposes to replace the 50 percent rule with a 30-day rule requiring employers to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days from the employer's first date of need on the certified *Application for Temporary Employment Certification,* and a longer recruitment period for those employers who choose to stagger the entry of H–2A workers into the United States, as explained below. Under the current regulation, an employer granted temporary agricultural labor certification must continue to provide employment to any qualified, eligible U.S. worker who applies until 50 percent of the period of the work contract has elapsed. The obligation to hire additional workers mid-way through a season is disruptive to agricultural operations and makes it difficult for agricultural employers to be certain they will have a steady, stable, properly trained, and fully coordinated workforce. Since the implementation of the current regulation, the Department has collected a significant amount of data that shows that a very low number of U.S. workers apply for the job opportunity within 30 days after the start date of work, and even fewer after that.

Section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii), tasked the Department with determining whether agricultural employers should be required by regulation to hire U.S. workers after H–2A workers have already departed for the place of employment. These provisions suggest that, in making this determination, the Department should weigh the ''benefits to United States workers and costs to employers.'' Based on available data, it appears that the costs of the rule to employers outweigh any benefits the rule may provide to U.S. workers. Replacing the 50 percent rule with a rule requiring employers to hire qualified, eligible U.S. worker applicants for a period of 30 days after the employer's first date of need will balance the needs of workers and employers. Requiring employers to hire workers 30 days into the contract period, while still disruptive to agricultural operations, shortens the period during which such disruptions may occur and restores some stability to employers that depend on the H–2A program. Providing U.S. workers the ability to apply for these job opportunities 30 days into the contract period ensures that U.S. workers still have access to these jobs after the start of the contract period during the period of time they are most likely to apply.

6. Staggered Entry

The Department proposes to permit the staggered entry of H–2A workers into the United States. Under this proposal, any employer that receives a temporary agricultural labor certification and an approved H–2A Petition may bring nonimmigrant workers into the United States at any time up to 120 days after the first date of need identified on the certified *Application for Temporary Employment Certification* without filing another H–2A Petition. If an employer chooses to stagger the entry of its workers, it must continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified *Application for Temporary Employment Certification,* whichever is longer. This proposal will provide employers with the flexibility to accommodate changing weather and production conditions that are inherent to agricultural work. It will also reduce the need for employers to file multiple *Applications for Temporary Employment Certification* for same occupational classification in which the only difference is the expected start date of work, thus improving efficiencies for both employers and the Department.

II. Discussion of Proposed Revisions to 20 CFR Part 655, Subpart B; 20 CFR 653.501(c)(2)(i); and 29 CFR Part 501

A. Introductory Sections

1. Section 655.100, Scope and Purpose of Subpart B

The proposed revisions to this section clarify the statutory authority for the H–2A temporary agricultural labor certification process, and the scope of the Department's role in receiving, reviewing, and adjudicating applications for temporary agricultural labor certification, and upholding the integrity of *Applications for Temporary Employment Certification.* These revisions also clarify the Department's authority to establish standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H–2A employers must comply, as well as the rights and obligations of H–2A workers and workers in corresponding employment.

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

The revisions to this section clarify the delegated authority of, and division of responsibilities between, ETA and WHD under the H–2A program. This section addresses the delegated authority of OFLC, the office within ETA that exercises the Secretary's responsibility for determining the availability of qualified U.S. workers to perform the temporary agricultural labor or services, and whether the employment of the H–2A workers will adversely affect the wages and working conditions of workers in the United States similarly employed. This provision also discusses the authority delegated to WHD, the agency responsible for investigation and enforcement of the terms and conditions of H–2A temporary agricultural labor certifications. Finally, this provision reminds program users of each agency's concurrent authority to impose a debarment remedy when appropriate under ETA regulations at 20 CFR 655.182 or under WHD regulations at 29 CFR 501.20.

3. Section 655.102, Transition Procedures

a. Proposal To Rescind the Provision That Allows for the Creation of Special Procedures

Special procedures in the H–2A program were based upon a determination that variations from the normal labor certification processes

were necessary to permit the temporary employment of foreign workers in specific industries or occupations when able, willing, and qualified U.S. workers were not available and the employment of foreign workers would not adversely affect the wages or working conditions of workers in the United States similarly employed. The H–2A regulations have, since their creation, provided authority for the Department to ''establish, continue, revise, or revoke special procedures for processing certain H–2A applications.'' 20 CFR 655.102.

In *Mendoza* v. *Perez,* 754 F.3d 1002, 1022 (D.C. Cir. 2014), the D.C. Circuit concluded that 20 CFR 655.102 was ''a grant of unconstrained and undefined authority [, and the] purpose of the [Administrative Procedure Act (APA)] would be disserved if an agency with a broad statutory command . . . could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation . . . and then invoking its power to interpret the statute and regulation in binding the public to a strict and specific set of obligations.'' Accordingly, the court in *Mendoza* specifically held that the special procedures pertaining to sheep, goat, and cattle herding issued under § 655.102 were subject to the APA's notice and comment requirements because they possess all the hallmarks of a legislative rule and could not be issued through sub-regulatory guidance. 754 F.3d at 1024 (''The [special procedures] are necessarily legislative rules because they 'effect [ ] a [substantive] change in existing law or policy,' and 'effectively amend[ ] a prior legislative rule.' '') (citations omitted).

In light of *Mendoza,* the Department proposes to rescind from the H–2A regulations the general provision that allows for the creation of special procedures that establish variations for processing certain *Applications for Temporary Employment Certification.* The Department proposes, in this NPRM, procedures for handling applications for each of the occupations that currently have special procedures under this authority: Animal shearing, commercial beekeeping, and custom combining. The Department also proposes procedures for handling applications involving reforestation, which, as discussed in detail below, the Department proposes to include within the H–2A definition of agriculture activities.

b. Proposal To Add a Provision Providing Procedures for Implementing Changes Created by a Final Rule

The Department proposes to rename § 655.102, ''Transition procedures,'' and add a transition period in order to provide an orderly and seamless transition for implementing changes created by these proposed regulatory revisions, if adopted in a final rule. Generally, the Department processes all applications in accordance with the rules in effect on the date the *Application for Temporary Employment Certification* is submitted. However, based on the Department's program experience, a transition period will help provide employers and other stakeholders with time to understand and comply with regulatory revisions affecting the assurances and obligations of the H–2A program to obtain and employ workers under a temporary agricultural labor certification. Similarly, a transition period will allow the Department to implement necessary changes to program operations, application forms, technology systems, and to provide training and technical assistance to OFLC, SWAs, employers, and other stakeholders in order to familiarize them with changes required by this proposed rule.

Accordingly, the Department proposes that any application submitted by an employer prior to the effective date of a final rule must meet regulatory requirements and will be processed by the NPC in accordance with the 2010 Final Rule. The Department also proposes to establish a transition period that will apply to any application for which the first date of need for H–2A workers is no earlier than the effective date of a final rule and not later than the date that is 90 calendar days after the effective date of a final rule. Specifically, an employer submitting an application on or after the effective date of a final rule, where the first date of need for H–2A workers is not later than 90 calendar days after the effective date of a final rule, will continue to meet regulatory requirements and will be processed by the NPC in accordance with the current regulation. Thus, the Department proposes to establish a 90-day transition period in which employers are allowed to continue filing applications and receive temporary agricultural labor certifications under the regulatory requirements set forth in the current regulation. However, all applications submitted by employers on or after the effective date of a final rule, where the first date of need for H–2A workers is later than 90 calendar days after the effective date of a final rule, will be expected to fully comply with all of the requirements of a final rule. The Department invites comments on the length of the transition period, including impact and costs associated with a transition period longer or shorter than 90 days.

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

a. Paragraph (b), Definitions; and 20 CFR 653.501(c)(2)(i)

i. Adverse Effect Wage Rate

The current regulation provides that the AEWR is set at the annual weighted average hourly wage for field and livestock workers (combined) based on the USDA's FLS. To be consistent with the Department's proposal to adjust the current AEWR methodology, the Department proposes conforming changes to the definition of AEWR in this section. The Department discusses the proposed changes to the AEWR methodology in the preamble to § 655.120.

ii. Administrator, OFLC Administrator, WHD Administrator, and Wage and Hour Division

The current regulation defines the OFLC Administrator as the primary official of the OFLC or the OFLC Administrator's designee. The Department proposes to add an equivalent definition of ''WHD Administrator'' to clarify that the OFLC and WHD Administrators have unique roles in the H–2A temporary agricultural labor certification process. Additionally, the Department proposes to add a definition of ''Administrator'' that cross references the definitions of OFLC Administrator and WHD Administrator so that interested parties may be able to locate these definitions more easily. Finally, the Department proposes to add a definition of ''Wage and Hour Division'' to provide a clear definition of a term used throughout the current and proposed regulations.

iii. Area of Intended Employment

The Department proposes a minor amendment to the definition of ''area of intended employment'' that replaces the terms ''place of the job opportunity'' and ''worksite'' with the term ''place(s) of employment,'' consistent with the proposed inclusion and definition of ''place(s) of employment'' in this section. Based on the factual circumstances of each application, the Certifying Officer (CO) will continue using the term ''area of intended employment'' to assess whether each place of employment is within normal commuting distance from the first place of employment or, if designated, the centralized ''pick-up'' point (*e.g.,*

worker housing) to every other place of employment identified in the application and job order. The Department maintains that the recruitment of U.S. workers is most effective when the work performed under the job order is advertised to workers residing in the local or regional area and enables them to return to their permanent places of residence on a daily basis rather than traveling long distances to reach the places of employment. Longer than normal commuting times, transportation issues, geographic barriers, or the need to live away from home are all factors that can discourage U.S. workers from accepting a temporary agricultural job opportunity, making it challenging for the Department to accurately assess whether there are sufficient U.S. workers who are able, willing, and qualified to perform the labor or services involved in the application.

However, the Department acknowledges that the absence of a clear and objective standard for normal commuting distance in the definition of area of intended employment makes it difficult for employers to understand and predict how the Department will review the geographic scope of their job opportunities. Accordingly, the Department invites comments on whether it should further revise the definition of area of intended employment. Specifically, the Department is interested in comments focused on whether there are objective factors, commuting or labor market area designation systems, or other comprehensive commuting studies and data that can be used to more effectively determine normal commuting distances for the purpose of the Department's implementation of the H–2A program. The Department is also interested in comments on whether it should continue making fact-based determinations on a case-by-case basis, or whether it should impose a more uniform standard for all employers, such as maximum commuting distance or time above which will be considered an unreasonable commuting distance or time in all cases. Comments submitted under this proposed rule should address the advantages and disadvantages of each suggested alternative, and how implementation of the alternative will ensure the integrity of the labor market test and provide greater clarity to employers with respect to what constitutes a normal commuting distance to the places of employment identified in their applications and job orders.

iv. Average AEWR

The Department proposes to define a new term ''average adverse effect wage rate'' to complement proposed changes to § 655.132. As discussed more fully later in this preamble, the Department proposes to change the H–2A Labor Contractor (H–2ALC) surety bond requirement such that the required bond amounts adjust annually based on changes to a nationwide average AEWR. The Department will calculate and publish the average AEWR annually when it calculates and publishes AEWRs in accordance with § 655.120(b).[10] The average AEWR will be calculated as a simple average of the published AEWRs applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). This classification was chosen to benchmark the required bond amounts because the majority of workers employed by H–2ALCs perform work in this classification.

v. Employer and Joint Employment

Section 218 of the INA generally recognizes that growers, agricultural associations, and H–2A labor contractors that file applications are employers or joint employers.[11] In conformity with the statute as well as the Department's current policy and practice, the Department proposes to clarify the definitions of employer and joint employment with respect to the H–2A program to include those entities the statute recognizes as employers or joint employers. First, the Department proposes to add language to the definition of joint employment in the H–2A program that clarifies that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H–2A workers sponsored under the application and, if applicable, of corresponding workers. Second, the Department proposes to clarify the definition of joint employment to include an employer-member of an agricultural association that is filing as a joint employer, but only during the period in which the member employs H–2A workers sponsored under the association's joint employer application. Third, the Department proposes a slight change to the joint employment language in the current regulation to more expressly codify that the common law of agency determines joint employer status under the statute. Fourth, the Department proposes to add language to the definition of joint employment with respect to the H–2A program that would clarify that growers who file the joint employer application proposed in § 655.131(b) are joint employers, at all times, with respect to the H–2A workers sponsored under the application and, if applicable, any corresponding workers. Fifth, in addition to the proposed changes to the definition of joint employment, the Department proposes to add language to the definition of employer to clarify that a person who files an application other than as an agent is an employer. Sixth, the Department proposes to add language to the definition of employer to clarify that a person on whose behalf an application is filed is an employer. These proposed revisions reflect the Department's longstanding administrative and enforcement practice that is already familiar to employers.

Controlling judicial and administrative decisions provide that to the extent a federal statute does not define the term employer, the common law of agency governs whether an entity is an employer.[12] Accordingly, the proposal continues to use the common law of agency to define the terms employer and joint employment for associations and growers that have not filed applications. Thus, for example, under the Department's current and continuing enforcement policy—with which employers are already familiar—if an agricultural association files as a joint employer, the association's employer-members are only joint employers with the association when they are jointly employing the H–2A or corresponding worker under the common law of agency.

The Department additionally notes that the current H–2A program definitions of employer and joint

[10] The Department published the 2018 AEWRs for non-range occupations in Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2018 Adverse Effect Wage Rates for Non-Range Occupations,* 82 FR 60628 (Dec. 21, 2017).

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

[12] *See Nationwide Mutual Insurance* v. *Darden,* 503 U.S. 318, 322–24 (1992); *Garcia-Celestino* v. *Ruiz Harvesting,* 843 F.3d 1276, 1288 (11th Cir. 2016); *Admin.* v. *Seasonal Ag. Services, Inc.,* 2016 WL 5887688, at *6 (ARB, Sept. 30, 2016). The focus of the common law standard is the ''hiring entity's 'right to control the manner and means by which the product is accomplished.' '' *Ruiz Harvesting,* 843 F.3d at 1292–93 (quoting *Darden,* 503 U.S. at 323). Application of the standard typically entails consideration of a variety of factors. *See Ruiz Harvesting,* 843 F.3d at 1293 (citing *Darden,* 503 U.S. at 323–24).

employment, as well as those the Department proposes herein, are different from the definitions of ''employer,'' ''employee,'' ''employ'' in the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA) and the definition of ''employ'' in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* (MSPA). Thus, the statutory definitions in the FLSA and MSPA that determine the existence of an employment relationship or joint employer status neither apply nor are relevant to the determination of whether an entity is an H–2A employer or joint employer.

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

Consistent with existing practice, when an agricultural association files a joint employer application, an employer-member of that association is an employer of the H–2A workers during the time when those workers perform work or services for the member. When only one employer-member is employing the H–2A workers at the time of a program violation, only that employer-member and its agricultural association are economically responsible for program violations.

Joint Employer Applications Under Proposed § 655.131(b)

Proposed § 655.131(b) generally codifies the Department's longstanding practice with regard to joint employer applications. Each grower party to a § 655.131(b) joint employer application will be jointly liable for compliance with all H–2A program requirements. Thus, for example, if employer C and employer D file a joint employer application under proposed § 655.131(b) and employer C fails to pay the H–2A workers the required wage, employer D will be jointly liable for employer C's violations. This codification of ongoing administrative and enforcement policy towards employers that have filed as joint employers under the program is designed to maintain consistency with the Department's well-known practices that are already familiar to employers.

The Department's approach to joint employment under § 655.131(b)—which aims to accommodate small growers that do not have full time work for their H–2A employees—is implied by the statute. The statute specifically contemplates that filers (other than agents) are employers and only expressly permits an entity (*i.e.,* an agricultural association) to transfer H–2A workers when the entity agrees to retain program responsibility with respect to the workers it transfers.[13] Therefore, the Department must require entities that jointly apply for H–2A workers, who they intend to transfer among themselves, to retain program responsibility for the transferred workers and, if applicable, any corresponding workers.

This proposed approach provides a flexible application system that harmonizes with the statutory language. Growers who prefer not to assume the shared liability under the proposed joint employer application may file through an agricultural association acting as a joint or sole employer. In addition to conformity with the statute, the Department's proposed approach is also consistent with judicial authority.[14]

Department's Approach to Imposing Liability Among Culpable Joint Employers

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

Proposal To Move Certain Requirements in the Definition of Employer

The current definition of employer in the H–2A program requires an employer to have a place of business in the United States and a means of contact for employment as well as a Federal Employer Identification Number (FEIN). The Department proposes to move these requirements to §§ 655.121(a)(1) and 655.130(a). The proposal will require a prospective employer to include its FEIN, its place of business in the United States and a means of contact for employment in both its job order submission to the NPC, and its *Application for Temporary Employment Certification.*

vi. First Date of Need and Period of Employment

The Department proposes to define the term ''first date of need'' as the first date on which the employer anticipates requiring the temporary agricultural labor or services for which it seeks a temporary agricultural labor certification. This is the date that appears on the employer's job order and *Application for Temporary Employment Certification* as the start date of work for the job opportunity and will be used in recruitment and for calculating program requirements (*e.g.,* the positive recruitment period under § 655.158). By including the term ''anticipated,'' the Department's proposed definition would provide a limited degree of flexibility for the actual start date of work for some or all of the temporary workers hired, which may vary due to such factors as travel delays or crop conditions at the time work is expected to begin. Provided that the employer complies with all obligations to workers (*e.g.,* providing housing and subsistence at no cost to workers as set forth in § 655.145(b)), the employer's actual start date of work may occur within 14 calendar days after the anticipated first date of need listed on the temporary agricultural labor certification. Additionally, the Department proposes to define the term ''period of employment'' as the time during which the employer requires the temporary agricultural labor or services for which it seeks a temporary agricultural labor certification, as indicated by the first date of need and the last date of need provided on the employer's job order and *Application for Temporary Employment Certification.*

vii. Prevailing Wage

The current H–2A regulation defines ''prevailing wage'' as ''[w]age established pursuant to 20 CFR 653.501(d)(4),'' which is the Wagner-Peyser Act regulation that covers clearance of both H–2A and non-H–2A agricultural job orders. Due to regulatory revisions to part 653 under the Workforce Innovation and Opportunity Act, § 653.501(d)(4) no longer addresses prevailing wages but rather discusses the referral of workers.[15] While § 653.501(c)(2)(i) contains the requirement that the SWA must ensure that job orders provide that the employer has offered not less than the

[13] *See* 8 U.S.C. 1188(d)(2).

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

[15] *See* Final Rule, *Workforce Innovation and Opportunity Act,* 81 FR 56071, 56346–48 (Aug. 19, 2016) (amending § 653.501).

higher of the prevailing wage rate or applicable Federal or State minimum wage, nothing in part 653 addresses how that prevailing wage is established.

As discussed in detail below, the Department proposes to modernize the longstanding sub-regulatory guidance that it uses to establish prevailing wages and replace the existing methodology with a new methodology, as set forth in proposed regulatory text in 20 CFR 655.120 and discussed in the preamble to that section. Accordingly, the Department proposes to conform changes to the regulatory definition of prevailing wage in § 655.103 to cross reference that new proposed methodology at § 655.120(c). The Department proposes to use the same methodology to establish the prevailing wage for both H–2A and non-H–2A agricultural job orders. As a result, the Department proposes to make a corresponding change to the Wagner-Peyser Act regulation at 20 CFR 653.501(c)(2)(i) to define ''prevailing wage'' for the agricultural recruitment system in the same manner as the Department proposes to define ''prevailing wage'' for the H–2A program in 20 CFR 655.103(b).

viii. Temporary Agricultural Labor Certification

The Department also proposes revisions to the definition of ''temporary agricultural labor certification.'' Under the proposal, the definition clarifies that the certification made by OFLC is made based on the information contained in the *Application for Temporary Employment Certification,* the job order, and all supporting documentation submitted to the Department in the course of processing the application and job order. Under the current regulation, the definition does not make it clear that the Department's determination is based on all of these documents, though OFLC can and does consider that information in processing H–2A applications. The proposed revision would codify the Department's long-standing practice to base the certification determination on the information contained in those documents, demonstrating compliance with regulatory requirements.

ix. Additional definitions

The Department proposes to add definitions of other terms for clarity: Act, applicant, *Application for Temporary Employment Certification,* Board of Alien Labor Certification Appeals (BALCA), Chief ALJ, Department of Homeland Security, Employment and Training Administration, H–2A Petition, Metropolitan Statistical Area, piece rate, place of employment, Secretary of Labor, Secretary of Homeland Security, and U.S. Citizenship and Immigration Services.

b. Paragraph (c), Definition of Agricultural Labor or Services

The Department proposes to expand the regulatory definition of agricultural labor or services pursuant to section 101(a)(15)(H)(ii)(a) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a), to include reforestation and pine straw activities, which have similar fundamental characteristics to occupations currently defined as agricultural labor or services by statute or by the Secretary. When considering the Department's enforcement experience and reconsidering comments on past proposed rules, the Department has determined that reforestation and pine straw activities are more appropriately included in the H–2A program than in the H–2B program. In view of the changes that have taken place since the last proposal to include these activities in the H–2A program, it is appropriate to again seek comment on this issue. Although the Department cannot immediately anticipate the full impact of shifting these specific activities to the H–2A program, it notes that ''Forest & Conservation Workers'' have been the second leading occupation in DOL's certification of H–2B temporary labor certifications, with upwards of 11,000 certified positions annually in each of the last two fiscal years (FY17 and FY18). However, it is unlikely that all of these certified positions would have been filled with foreign H–2B workers due to the H–2B visa cap.

The proposed rule defines reforestation activities as predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas including, but not limited to, planting tree seedlings in specified patterns using manual tools, and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. This definition encompasses tasks that are normally associated with reforestation work and the cultivation of trees or other forestry products, regardless of whether the result of such cultivation is timber or a forested area for conservation purposes. Reforestation activities may include some forest fire prevention or suppression duties such as constructing fire breaks or performing prescribed burning tasks when such duties are in connection with and incidental to other reforestation activities. Forest fire protection or suppression duties are reforestation activities only when incidental to and performed as part of tree or forest product cultivation. For example, reforestation crews engaged in thinning to accelerate growth of immature trees may also construct a fire break, and reforestation crews engaged in planting may perform a prescribed burn prior to planting seedlings. This definition does not include regular and routine work of a forest firefighting crew and performance of job duties such as rescuing fire victims, administering first aid, locating fires, or monitoring environmental conditions for fire risk.

The proposed rule also states that reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way. As defined here, reforestation activities exclude vegetation management activities that are not associated with the cultivation of trees or other forestry products for timber or conservation purposes. [16] This includes, but is not limited to, right-of-way vegetation management activities such as the removal of vegetation that may interfere with utility lines or lines-of-sight, herbicide application, brush clearing, mowing, cutting, and tree trimming around roads, railroads, transmission lines, and other rights-of-way. Consequently, employers seeking temporary foreign workers for occupations involving these activities will have to file under the H–2B program and meet all applicable program requirements.

The proposed rule defines pine straw activities as ''[o]perations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations.''

As required by the INA, the definition of agricultural labor or services encompasses certain statutory

[16] The definition of reforestation activities in the proposed rule excludes right-of-way vegetation management because this work does not involve the handling or planting of trees or other forestry products as an agricultural or horticultural commodity. Although right-of-way vegetation management involves similar activities as performed in reforestation (*i.e.,* brush clearing and tree trimming), the result of these activities is the destruction of vegetation, not cultivation. Right-of-way vegetation management therefore is more akin to landscaping, which is generally recognized as a non-agricultural industry and would be inappropriate to include within the scope of the H–2A program. The Department has also previously opined that right-of-way vegetation management does not constitute agricultural employment as defined by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), thereby further distinguishing this industry from reforestation activities as defined here, which do constitute MSPA agricultural employment. *See* WHD Opinion Letter, June 11, 2002.

definitions,[17] as well as occupations defined as such by the Secretary in regulations. Prior to the 2008 Final Rule,[18] the Secretary did not use his authority to expand the scope of agricultural labor or services beyond those activities that the statute required to be included, none of which normally included reforestation or pine straw activities. The 2008 Final Rule expanded the definition of agricultural labor or services to include logging employment,[19] which the current regulation maintained and further clarified. *See* 2010 Final Rule, 75 FR 6884, 6981. Although reforestation and pine straw activities are generally recognized as sub-industries of forestry, they do not generally meet the definition of logging employment and therefore were excluded from the definition of agricultural labor or services.

Consequently, nonimmigrant workers engaged in reforestation and pine straw activities as defined in the proposed rule historically have been and are currently admitted under the H–2B program. However, these activities, as defined in the proposed rule, share fundamental similarities with traditional agricultural industries. Specifically, both reforestation and pine straw activities can involve the handling or planting of agricultural and horticultural commodities in their unmanufactured state and include tasks that are substantially similar to traditional agriculture, such as planting, weed control, herbicide application, and other unskilled tasks related to preparing the site and cultivating the soil. *See* 2008 Final Rule, 73 FR 77110, 77118. Additionally, the working conditions have similar characteristics to those encountered in agricultural industries; reforestation activities are commonly performed by migrant crews and overseen by labor contractors, occur in remote locations, and are frequently paid on a piece rate basis.[20] Due to these similarities, work in both the reforestation and pine straw industries, as defined in this proposed rule, often meets the definition of agricultural employment under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) [21] and of agricultural employers under the Occupational Safety and Health (OSH) Act's field sanitation standards.

In past rulemakings, these fundamental similarities prompted the Department to consider similar proposals regarding the inclusion of reforestation and pine straw activities within the scope of the H–2A program. In the 2008 NPRM, the Department sought comments regarding other industries for possible inclusion in the definition of agricultural labor and services.[22] In response, some representatives from the reforestation industry suggested that reforestation activities be included. In the 2008 Final Rule, the Department acknowledged the validity of these comments, but wanted input from a more representative sample of the affected industry.[23] In the 2009 NPRM, the Department proposed the inclusion of reforestation and pine straw activities within the definition of agricultural labor or services. 74 FR 45906, 45910–11. The Department, however, removed this provision in the 2010 Final Rule in response to comments that opposed the inclusion of reforestation. Only one comment specifically addressed pine straw activities. 75 FR 6884, 6889.

The Department, however, believes that many of the comments received in response to the 2009 NPRM are no longer applicable in the current regulatory environment. Specifically, some commenters expressed concern about the additional costs and regulatory burdens that would be imposed by participation in the H–2A program instead of the H–2B program. 2010 Final Rule, 75 FR 6884, 6889. However, this is no longer the case as the protections that currently apply to H–2A workers are generally comparable to the protections afforded to H–2B workers in the reforestation and pine straw industries.[24] For example, the employer's obligation to pay or reimburse the worker for inbound and outbound transportation to and from the place of employment is similar under both H–2A and H–2B programs.[25] Likewise, among other similarities, both programs include similar recordkeeping and disclosure requirements, and require the employer to provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.[26]

There are certain important differences, however, between the programs. For example, while an itinerant H–2B employer must provide housing at no cost to the workers (as is required of all H–2A employers), the H–2A program further requires that all employer-provided housing be inspected and certified, and that rental and/or public accommodations meet certain local, State, or Federal standards. *See* 20 CFR 655.122(d). In addition, the H–2A corresponding employment and three-fourths guarantee requirements differ slightly from these same requirements under the H–2B program.[27] Moreover, the time period during which an employer must recruit and hire U.S. workers differs between the H–2A and the H–2B programs.[28] Similarly, employers in the reforestation and pine straw industries may qualify as H–2ALCs as defined in § 655.103 and, therefore, would be subject to the requirements found in § 655.132, including the requirement to

[17] Specifically, section 101(a)(15)(H)(ii)(a) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a), identifies that, in addition to industries defined as such by the Secretary, the definition of agricultural labor or services includes ''agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. 203(f), and the pressing of apples for cider on a farm.''

[18] *See* Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,* 73 FR 77110, 77212 (Dec. 18, 2008) (2008 Final Rule).

[19] *See* Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,* 73 FR 77110, 77212 (Dec. 18, 2008) (2008 Final Rule).

[20] For further analysis of the similarities between reforestation activities and traditional agricultural crews, see Proposed Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 74 FR 45906, 45910–11 (Sept. 4, 2009) (2009 NPRM).

[21] *See Morante-Navarro* v. *T & Y Pine Straw, Inc.,* 350 F.3d 1163, 1170–72 (11th Cir. 2003); *Bresgal* v. *Brock,* 843 F.2d 1163, 1171–72 (9th Cir. 1987); *Davis Forestry Corp.* v. *Smith,* 707 F.2d 1325, 1328 n.3 (11th Cir. 1983).

[22] *See* Proposed Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,* 73 FR 8538, 8555 (Feb. 13, 2008) (2008 NPRM).

[23] ''The comments from the reforestation industry, while thoughtful, represented the input of only two individual employers and a single employer association who do not necessarily provide a representative sample of the entire reforestation industry. The department is reluctant to overturn the regulatory practices of several decades and impose the significant obligations of an H–2A employer without significant input from that industry. While the Department is willing to further explore whether to include the reforestation industry in the definition of agriculture, it does not believe a decision to do so is warranted at this time.'' 2008 Final Rule, 73 FR 77110, 77118.

[24] *See* Interim Final Rule, *Temporary Non-Agricultural Employment of H–2B Aliens in the United States,* 80 FR 24041 (Apr. 29, 2015).

[25] *See* 20 CFR 655.122(h)(1) and (2) for H–2A program requirements and 20 CFR 655.20(j)(1)(i) and (ii) for H–2B program requirements regarding inbound and outbound transportation.

[26] *Compare* 20 CFR 655.122 and 20 CFR 655.20.

[27] *See* 20 CFR 655.103 and 655.122(i) for H–2A program requirements and 20 CFR 655.5 and 655.20(f) for H–2B program requirements.

[28] *See* 20 CFR 655.135(d) for H–2A program requirements and 20 CFR 655.40(c) for H–2B program requirements.

obtain a surety bond.[29] Reforestation and pine straw employers would be required to become familiar, and comply, with these differences in program requirements, among others, to ensure compliance with the H–2A program under the proposed rule. Despite these differences, the Department believes that transitioning these industries from the H–2B to the H–2A program should not represent a significant burden for employers, given the overall similarities between the programs and that (as discussed above) work in both the reforestation and pine straw industries, as defined in the proposed rule, often meets the definition of agricultural employment under the MSPA.

c. Paragraph (d), Definition of a Temporary or Seasonal Nature

The Department seeks comment on the possibility of moving the adjudication of an employer's temporary or seasonal need either exclusively to DHS or exclusively to DOL. It is an administration goal to eliminate duplication wherever feasible and this potential change may or may not streamline the adjudications of temporary or seasonal need for employers. Section 101(a)(15)(H)(ii)(a) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a), requires that only ''agricultural labor or services . . . of a temporary or seasonal nature'' may be performed under the H–2A visa category. Currently, the Department evaluates an employer's temporary or seasonal need in the first instance, using the standards set forth in § 655.103(d), which provides that 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.

DHS regulations provide that the Department's finding that employment is of a temporary or seasonal nature as ''normally sufficient'' for the purpose of an H–2A Petition, but also state that notwithstanding this finding, DHS adjudicators will not find employment to be temporary or seasonal in certain situations, such as ''where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate,'' or ''where there is substantial evidence that the employment is not temporary or seasonal.'' 8 CFR 214.2(h)(5)(iv)(B). In making the latter determination, DHS uses the same definitions of temporary and seasonal as the Department. *Compare* 20 CFR 655.103(d) *with* 8 CFR 214.2(h)(5)(iv)(A).

Under the current process, the Department and DHS use separate and distinct experience to adjudicate temporary or seasonal need in the H–2A program. The Department has developed expertise and a process to which H–2A employers have become accustomed. DHS has historically adjudicated this need as part of its review of an H–2A visa petition, and it may have access to independent documentation unavailable to the Department that allows it to assess whether an employer has a temporary or seasonal need.

The Department contemplates that if either the Department or DHS became the sole arbiter of temporary or seasonal need for all H–2A employers, the Department and DHS would take actions, including delegation of authorities as the final arbiter of temporary or seasonal need and amendment of regulations, as needed, to effectuate this change. Accordingly, the Department seeks comment on whether there are benefits or concerns if either the Department exclusively or DHS exclusively became the sole arbiter of temporary or seasonal need.

B. Prefiling Procedures

1. Section 655.120, Offered Wage Rate

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H–2A worker is admissible only if the Secretary determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring an employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. As discussed below, the Department proposes to maintain this wage-setting structure with only minor revisions and proposes to modify the methodologies by which the Department establishes the AEWRs and prevailing wages.

Specifically, the Department proposes to establish AEWRs for each agricultural occupation, as identified by the FLS and the OES survey, so that each AEWR is based on data more specific to the agricultural occupation of workers in the United States similarly employed and, as a result, better protects against adverse effect on the wages of workers in the United States similarly employed. In addition, the Department proposes to modernize the methodology used by the SWAs to conduct prevailing wage surveys. Finally, the proposed rule sets requirements for updates to wage rates during the work contract and for wage assignments and appeals of those assignments. Currently DOL funds the NASS Farm Labor Survey. USDA is committed to this survey and including $5 million in the President's budget for its modification and expansion to collect more granular data. This expansion will assist in providing the SOC level data DOL is seeking to best capture wage rates from farmerworkers across the country.

The Department currently sets the AEWR at the gross hourly rate for field and livestock workers (combined) from the FLS conducted by the USDA's NASS for each State or region. This produces a single AEWR for all agricultural workers in a given State or region, so that supervisors, agricultural inspectors, graders and sorters of animal products, agricultural equipment operators, construction laborers, and crop laborers are all assigned the same AEWR.

The Department is concerned that the current AEWR methodology may have an adverse effect on the wages of workers in higher-paid agricultural occupations, such as construction laborers and supervisors of farmworkers on farms or ranches, whose wages may be inappropriately lowered by an AEWR established from the wages of field and livestock workers (combined) because this is an occupational category from the FLS that does not include construction laborers or supervisors of farmworkers, among other occupations. In addition, the use of generalized data for other agricultural occupations could produce a wage rate that is not sufficiently tailored to the wage necessary to protect against adverse effect on workers in the United States similarly employed.

[29] Additional filing requirements for H–2ALCs include a detailed itinerary of worksites, a copy of the MSPA Farm Labor Contractor Certificate of Registration (if required), copies of fully executed work contracts with each fixed-site agricultural business, and specific details and proof pertaining to worker housing and transportation. *See* 20 CFR 655.132.

Accordingly, the Department proposes to revise its methodology so that the AEWR for a particular agricultural occupation will be based on the annual average hourly gross wage for that agricultural occupation in the State or region reported by the FLS when the FLS is able to report such a wage.[30] If the FLS does not report a wage for an agricultural occupation in a State or region, the Department proposes to set the AEWR at the statewide annual average hourly wage for the SOC from the OES survey conducted by BLS. If both the FLS cannot produce an annual average hourly gross wage for that agricultural occupation in the State or region and the OES cannot produce a statewide annual average hourly wage for the SOC, then the Department proposes to set the AEWR based on the national wage for the occupational classification from these sources.[31] This change to an occupation-based wage is intended to produce more tailored AEWRs that better protect against adverse effect on workers in the United States similarly employed than the Department's current regulation.

The Department also proposes to modernize the methodology used by the SWAs to conduct prevailing wage surveys, which applies to both H–2A and other job orders that use the Wagner-Peyser Act agricultural recruitment system. The Department currently relies on Handbook 385, which pre-dates the creation of the H–2A program and was last updated in 1981, to set the standards that govern the prevailing wage surveys that the SWAs conduct to establish prevailing wage rates for all agricultural job orders. Many of these survey standards, such as a requirement for in-person interviews, are inconsistent with modern survey methods and the level of appropriated funding at the State and Federal levels. Due to the difficulty of implementing these resource-intensive standards, the SWAs are often required to report ''no finding'' from the prevailing wage surveys that they conduct. As a result, the current survey standards are not only resource-intensive but also fail to meet the Department's aim of producing reliable prevailing wage rates. Accordingly, the Department proposes to modernize the prevailing wage standards as set out in proposed § 655.120(c) to: (1) Establish reliable and accurate prevailing wage rates for employers and workers; and (2) allow the SWAs and other State agencies to conduct surveys using standards that are more realistic.

a. The Department's Proposal Maintains the Requirement That the Offered Wage Rate Must Be the Highest of Applicable Wage Sources

The Department proposes to continue to protect against adverse effect on the wages of workers in the United States similarly employed by maintaining the current requirement in § 655.120(a) that an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, unless a special procedure wage rate applies, with only three minor changes.

First, the Department proposes to remove the exception in the current regulation for separate wage rates set by ''special procedures'' (*i.e.,* sub-regulatory variances from the regulation). The Department proposes to remove this exception because the only occupation that has a different wage rate structure is the herding and production of livestock on the range, and the wage methodology for that occupation is governed by § 655.211 and is no longer set through a sub-regulatory ''special procedure.'' In addition, as discussed above, the Department proposes to remove the authority in § 655.102 to establish, continue, revise, or revoke special procedures for H–2A occupations. Accordingly, the Department proposes to replace the reference to ''special procedures'' in the current regulation with a reference to the regulatory provisions covering workers primarily engaged in herding and production of livestock on the range as the only exception from the wage methodology set forth in this proposed rule.

Second, the Department proposes to remove the current reference to ''the prevailing hourly wage or piece rate in 20 CFR 655.120(a) and (b).'' [32] Instead, the Department proposes to refer only to the ''prevailing wage'' or ''prevailing wage rate,'' except where a given provision specifically applies only to prevailing piece rates. The Department proposes this change because the Department has issued prevailing wage rates that are not in the form of an hourly or piece rate wage, including monthly prevailing wage rates.

Third, the Department proposes to clarify that the requirement to offer and pay the prevailing wage applies only ''if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of paragraph (c)'' of § 655.120.[33] This revision is intended to clarify that the Department is not obligated to establish a prevailing wage separate from the AEWR for every occupation and agricultural activity in every State. As discussed further below, the Department meets its obligation to protect against adverse effect on workers in the United States similarly employed primarily by requiring employers to offer, advertise, and pay the AEWR, which under the current wage methodology is the required wage rate in approximately 92 percent of H–2A applications based on a review of OFLC certification data. In addition, as the Department has previously acknowledged, the AEWR is actually a type of prevailing wage rate because it is the wage rate that is determined from a survey of actual wages paid by employers. Accordingly, the Department is already establishing a prevailing wage in the form of the AEWRs for all agricultural occupations. 2008 Final Rule, 73 FR 77110, 77167.

Nevertheless, the Department recognizes that State-conducted prevailing wage rates can serve as an important additional protection for U.S. workers in crop activities and agricultural activities with piece rates or, in rare instances, higher hourly rates of pay. Accordingly, the Department proposes to make the changes discussed below to modernize the prevailing wage methodology and empower States to produce a greater number of reliable prevailing wage surveys results. However, the Department proposes this new text to clarify that the Department is not required to issue prevailing wage rates for all crop activities and

[30] The Department proposes to remove the word ''weighted'' from the description of the FLS wage rate from the current regulation. This proposed change has no substantive effect. Both the OES and FLS apply weights in determining the average wage in accordance with accepted statistical principals, and the Department's other regulations which refer to OES-based wage rates do not use the term weighted. Therefore, for consistency, the Department proposes to remove the word ''weighted'' from the H–2A regulation governing the AEWR methodology. The Department also proposes to add the term ''gross'' after the term ''hourly'' in describing the wage rate from the FLS because, as discussed further below, USDA is considering making changes to its survey instrument to produce a wage that excludes certain types of incentive pay to report a ''base'' wage separate from the currently reported gross hourly wage. If the Department elects to use this new base wage as a source for the AEWR, the Department would first engage in notice-and-comment rulemaking to adopt that change, consistent with APA requirements. Until that time, the Department proposes to continue to use the ''gross'' hourly wage reported, consistent with the current regulation.

[31] Using a national wage when a State wage cannot be produced is consistent with the OES reporting methodology.

[32] The Department also proposes to make corresponding changes throughout the regulation.

[33] The Department also proposes a corresponding change to 20 CFR 655.122(l).

agricultural activities in every State as such a requirement is both inconsistent with available Federal and State resources and unnecessary to prevent adverse effect. If finalized as proposed, the Department will work with the States through their annual grant plans to focus prevailing wage surveys on those crop activities and agricultural activities where prevailing wage surveys are most useful to protect the wages of U.S. workers, including for activities for which employers commonly pay based on a piece rate and when State agencies know based on past experience that prevailing wage surveys commonly result in hourly wages higher than the AEWR. The Department invites comments on other circumstances in which prevailing wage rates can be most useful as a tool to protect the wages of U.S. workers.

b. The Department Proposes To Base the AEWR on Occupation-Specific Data That Better Reflects the Wages of Workers in the United States Similarly Employed

The Department is retaining the requirement in the current regulation that employers in the H–2A program offer, advertise, and pay at least the AEWR if it is the highest applicable wage. Section 218(a)(1)(B) of the INA, 8 U.S.C. 1188(a)(1)(B), provides that DHS cannot approve an H–2A Petition unless the Department certifies 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.'' Requiring employers to pay the AEWR when it is the highest applicable wage is the primary way the Department meets its statutory obligation to certify no adverse effect on workers in the United States similarly employed.

As the Department has explained in previous regulations, the AEWR ''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.'' 2010 Final Rule, 75 FR 6884, 6891. The use of an AEWR, separate from a State-conduced prevailing wage for a particular crop activity or agricultural activity, ''is most relevant in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area (within which the movement of domestic labor is feasible) or over a broader occupation/crop/activity definition (within which reasonably ready transfer of skills is feasible).'' *Id.* at 6892–6893.

The H–2A program is unique among the temporary nonimmigrant programs administered by the Department because the H–2A program is not subject to a statutory cap. Consequently, concerns about wage depression from the importation of foreign workers are particularly acute because access to an unlimited number of foreign workers in a particular labor market and crop activity or agricultural activity could cause the prevailing wage of workers in the United States similarly employed to stagnate. In this context, the AEWR acts as ''a prevailing wage concept defined over a broader geographic or occupational field.'' 2010 Final Rule, 75 FR 6884, 6892. In other words, because the AEWR is generally based on data collected in a multi-State agricultural region and an occupation broader than a particular crop activity or agricultural activity, while the prevailing wage is commonly determined based on a particular crop activity or agricultural activity at the State or sub-State level, the AEWR protects against localized wage depression that might occur in prevailing wage rates. For these reasons, the Department proposes to continue to use an AEWR in the H–2A program and to require employers to offer, advertise, and pay at least the AEWR if it is the highest applicable wage.

i. The Department Proposes To Continue to the Use the FLS To Establish the AEWR in Most Geographic Areas for Most H–2A Workers

The Department proposes to use the FLS conducted by USDA's NASS to set the AEWR for the overwhelming majority of H–2A workers. The FLS is the Department's preferred wage source for establishing the AEWR because it is the only comprehensive wage survey that collects data from farm and ranch employers. The Department proposes to use the OES survey conducted by BLS to set the AEWR only for occupations and locations where the Department cannot establish an AEWR based on the FLS because the FLS does not report a wage. Because the OES survey is a reliable and comprehensive wage survey and is widely used in the Department's other foreign labor certification programs, the OES survey provides useful data for setting the AEWR in the limited circumstances where the FLS may not report a wage. The use of the FLS survey, and the OES survey as needed, will allow the Department to establish AEWRs based on occupational classification rather than based on all field and livestock workers (combined) and will better protect against adverse effects on similarly employed U.S. workers, as discussed below.

As the Department has stated in prior rulemakings, the FLS and the OES survey are the two ''leading candidates'' that the Department could use to establish the AEWR. 2009 NPRM, 74 FR 45906, 45912. The Department has always used the FLS to set the H–2A AEWR, with the exception of a brief period under the 2008 Final Rule. Currently, the Department uses the average gross hourly wage rate for the category field and livestock workers (combined) from the FLS as the AEWR for each State in the multi-State or single-State crop region to which the State belongs.

By contrast, under the 2008 Final Rule, the Department set the AEWR based on the OES survey. Under that rule, the Department set the AEWR using the SOC taxonomy and set a different AEWR for each SOC and localized area of intended employment. The Department used four wage levels intended to reflect education and experience under the 2008 Final Rule.

The FLS uses the following methodology: NASS collects wage and employment data for four reference weeks, one each quarter, from all farms with $1,000 or more in annual sales revenue for all in all States except for Alaska. The total sample of the FLS is approximately 10,000 to 13,000 farms and ranches, and data is reported for the United States as a whole and for each of 15 multi-State labor regions and the 3 single States of Florida, California, and Hawaii.[34]

[34] Guide to NASS Surveys: Farm Labor, *available at https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/index.php* (last modified May 4, 2018).

The USDA regions are as follows:

TABLE 1—USDA REGIONS

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

Appendix A, Table 1 shows the AEWRs by region or State established by the Department for 2016 to 2018 based on FLS data for field and livestock workers (combined) under the current regulation.

Most data for the FLS is collected by mail and computer-assisted phone interviews, with personal interviews used for some large operations and those with special handling arrangements. NASS reports FLS data semiannually based on four quarterly reference weeks; in November, NASS reports annual data. In California, NASS collects data in cooperation with the California Employment Development Department and reports the data monthly. The FLS generally has a response rate of greater than 50 percent. The FLS reports hourly wage rates based on employers' reports of gross wages paid and total hours worked for all hired workers during the survey reference week for each quarter it conducts the survey.

Since 2014, the FLS has collected data by SOC—the same taxonomy that is used for the OES survey. It does not currently report wage data by SOC. Instead, the FLS aggregates and reports data in the major FLS occupational categories of field workers, livestock workers, field and livestock workers (combined), and all hired workers. In collaboration with the Department and the OMB, USDA established and implemented a crosswalk from the major FLS categories to the SOC categories.[35] Within the major FLS field worker category is the SOC category Farmworkers and Laborers, Crop, Nursery and Greenhouse (SOC 45–2092). Within the FLS livestock worker category is the SOC category Farmworkers, Farm, Ranch, and Aquacultural Animals (SOC 45–2093). Agricultural Equipment Operators (SOC 45–2091), Packers and Packagers, Hand (SOC 53–7064), Graders and Sorters, Agricultural Products (SOC 45–2041), and All Other Field Workers and All Other Livestock Workers (SOC 45–2099) are assigned to either the livestock worker or field worker major category of the FLS depending upon the agricultural product. Although the FLS collects data on the wages of supervisors, the FLS has not been able to report a statistically valid wage result for the major FLS category of supervisors. As a result, the wages of supervisors are currently only reported in the all hired workers category and are not included in the field and livestock workers (combined) category that the Department uses to establish the AEWR. Included within the major FLS category of supervisors are Farmers, Ranchers, and Other Agricultural Managers (SOC 11–9013); and First Line Supervisors of Farm Workers (SOC 45–1011). Finally, the FLS collects data on ''other workers.'' The FLS has not been able to report a statistically valid wage result for this FLS category, and, as a result, wages for ''other workers'' are reported only in the all hired workers category and are not included in the wages reported in the field and livestock workers (combined) category. Included in the ''other workers'' category are Agricultural Inspectors (SOC 45–2011), Animal Breeders (45–2021), Pest Control Workers (37–2021), and any other agricultural worker not fitting into the categories above, including mechanics, shop workers, truck drivers, accountants, bookkeepers, and office workers who fall within a variety of SOCs and have a wide variety of job duties. Contract and custom workers are excluded from the FLS sample population.

The OES survey is among the largest ongoing statistical survey programs of the Federal Government and produces wage estimates for over 800 occupations. It is used as the primary wage source for all of the nonimmigrant and immigrant prevailing wage determinations issued by the Department, except for those in the H–2A program. The OES program surveys approximately 200,000 establishments every 6 months and over a 3-year period collects the full sample of 1.2 million establishments, accounting for approximately 57 percent of employment in the United States.[36] Every 6 months, the oldest data from the 3-year cycle is removed from the sample, and new data is added. The wages reported in the older data are adjusted by the ECI, which is a BLS index that measures the change in labor costs for businesses. The OES survey is primarily conducted by mail, with follow up by phone to non-respondents or if needed to clarify data.[37] The OES average [38] hourly wage reported includes all straight-time, gross pay, exclusive of premium pay, but including piece rate pay.

The primary advantage of using a wage derived from the FLS is that the FLS surveys farm and ranch employers. The OES survey, on the other hand, surveys establishments that support farm production. While establishments

[35] *See* Crosswalk from the National Agricultural Statistics Service (NASS) Farm Labor Survey (FLS) Occupations to the 2010 Standard Occupational Classification (SOC) System, *available at https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/Farm-Labor-Survey-(FLS)-to-SOC-Crosswalk.pdf.*

[36] *See* OES Frequently Asked Questions, available at *https://www.bls.gov/oes/oes_ques.htm.*

[37] *Id.*

[38] The OES uses the term ''mean.'' However, for purposes of this regulation the Department uses the term ''average'' because the two terms are synonymous, and the Department has traditionally used the term ''average'' in setting the AEWR from the FLS.

that support farm production participate in the H–2A program, they constitute a minority of agricultural labor or services, and so data reported by these establishments is generally useful for purposes of calculating the AEWR applicable to an agricultural occupation only in the limited circumstances where FLS data is unavailable for the occupation.[39] Another positive feature of the FLS is that the statewide and regional wages issued provide protection against wage depression that is most likely to occur in particular local areas where there is a significant influx of foreign workers. The OES survey also produces statewide wage rates in addition to wage rates based on metropolitan statistical areas (MSAs).[40] Similarly, both the FLS and the OES surveys report a wage that covers activities above a crop activity level, which, as discussed above, is where wage depression from an influx of foreign workers could be most acute.

The Department favors the FLS as a source for the AEWR, and the Department proposes to use an occupation-based wage from that survey due to concerns that the current AEWR based solely on the field and livestock worker (combined) wage aggregates data at a level that combines wages of agricultural occupations that are dissimilar and that this may have the effect of inappropriately raising wages for lower-paid agricultural jobs while depressing wages in higher-paid occupations. For example, a worker performing construction labor on a farm under the H–2A program in Ohio must currently be paid at least the AEWR of $12.93 per hour because the worker's wage is determined based on the field and livestock (combined) wage, which contains many dissimilar jobs, including agricultural equipment operators; graders and sorters of agricultural products; hand packers and packagers of agricultural products; and farmworkers who tend to farm, ranch, and aquacultural animals, as well as farmworkers who perform manual labor to harvest crop, nursery, and greenhouse products. This is the case even though the FLS sample does not include workers who perform contract work, and workers performing construction labor on farms are likely to be employed as contract workers. In contrast, if the same construction worker performed identical job duties at a location other than a farm and, therefore, fell under the H–2B program, the required prevailing wage rate based on the OES SOC would be approximately $20.27 per hour.[41] This aspect of the current methodology appears to cause an adverse effect on the wages of workers in the United States similarly employed, contrary to the Department's statutory mandate.

An AEWR based on an occupational classification that accounts for significantly different job duties but remains broader than a particular crop activity or agricultural activity in a local area may better protect U.S. workers.[42] Accordingly, the Department proposes to amend its current AEWR methodology to issue an occupation-specific AEWR. The Department proposes to establish the AEWR using the FLS where the FLS reports a statewide or regional annual average gross hourly wage result for a particular agricultural occupation.

Based on data collected by NASS from 2015 to 2017, the Department expects it will be able to establish AEWRs for most States and regions in SOCs 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals). These occupations would represent approximately 89 percent of workers in the H–2A program if Forest and Conservation Workers (SOC 45–4011) are added to the H–2A program as proposed, and so the FLS will continue to be the basis for the AEWRs covering the vast majority of H–2A workers. In addition, the Department anticipates that it will be able to use the FLS to establish AEWRs for some States and regions for SOCs 45–2041 (Graders and Sorters, Agricultural Products), 45–2091 (Agricultural Equipment Operators), 45–2099 (Agricultural Workers, All Other),[43] 53–7064 (Packers and Packagers, Hand), 11–9013 (Farmers, Ranchers and Other Agricultural Managers), and 45–1011 (First Line Supervisors of Farm Workers) based on NASS data. The FLS will never be able to report a statewide or regional wage for Alaska because the survey is not conducted there.

In a circumstance where the FLS cannot produce a wage for the occupational classification, the Department proposes to establish the AEWRs for all SOCs and States or regions at the statewide average hourly wage for that occupation using data from the OES survey, as discussed below, unless such a wage is not reported by BLS. Under this methodology, the OES statewide average hourly wage would also be used to establish the AEWR if USDA ceased to conduct the FLS for budgetary or other reasons.

To the extent the FLS may not consistently report data in each SOC for a State or region, the wage source used to establish the AEWR may vary from year to year, which could result in a much higher degree of variation in the AEWR applicable to an occupation from year to year than exists under the current methodology. The Department requests comments on whether there are alternate methods or sources that it should use to set the AEWR in the event that the FLS does not produce a wage in an SOC and State or region, including, but not limited to: (1) Whether the Department should use the separate field worker and livestock worker classifications from the FLS to set AEWRs for workers in occupations included in those classifications if a wage based on the SOC from the FLS is not available; (2) whether the Department should index past wage rates for a given SOC using the Consumer Price Index (CPI) or Employment Cost Index (ECI) if a wage cannot be reported for an SOC in a State or region in a given year based on the FLS but a wage was available in a previous year; (3) whether the Department should use the FLS national wage rate to set the AEWR for an SOC if the FLS cannot produce a wage at the State or regional level; and (4) whether the Department should consider any other methodology that would promote consistency and reliability in wage rates from year to year.

As an alternative, the Department invites comments on whether to set AEWRs based on the current FLS occupational classifications of field

[39] Indeed, BLS refers the public to USDA and NASS for statistics on U.S. agriculture employment and wages. *See* OES Frequently Asked Questions, *https://www.bls.gov/oes/oes_ques.htm.*

[40] The Department uses MSA-based wage estimates from the OES survey to set prevailing wage rates for the H–2B program and used OES MSA-based wage rates to set AEWRs under the 2008 H–2A Rule.

[41] This is the current statewide OES wage for the category of Construction Laborer, SOC 47–2061, in Ohio. Under the H–2B program, a local wage for that occupation would be used if available. As discussed below, the Department proposes to use the statewide OES mean hourly wage to establish the AEWR if the FLS cannot report a wage for the occupational classification in a given State or region.

[42] For example, an AEWR under this proposal would be established for SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), while particular crop activities within that category might include the hand harvesting of strawberries or onion packing shed duties.

[43] The Department would not use the ''all other'' category from the FLS to set a wage if a more specific SOC applies. For example, under this proposal, the AEWRs for Forest and Conservation Workers (SOC 45–4011), Logging Workers (SOC 45–4020), and Construction Laborers (SOC 47–2061) would all be based on those specific SOCs, not the ''all other'' category.

workers and livestock workers for each State or region. Under this alternative, any occupational classifications not surveyed by NASS under either the field worker or livestock worker category would be assigned an AEWR based on the OES SOC. The disadvantage of this alternative is that it produces an AEWR at a broader occupational level than the SOC taxonomy. As a result, this option would provide a single AEWR covering a broader group of occupations, such as Graders and Sorters, Agricultural Products (SOC 45–2041) and Agricultural Equipment Operators (SOC 45–2091), in which workers perform dissimilar job duties. In contrast, the advantage of this alternative is that the FLS is currently able to produce a statewide or regional wage for both the field worker and livestock worker categories in every year, except in Alaska. As a result, this alternative would significantly reduce the likelihood that wage sources will change from year to year. For the same reasons, this methodology would also likely result in the Department using the FLS to set wages more often if the Department were to adopt a methodology that set AEWRs based on the SOC. As discussed above, the Department generally prefers to establish AEWRs based on the FLS rather than the OES survey because the FLS surveys farmers and ranchers, whereas the OES surveys establishments that support farm production, as discussed below.

In proposing to continue use of the FLS to set the AEWR for most H–2A workers, the Department notes that it does not have direct control over the FLS, and that USDA could elect to terminate the survey at some point. Indeed, USDA did briefly terminate the survey in 2007 due to budget constraints. The Department has addressed such a possibility in this proposal by providing that the OES statewide average hourly wage for the SOC will be used if the FLS does not produce an annual gross hourly wage for the occupational classification for a State or region.

The Department understands that USDA may make future adjustments to the FLS methodology, including that USDA may exclude certain types of incentive pay so that a base wage can be separately reported from the hourly wage rate. However, even after these modifications are complete, USDA also plans to continue to release data using its current methods. Under this proposed rule, the Department would continue to use USDA's existing methodology to set AEWRs based on SOC codes as discussed above. If the Department decides to later adjust the AEWR calculation based on methodological changes by USDA, the Department will provide the public with notice and the opportunity to provide comment before adopting any changes.

ii. If the OES Produces a Statewide Average Hourly Wage for the SOC, the Department Proposes To Use That Wage To Set the AEWR for Any Occupation Classification Where the FLS Does Not Report a Wage for the Occupational Classification and State or Region

The OES survey can be very useful in limited circumstances where the FLS cannot produce statistically reliable data for an occupation and state or region, and the OES survey is able to do so. The Department expects that the OES will be particularly useful in those occupations that constitute a small percentage of agricultural labor or services and a larger subset of non-agricultural labor or services (*e.g.,* construction workers), or where work is generally not performed on farms, so wages are not generally sampled by the FLS (*e.g.,* logging occupations). For these types of occupations, the FLS cannot produce a wage for the applicable SOCs. Similarly, the OES will be useful for the proposed addition of forest and conservation workers to the H–2A program. Like logging, forest and conservation work is not generally performed on farms or ranches, so it is generally excluded from the FLS, and the FLS cannot produce a wage for the applicable SOC. Accordingly, in the Department's view, the OES survey provides the most accurate source for determining the AEWR for these occupations. Indeed, because the OES survey is the primary wage source in the H–2B program, employers bringing in forest and conservation workers for temporary work are already required to pay at least an average hourly wage based on the OES survey.

Accordingly, the Department proposes to use the statewide OES average hourly wage for the SOC where the FLS cannot produce a wage for the agricultural occupation and State or region. In the H–2B program, the Department generally establishes prevailing wages based on the OES survey for the SOC in a metropolitan or non-metropolitan area. For the H–2A program, however, the Department proposes to use a statewide wage both to more closely align with the geographic areas from the FLS and to protect against wage depression from a large influx of nonimmigrant workers that is most likely to occur at the local level. As explained in prior rulemakings, the concern about localized wage depression is more pronounced in the H–2A program than in the H–2B program due to both the vulnerable nature of agricultural workers and the fact that the H–2A program is not subject to a statutory cap, which allows an unlimited number of nonimmigrant workers to enter a given local area.[44]

When the OES survey is used to establish the AEWR, the Department proposes to use the average hourly wage for the SOC, which is the methodology used under the H–2B program.[45] The average is proposed rather than the four-tiered wage level structure that the Department used to set the AEWR under the 2008 H–2A Final Rule. As explained in the preamble to the Department's current H–2A regulation: ''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 [imposed by a four tier system] do not accurately reflect meaningful differences in skills or job complexity.'' 2010 Final Rule, 75 FR 6884, 6900. As the Department further noted, ''[m]ost 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, skills peak quickly, rather than increasing with long-term experience.'' *Id.* To the extent that there are some agricultural activities that require a higher amount of expertise than others, such as agricultural inspectors or animal breeders, such differences are accounted for in the Department's proposal to issue AEWRs at the occupational classification level without regard to artificial ''tiers.''

In proposing to use the OES survey to establish the AEWR for a small percentage of H–2A workers, the Department acknowledges that the Department concluded in the 2010 Final Rule that use of the OES survey under the 2008 Final Rule depressed the wages of workers in the United States similarly employed. That finding does not apply to the current proposal for three primary reasons.

First, the Department proposes to use the OES survey only when the FLS cannot produce a wage for an occupation at the State or regional level. As discussed above, using the generalized field and livestock workers

[44] *See, e.g.,* 2010 Final Rule, 75 FR 6884, 6895.

[45] The H–2B regulation uses the term ''mean'' rather than ''average,'' but the meaning is the same.

(combined) wage from the FLS to establish the AEWR may have a depressive effect on wages of workers in the United States similarly employed for some agricultural occupations. As a result, if the FLS cannot produce a State or regional wage for an agricultural occupation, it is the Department's preliminary view, for the reasons discussed above, that the statewide OES survey provides a more accurate and appropriate source for the AEWR. Second, much of the wage reduction under the 2008 Final Rule was due to the fact that the 2008 Final Rule used a four-tiered wage level system, in contrast to this NPRM's proposal to use the average. As the Department has noted, under the 2008 Final Rule, ''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.'' 2010 Final Rule, 75 FR 6884, 6898. Third, the use of the statewide wage rather than the wage at the metropolitan or non-metropolitan area is intended to prevent the OES wage from reflecting any wage depression in a particular local geographic area. Accordingly, the proposal to use the OES survey in this manner does not raise the same concerns as the 2008 Final Rule did.

The Department recognizes that the proposed methodology results in some AEWR increases and some AEWR decreases depending upon geographic location and agricultural occupation. Because any wage reductions are the result of the use more accurate occupational data, the reductions are consistent with the Department's obligation to protect against adverse effect on workers in the United States similarly employed. The use of more accurate occupational data means that lower AEWRs that better reflect the wage needed to protect against adverse effect for those agricultural occupations are generally offset by higher AEWRs in other occupations.

Appendix A, Table 2 provides average hourly wages by SOC and State under the proposed rule. The estimates in Appendix A, Table 2 are based on historic data.

iii. The Department Proposes To Use National Occupational Data If Neither the OES Survey Nor the FLS Reports a State or Regional Wage for the Occupation

In the rare event that both the FLS does not report an annual average hourly gross wage for the occupational classification in the State or region and the OES survey does not report a statewide annual average hourly wage for the SOC, the Department proposes to use national data for the occupation to set the wage for that geographic area. If both wage sources report a national wage rate for the occupational classification, the Department proposes to set the AEWR at the national annual average hourly gross wage for the occupational classification from the FLS because, for the reasons discussed above, the Department generally prefers to use the FLS, which is based on wages paid by farmers and ranchers. If the FLS does not report a national wage for the occupation, the Department proposes to use the national average hourly OES wage for that SOC and geographic area.

iv. The Department Requests Comments on All Aspects of Its Proposed Methodology for Establishing the AEWR

The Department invites comments on all aspects of the proposed AEWR methodology. In particular, the Department is interested in comments on the use of the FLS and OES survey, the conditions under which each survey should be used to establish the AEWR, and the proposal to depart from relying on the field and livestock workers (combined) wage from the FLS to instead establish AEWRs based on occupational classifications. The Department also invites comments on any alternate wage sources the Department might use to establish the AEWRs in the H–2A program.

c. The Department Proposes To Modernize the Methodology Used To Establish the Prevailing Wage Rate

i. The Current Prevailing Wage Methodology is Outdated and Does Not Meet the Policy Goal of Producing Reliable Prevailing Wage Rates

Current 20 CFR 655.120(a) requires that an employer seeking a temporary agricultural labor certification to employ an H–2A worker must offer, advertise in its recruitment, and pay a wage that is at least the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage.[46] In addition, the Wagner-Peyser regulation at 20 CFR 653.501(c)(2)(i) requires the SWA to ensure for all agricultural job orders, H–2A and non-H–2A, that ''wages . . . offered are not less than the prevailing wages . . . among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher.'' Currently, the SWAs are required to conduct prevailing wage surveys using standards set forth in Handbook 385, which pre-dates the creation of the H–2A program and has not been updated since 1981. The Handbook is used for both H–2A and non-H–2A agricultural job orders. Notable aspects of the guidance are discussed below.

Handbook 385 requires the SWAs to conduct prevailing wage surveys to determine the wage rates paid to domestic workers. Handbook 385 at I–116. These surveys are conducted based on ''crop activity,'' with ''crop activity'' defined as follows:

> the job actually being performed in a specific crop at time of survey. A single job title, such as 'harvest', may apply to the entire crop activity. On the other hand, different stages of the harvest, such as 'cotton, 1st pick, 2nd pick, and strip', may be involved; or, a different use of the commodity such as 'tomatoes, fresh' or 'tomatoes, canning.' In such cases, the important consideration is whether the work is different. . . . For the purposes of this report, each operation or job related to a specific crop activity for which a separate wage rate is paid should be identified and listed separately.

Handbook 385 at I–113. In addition, the Handbook establishes separate prevailing wage rates for in-State workers, interstate workers, and all workers. Handbook 385 at I–118. Generally, job orders placed in the interstate clearance system are required to use the highest of these three rates. Handbook 385 at I–118.

Among the guidelines provided, the Handbook lists sample sizes that the SWA ''should'' follow, which vary depending upon the number of workers. Handbook 385 at I–114. The Handbook provides that for some crops with a small number of domestic workers, samples of the wages of all workers in the crop activity should be conducted, as follows:

TABLE 2—SAMPLE SIZES FROM HANDBOOK 385

Number of workers in the crop activity in area	Sample size (percent of workers)
100–349	100
350–499	60
500–799	50
800–999	40
1000–1249	35
1250–1599	30
1600–2099	25
2100–2999	20
3000 or more	15

[46] Under the current regulations and survey methodology, the AEWR most often sets the minimum hourly requirement.

Handbook 385 at I–114. The Handbook does not provide any further information on whether the sample size guidelines are intended to be mandatory in all circumstances and, if the standards are not intended to be mandatory in all circumstances, what factors the Department must consider in determining whether to issue a prevailing wage if the sample size guidelines are not met. The Handbook further suggests that the State should conduct at least 1 survey per season in each of the following circumstances: (1) At least 100 workers were employed in the crop activity in the previous season or are expected to be employed in the current season; (2) regardless of the number of workers employed, foreign workers were employed in the previous season, or employers have requested or may be expected to request foreign workers in the current season, regardless of the number of workers involved; (3) the crop activity has an unusually complex wage structure; or (4) the crop or crop activity has been designated by the ETA national office as a major crop or crop activity. Handbook 385 at I–115. In addition, the Handbook recommends that surveys should normally be completed within 3 days. Handbook 385 at I–115.

The Handbook provides that prevailing wages are produced based on a ''40 percent rule'' and a ''51 percent rule.'' Handbook 385 at I–116–17. Under the 40 percent rule, a single rate or schedule that ''accounts for the wages paid to 40 percent or more of the domestic seasonal workers in a single crop activity is the prevailing rate.'' Handbook 385 at I–116. There are additional special rules if there is more than one rate or schedule accounting for 40 percent of the domestic seasonal workers. Handbook 385 at I–116. If no single rate or schedule accounts for 40 percent or more of the domestic workers, the prevailing rate is set at the 51 percentile. Handbook 385 at I–117. If there is more than one unit of payment, the SWA is instructed to determine which unit of payment is prevailing and base the prevailing wage finding on that unit of payment. Handbook 385 at I–117.

Most burdensome, the Handbook methodology requires in-person interviews to conduct the prevailing wage survey. Specifically, the wage survey must include ''a substantial number of personal employer interviews,'' which can only be supplemented by telephone or mail contacts ''to a limited extent.'' Handbook 385 at I–116. Further, the Handbook requires that 10 percent of the workers included in the sample for the wage survey must be interviewed and suggests that the worker sample ''should be drawn from workers of as many as possible of the employers interviewed.'' Handbook 385 at I–116. Neither the FLS nor the OES survey requires in-person interviews of employers as the primary collection method. Both the FLS and OES survey rely solely on employer-reported data and do not canvass workers directly.

The methodology in the Handbook 385 is outdated and needs to be modernized in a manner that produces reliable and accurate prevailing wage rates, while still being manageable given the limited available resources at the State and Federal levels. The Handbook methodology dates from 1981, before the creation of the modern H–2A program. Before the IRCA, the Department established AEWRs in only 14 ''traditional user'' States, leaving the prevailing wage and Federal and State minimum wages as the only wage protections available in other states. *See* 1989 Final Rule, 54 FR 28037, 28038. After the passage of the IRCA, the Department dramatically expanded the use of the AEWR as a wage protection in the H–2A program in 49 States (excluding Alaska) and first began using the FLS to set the AEWR. *See id.* In contrast, no updates were made to the Handbook 385 after the passage of the IRCA or at any time since. Requirements in the Handbook, such as the requirement for in-person interviews, are now unrealistic given current SWA limitations. Due to the continued use of these standards, the SWAs are often required to report that the State cannot produce a finding for a given crop activity or agricultural activity because the completed survey cannot meet methodological standards. Accordingly, the current wage methodology both wastes State and Federal resources and fails to produce reliable and accurate prevailing wage rates for employers and workers.

For all of these reasons, the Department proposes to make changes to modernize the prevailing wage methodology. The proposal is intended to meet the Department's goals of establishing requirements that allow the SWAs and other State agencies to conduct surveys using standards that are realistic in a modern budget environment, while also establishing reliable and accurate prevailing wage rates for employers and workers. By modernizing the prevailing wage survey standards, the Department hopes to focus States on producing surveys in the circumstances in which the surveys can be most useful for protecting the wages of U.S. workers, and hopes to encourage a greater number of reliable prevailing wage survey results. The proposal recognizes that under the proposed wage methodology, which requires the offered wage rate to be set at the highest of all applicable wage rates, prevailing wage determinations will continue to be relevant only to a small percentage of job orders.

ii. The Department Proposes To Modernize the Methodology Used To Establish the Prevailing Wage Rate

For the reasons discussed above, the Department proposes to modernize the standards in Handbook 385 and replace the existing prevailing wage methodology with a new methodology at § 655.120(c) under which the Department would establish prevailing wages for crop activities or agricultural activities. The Department proposes to use the term ''crop activity or agricultural activity'' rather than the term ''crop activity'' from Handbook 385 because prevailing wage rates may exist for a single agricultural activity conducted across multiple agricultural commodities. Establishing wage rates by both crop activities and agricultural activities is consistent with the Department's current policy. For example, the Department's existing sub-regulatory guidance covering custom combine workers explains that prevailing wage rates for custom combine operators are established in accordance with Handbook 385.[47] This is because custom combine operators may be engaged in an agricultural activity, such as operating harvesting equipment, with a single wage structure across multiple crops.

Under the new proposed methodology, the OFLC Administrator would establish a prevailing wage for a given crop activity or agricultural activity only if all of the requirements in proposed § 655.120(c)(1) are met. Requiring that all surveys meet statistical standards is necessary to establish reliable and accurate prevailing wage rates for employers and workers. The Department proposes the following standards: (1) The SWA must submit a standardized form providing the methodology of the survey, which must be independently conducted by

[47] *See* TEGL 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program,* Attachment A at p. 1, available at *https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf* (last updated June 14, 2011). As discussed further in the preamble related to proposed §§ 655.300 through 655.304, the Department proposes to codify in regulations the existing sub-regulatory guidance for certain H–2A itinerant occupations, including guidance applicable to custom combine operators.

the SWA or another state entity; (2) the survey must cover a distinct work task or tasks performed in a single crop activity or agricultural activity; (3) the survey must be based on either a random sample or a survey of all employers in the geographic area surveyed who employ workers in the crop activity or agricultural activity; (4) the survey must be limited to the wages of U.S. workers; (5) a single unit of pay must be used to compensate at least 50 percent of the U.S. workers included in the survey; (6) the survey must report an average wage; (7) the survey must cover an appropriate geographic area based on several factors; and (8) the survey must report the wages of at least 30 U.S. workers and 5 employers and the wages paid by a single employer must represent no more than 25 percent of the sampled wages included in the survey. In addition to these methodological standards, the Department proposes to establish a validity period of prevailing wage surveys.

First, the Department proposes to maintain the current requirement that the SWA submit a Form ETA–232 providing the methodology for the survey. If finalized as proposed, the Department would update the Form ETA–232 to align with the new proposed prevailing wage methodology. While the SWA would continue to submit the Form ETA–232 to OFLC, the Department proposes to allow the survey to be independently conducted by State entities other than the SWA, including any State agency, State college, or State university.[48] The Department proposes to broaden the universe of State entities that may conduct a prevailing wage survey because the SWAs have limited capacity to conduct surveys given other legal requirements, including the statutory requirement to conduct housing inspections. However, some other State agencies, State colleges, or State universities may have resources and expertise to conduct reliable prevailing wage surveys for the H–2A program. The Department proposes to broaden the categories of State entities that may conduct prevailing wage surveys to encourage more prevailing wage surveys to be conducted by reliable sources, independent of employer or worker influence. Under this proposal, a State entity other than the SWA could choose to conduct a prevailing wage survey using State resources without any foreign labor certification program funding, or the SWA could elect to wholly or partially fund a survey conducted by another State entity using funds provided by the Department for foreign labor certification programs. However, the Department proposes to continue to require the SWA to submit the Form ETA–232 for any prevailing wage survey, even if the survey was conducted by another State entity, to provide a single avenue through which States submit surveys, and so it is clear that all surveys sent to the Department are submitted on behalf of the State as a whole. The SWA is the appropriate entity to submit any survey to the Department because the SWA receives grant funding from the Department for the H–2A program. Without this requirement, the Department is concerned that more than one agency in a State might conduct a survey for the same crop activity or agricultural activity, which would require the Department to adjudicate conflicting prevailing wage surveys. The Department requests comments on alternate methods of dealing with the issue of possible conflicting surveys. The Department also requests comments on whether there are additional neutral sources of prevailing wage information that the Department should use in the H–2A program.

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

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

Handbook 385 at I–113 (emphasis in original). The distinct task requirement means that even within a single crop, distinct work tasks that are compensated differently (*e.g.,* picking and packing) would be required to be surveyed in a manner that produces separate wage results.

Third, the Department proposes that the survey must be based on either a random sample or a survey of all employers in the surveyed geographic area who employ workers in the crop activity or agricultural activity. This requirement is based on general statistical principals and is consistent with the recommendation in Handbook 385, which provides: ''[w]ithout regard to whether employers do or do not utilize the facilities of the Job Service, the wage survey sample should include workers of small, medium and large employers of domestic workers from all sectors of the area being surveyed, and should be selected by probability sampling methods.'' Handbook 385 at I–114. Probability and random sampling are synonymous, and random sampling includes both simple random sample and stratified random sample methods. The Department proposes to maintain this existing requirement to conduct a random/probability sample and clarify that random sampling (or surveying the entire universe) is a requirement, not a recommendation. The requirement that a prevailing wage survey be established based on a sampling of the entire universe or a random sample is also consistent with the H–2B prevailing wage regulation at § 655.10, as well as current H–2B prevailing wage guidance interpreting the H–2B appropriations riders.[49] To make a reasonable, good faith effort to contact all employers in the surveyed geographic area who employ workers in the crop activity or agricultural activity, the surveyor might send the survey through the mail or other appropriate means to all employers in the geographic area and then follow up by telephone with all non-respondents.

Fourth, to protect against possible adverse effect on the wages of workers in the United States similarly employed, the Department proposes to limit the survey to the wages of U.S. workers. This limitation applies to both determining the universe of workers' wages to be sampled and the universe of workers' wages reported. Limiting the survey to U.S. workers is consistent with the Department's current policy and reflects the Department's longstanding concern that including the wages of non-U.S. workers may depress wages.[50] The Department recognizes that in the H–2B program, prevailing wage surveys must be conducted

[48] The H–2B regulation generally uses the OES average wage for the SOC to set the prevailing wage rate and allows employers to submit non-OES wage surveys as an alternative to the OES only if the survey is independently conducted and issued by a State, including any State Agency, State college or State university; where the OES does not provide data in the geographic area; or if the OES does not accurately represent the relevant job classification. 20 CFR 655.10.

[49] *See Effects of the 2016 Department of Labor Appropriations Act* (Dec. 29, 2015) at p. 4, *available at https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf.*

[50] The Handbook 385 uses the terms ''domestic workers'' and ''U.S. workers'' in describing the sample to be conducted, and the current Form ETA–232 similarly limits the survey to U.S. workers.

without regard to the immigration status of the workers whose wages are included in the survey. However, the Department proposes to continue to require prevailing wage surveys in H–2A to include only the wages of U.S. workers due to concerns that the presence of the wages of undocumented workers in the sample may depress the wages of workers in the United States similarly employed are particularly acute in agriculture, because nearly half of farmworkers lack work authorization.[51] The Department invites comments on this policy, including whether the Department should instead adopt the H–2B standard.

Fifth, the Department proposes that a prevailing wage be issued only if a single unit of pay is used to compensate at least 50 percent of the U.S. workers included in the survey. For example, an hourly prevailing wage rate would only be issued if at least 50 percent of the U.S. workers included in the survey are paid by the hour (and the survey also meets all other requirements provided in the proposed rule). For a wage rate based on a piece rate to be issued under this proposal, at least 50 percent of the U.S. workers whose wages are included in the survey must be both paid by the piece and also must be paid based on the same unit of measurement (*e.g.,* bushel, bin, etc.). This is similar to the requirement in the Handbook 385 that if a survey includes more than one unit of payment, a prevailing wage rate is issued based on the unit of pay that represents the largest number of workers. Handbook 385 at I–117. The Department proposes this requirement both to verify that the rate structure reflected in the survey is actually prevailing and to provide that the wages included in the survey can be averaged, as discussed in the next paragraph of the preamble, because it would not be possible to average wages using different units of measurement.

Sixth, the Department proposes that a prevailing wage survey must report an average wage for the unit of pay that represents at least 50 percent of the wages of U.S. workers included in the survey. This proposal departs from the requirement in Handbook 385 to use a ''40 percent rule'' and a ''51 percent rule,'' discussed above. The Department proposes to use an average wage to establish the prevailing wage because it is consistent with both how the Department proposes to set the AEWR under the FLS and OES methodologies and with the current H–2B wage methodology for prevailing wage rates. The Department invites comments on this methodology as well as possible alternatives, including whether the ''40 percent rule'' and a ''51 percent rule'' from the Handbook should be maintained or whether the Department should instead establish the prevailing wage at the median wage based on the unit of pay.

Seventh, the Department proposes that a prevailing wage survey must cover an appropriate geographic area based on available resources, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the State. With this proposal, the Department intends to codify existing practice whereby the Department receives prevailing wage surveys based on State, sub-state, and—in the case of logging activities in Maine, New Hampshire, and Vermont—regional geographic areas based on the factors listed above. The Department requests comments on whether any other factors should be considered in determining the appropriate geographic area for prevailing wage surveys.

Eighth, and most significantly, the Department proposes to replace the statistical guidelines from Handbook 385 with standards that are more effective in producing a prevailing wage and more appropriate to a modern budget environment. As discussed above, existing standards often result in ''no finding'' from a prevailing wage survey; therefore, the current standards are both a waste of government resources and fail to meet the goal of producing reliable and accurate prevailing wage rates. The Department is also concerned that employers may be incentivized not to respond to a survey under the existing methodology because the OFLC Administrator does not issue a prevailing wage if the sample is too small. As a result, requiring smaller sample sizes than those suggested in Handbook 385 may actually increase survey response rates because employers may be more likely to respond to a survey if it is more likely that the OFLC Administrator will issue a prevailing wage than under the current methodology.

The Department proposes that the survey must report the wages of at least 30 U.S. workers and 5 employers and that the wages paid by a single employer must represent no more than 25 percent of the sampled wages included in the survey. The 30-worker standard is consistent with the requirements for H–2B prevailing wage rates as well as minimum reporting numbers for the OES. *See* 20 CFR 655.10(f)(4)(ii) (employer-provided surveys for the H–2B program must include wage data from at least 30 workers and three employers); *see also* 80 FR 24146, 24173 (Apr. 29, 2015). BLS requires wage information from a minimum of 30 workers (after raw OES survey data is appropriately scrubbed and weighted) before it deems data of sufficient quality to publish on its website. In addition, the Department proposes that a survey must include wages paid by at least five employers. This is a change from Handbook 385, which does not have a minimum number of employers who must be included in the survey. The Department recognizes that by proposing to require that a survey must include wages paid by at least five employers, the proposal exceeds the number of employers (*e.g.,* three) required to establish prevailing wage rates under the H–2B program; however, while prevailing wages in the H–2B program are generally set based on local area of intended employment, H–2A prevailing wage rates are generally set based on a larger geographic area. In the Department's preliminary view, this makes a higher number of employer responses appropriate for the H–2A program. Finally, the Department proposes that the wages paid by a single employer must represent no more than 25 percent of the sampled wages. The Department proposes this 25 percent standard so that the wage is not unduly impacted by the wages of a single dominant employer. The Department would issue a prevailing wage from a survey only if all of the sample size requirements—30 workers, 5 employers, and the 25 percent single employer standards—are met.

Both the five employer and 25 percent dominance standards are consistent with the ''safety zone'' standards for exchanges of employer wage information established by the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the antitrust context.[52] Under the safety zone

[51] According to the most recent U.S. Department of Labor's National Agricultural Workers Survey, between October 1, 2012, and September 30, 2014, 47 percent of farmworkers in the United States lacked work authorization. Findings from the National Agricultural Workers Survey (NAWS) 2013–2014: A Demographic and Employment Profile of United States Farmworkers, Research Report No. 12 (Dec. 2016), pp. 4–5, *available at https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_12.pdf.*

[52] *See* Statement 6 of the Antitrust Enforcement Policy in Health Care (''enforcement policy''), August 1996, *available at http://www.justice.gov/atr/public/guidelines/0000.htm.* While the enforcement policy was developed for exchanges of information in the health care industry, the policy has been recognized to ''offer significant insights that go beyond health care, including a very useful framework for analyzing information exchanges,'' David H. Evans & Benjamin D. Bleiberg, *Trade*

Continued

standards, absent extraordinary circumstances, the exchange of information about employer wages meeting the requirements for the safety zone will not be challenged by the DOJ or the FTC as a violation of antitrust law. Although created for a different purpose than these proposed H–2A regulatory standards, the safety zone standards establish levels at which the DOJ and FTC have established that an exchange of wage information is sufficiently anonymized to prevent the wages of a single employer from being identified because the wage results reported too closely track the wages paid by a single employer. It is the Department's preliminary conclusion that the safety zone standards are consistent with the Department's aim of requiring that the wages reported from a prevailing wage survey are sufficiently representative, and the wages of a single employer do not drive the wage result.

The Department requests comments on these statistical standards and any alternate standards that might be used to meet the Department's goals of establishing reliable and accurate prevailing wage rates consistent with a modern budget environment. For example, the Department requests comments on whether to require the Handbook's suggested sample size of 15 percent for crop activities or agricultural activities with at least 3,000 U.S. workers but require a smaller sample than those set in the Handbook for smaller crop activities and agricultural activities. Additionally, the Department requests comments on whether the proposed sample size requirements, and any recommended alternative requirements, should apply to the survey overall or to the prevailing unit of pay. For example, the Department invites comments on whether, if a survey includes both hourly pay and piece rate pay based on a bushel unit, the 30 worker, 5 employer, and 25 percent dominance standards should apply to the survey overall, or to the unit of pay that represents the wages paid to at least 50 percent of the workers in the survey.

In addition to the standards governing the methodology in the survey, in § 655.120(c)(2), the Department proposes that a prevailing wage rate would remain valid for 1 year after OFLC posts the wage rate or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed in the employer's *Application for Temporary Employment Certification* expires during the contract period, the employer must continue to guarantee a wage that is at least equal to the expired prevailing wage rate. This proposal is consistent with OFLC's current policy. The Department proposes that if an employer guaranteed a prevailing wage rate in the *Application for Temporary Employment Certification,* it must continue to guarantee that rate if it is the highest applicable wage, even if the prevailing wage rate ''expires'' during the contract period. This is because the employer may not pay a wage lower than the wage it offered to U.S. or H–2A workers.

The 1-year validity period for prevailing wage rates is generally consistent with OFLC's current practice. The Department proposes to maintain the current validity period with the goals of both basing prevailing wage rates on the most recent and accurate data and making prevailing wage rate findings available where the prevailing wage rate would be higher than the AEWR. The Department invites comments on whether an alternate duration for the validity of prevailing wage surveys would better meet these goals. For example, the Department invites comments on whether to use the 2-year period that is used for the H–2B program. For the H–2B program, an employer may submit a prevailing wage survey if it is the most recent edition of a survey and is based on data collected no more than 24 months before submission. The Deparment also invites comments on whether it should index prevailing wage rates based on either the CPI or ECI when the OFLC Administrator issued a prevailing wage rate in 1 year for a crop activity or agricultural activity but a prevailing wage finding is not available in a subsequent year. The Department also invites comments on whether it should set any limits on the age of the data reported by a survey.

The Department requests comments on each of the methodological changes discussed above, as well as any alternate prevailing wage survey requirements. This includes comments on whether and why any of the elements of Handbook 385 should be maintained and incorporated in to the regulation as well as whether and why any aspects of the Department's H–2B prevailing wage methodology for employer-provided surveys should be adopted for the H–2A program. The Department is particularly interested in comments that address how the recommended standard will meet the Department's objective to produce reliable and accurate prevailing wage rates for employers and workers in a manner consistent with available resources at the State and Federal levels.

d. The Department Proposes That the Employer Must Pay Any Higher AEWR or Prevailing Wage Rate Not Later Than 14 Days After Notification of the New Wage Rate

Paragraph (c) of current § 655.120 provides that the Department would update the AEWR at least annually by publication in the **Federal Register**.[53] In addition, the current regulation at § 655.122(l) requires employers to pay the highest wage ''in effect at the time the work is performed,'' which means employers must begin paying the AEWR upon its effective date. The current regulation is silent on when a published AEWR becomes effective. For many years, the Department published AEWRs with an immediate effective date. However, starting with the AEWRs for 2018, the Department gave employers up to 14 days to start paying a newly issued higher AEWR.[54] The Department proposes to provide text in § 655.120(c) that clarifies that if a higher AEWR is published in the **Federal Register** during the labor certification period, the employer must begin paying the new wage rate within 14 days, consistent with the current regulation and policy. This policy prevents adverse effect on the wages of U.S. workers by quickly implementing any newly-required higher wage rate, while giving employers a brief window to update their payroll systems to implement a newly-issued wage. The 14-day effective date is based on the current regulation at § 655.122(m), which requires the employer to pay the worker at least twice a month or according to the prevailing practice in the area of intended employment, whichever is more frequent. No changes are proposed to § 655.122(m). Given this existing requirement, the 14-day window provides that an employer is not required to adjust a worker's pay in the middle of a pay period.

In addition, the Department proposes to make minor edits to the existing language because the AEWRs will no longer be announced in a single **Federal**

Associations: Collaboration, Conspiracy and Invitations to Collude, Antitrust Rev. of the Americas, at 40 (2011); *see also* Robert H. Lattinville & Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review,* 17 Marq. Sports L. Rev. 109, at n. 428 (Fall 2006) (''Officials from the FTC have stated that the principles, while nominally focused on the health care industry, are broadly applicable to other industries and professions.'').

[53] Under 44 U.S.C. 1507, publication in the **Federal Register** provides legal notice of the new wage rates.

[54] *See* Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2018 Adverse Effect Wage Rates for Non- Range Occupations,* 82 FR 60628 (Dec. 21, 2017).

Register announcement. Instead, each AEWR will be updated at least annually, but the Department plans to make the updates through two announcements, one for the AEWRs based on the FLS, and another one for the AEWRs based on the OES survey. This is due to the different time periods for release of these two surveys.

Similar to the current regulation on AEWR updates, the current regulation at § 655.120(b) requires the employer to pay a higher prevailing wage upon notification to the employer by the Department. The Department's current practice is to publish prevailing wage rates on its website and to directly contact employers who are covered by a higher prevailing wage rate. The proposed regulation maintains this current practice for notifying employers directly, rather than through the **Federal Register**, because the administrative burden of contacting employers directly is less than publishing multiple prevailing wage rates in the **Federal Register** given that prevailing wage rate surveys are not provided for all crops, activities, and locations in a single cycle. As with the AEWR, the Department proposes to make the new prevailing wage rates effective 14 days after notification so that employers do not need to update the wage rate in the middle of a pay period.

For both the AEWR and prevailing wage rate, the Department proposes that the employer must pay a higher wage rate if the wage is adjusted during the contract period, but may not lower the wage rate if OFLC issues an AEWR or prevailing wage that is lower than the offered wage rate. Because the employer advertised and offered the higher rate through its recruitment of U.S. and H–2A workers, the wage cannot be reduced below the wage already offered and agreed to in the work contract. Under this proposal, an employer would not be permitted to put a clause in the job order stating that it may reduce the offered wage rate if a lower AEWR or prevailing wage is issued. The Department also proposes to remove current regulatory language that requires an employer to pay the wage ''in effect at the time work is performed'' from §§ 655.120(b) and 655.122(l) because that language may create confusion about the existing requirement to continue to pay a previously offered wage if the new ''effective'' wage is lower.

e. Wage Assignments and Appeals

Under this proposal, an employer would select the appropriate SOC code for the job opportunity and guarantee in its *Application for Temporary Employment Certification* a wage that is at least the highest of the AEWR for that SOC, a prevailing wage where the OFLC Administration has issued such a wage rate, an agreed-upon collective bargaining wage, or the applicable Federal or State minimum wage. The CO would then review the employer's wage selection as part of the review of the *Application for Temporary Employment Certification* to verify that the employer guarantees at least the required wage.

Under paragraph (b)(5) of this proposal, if the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification, the CO would determine the applicable AEWR at the highest AEWR for all applicable occupational classifications. Determining the appropriate SOC is an important component of the Department's proposal to move to an occupation-specific wage. The proposal to use the highest applicable wage would reduce the potential for employers to misclassify workers and would impose a lower recordkeeping burden than if the Department permitted employers to pay different AEWRs for job duties falling within different occupational classifications on a single *Application for Temporary Employment Certification.* This proposal is also consistent with how the Department assigns prevailing wage rates for jobs that cover multiple SOCs in the H–2B program.

Under this proposal, employers who currently file a single *Application for Temporary Employment Certification* covering multiple workers and a wide variety of duties might choose to file separate *Applications for Temporary Employment Certification* and limit the duties of the workers covered by each *Application for Temporary Employment Certification* to a single occupational classification. The employer would then pay a separate wage rate based on the duties of each *Application for Temporary Employment Certification.*

The Department invites comments on the proposal to determine the applicable AEWR at the highest AEWR for all applicable occupational classifications, including any alternate methods the Department should use to determine the AEWR if the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification. For example, the Department invites comments on whether it should establish the AEWR to be guaranteed on the *Application for Temporary Employment Certification* based on the primary duties of the job as reported on the *Application for Temporary Employment Certification.* Any proposals to use a methodology other than the highest AEWR for all applicable occupational classifications should explain how the Department would protect against misclassification.

All *Applications for Temporary Employment Certification* are currently assigned an SOC by the SWA, but these assignments have no impact on the required wage rate in the H–2A program, because the required wage rate is not currently based on the SOC system. Based on past SOC assignments by the SWA, approximately 95 percent of H–2A workers will fall within one of the following SOC codes: 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals), 45–2091 (Agricultural Equipment Operators), and 45–4011 (Forest and Conservation Workers) if reforestation workers are added to the H–2A program as proposed. Given the very small number of SOCs applicable to most H–2A jobs, the Department expects that employers will be able to select the correct SOC code and accompanying AEWR in most cases.

In a small number of cases, the employer may select the incorrect SOC on its *Application for Temporary Employment Certification.* If the employer offers a wage that does not meet the requirements of § 655.120(a), proposed paragraph (d)(1) explains that the CO would issue a NOD and require the employer to correct the wage rate. This would include recruiting for the job opportunity at the correct wage rate. Proposed paragraph (d)(2) further provides that if the employer disagrees with the wage rate required by the CO, the employer may appeal only after the *Application for Temporary Employment Certification* is denied, and the employer must follow the procedures in § 655.171. This proposal is consistent with the proposal to eliminate appeals of NODs discussed in the preamble related to § 655.141 of this proposed rule and would promote efficiency by providing that all possible grounds for denial are appealed at once, rather than allowing for separate appeals of multiple issues.

2. Section 655.121, Job Order Filing Requirements

a. Submission of the Job Order

The statute requires employers to engage in the recruitment of U.S. workers through the employment service job clearance system administered by the SWAs. *See* section

218(b)(4) of the INA, 8 U.S.C. 1188(b)(4); *see also* 29 U.S.C. 49 *et seq.,* and 20 CFR part 653, subpart F. The Department proposes to modernize and streamline the process by which employers submit job orders to the SWA for review and for intrastate and interstate clearance in order to test the local labor market and determine the availability of U.S. workers before filing an *Application for Temporary Employment Certification.*

Employers have described the current process of preparing and submitting job orders to the SWAs as cumbersome, complicated, and requiring the expenditure of considerable time and money. An employer must prepare the job order, *Agricultural and Food Processing Clearance Order* (Form ETA–790), in paper form, scan it, and submit it, along with any other paper attachments, to the SWA using email, U.S. mail, or private courier. Mistakes often must be corrected by hand, initialed and dated, then emailed or mailed to appropriate parties. Failure to complete these manual exchanges of corrections can lead to active job orders with outdated and/or inaccurate terms and conditions. Furthermore, the SWAs generally do not have adequate capacity to provide for the e-filing and management of job orders, which may create uncertainty for employers that need to submit job orders within regulatory timeframes. Given that an employer must provide a copy of the same job order to the NPC at the time of filing the *Application for Temporary Employment Certification,* the current job order filing process requires duplication of effort for employers, especially those with business operations covering large geographic areas that need to coordinate job order submissions with multiple SWAs.

Therefore, the Department proposes that an employer submit a newly designed job order, *H–2A Agricultural Clearance Order* (Form ETA–790/790A), directly to the NPC designated by the OFLC Administrator. This proposal also requires an employer to submit the job order using the electronic method(s) designated by the OFLC Administrator, and adopts the use of electronic signatures. Employers permitted to file by mail or who request a reasonable accommodation due to a disability under the proposed procedures in § 655.130(c) would be permitted to file using those other means. Unless the employer has a disability or lacks adequate access to e-filing, the NPC will return without review any job order submitted using a method other than the electronic method(s) designated by the OFLC Administrator.

Where the job order is submitted in connection with a future master application, an agricultural association will continue to submit a single job order in the name of the agricultural association as a joint employer on behalf of all employer-members that will be identified on the *Application for Temporary Employment Certification.* The Department proposes edits to clarify that the employer-members will also be listed on the job order. Similarly, the Department proposes that where two or more employers are seeking to jointly employ a worker or workers, as permitted by proposed § 655.131(b), any one of the employers may submit the job order as long as all joint employers are named on the job order and the future *Application for Temporary Employment Certification.*

Upon receipt of the job order, the NPC will transmit, on behalf of the employer, an electronic copy of the job order to the SWA serving the area of intended employment for review. If the job opportunity is located in more than one State within the same area of intended employment, the NPC will transmit a copy of the electronic job order, on behalf of the employer, to any one of the SWAs having jurisdiction over the place(s) of employment for review. The job order must continue to satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and § 655.122.

As explained above, the Department believes this proposal will modernize and streamline the job order filing process and create significant savings and efficiencies for employers, SWAs, and the Department. Many employers and their authorized representatives are highly automated in their business operations and familiar with e-filing the Form ETA–9142A, required appendices, and supporting documentation with the NPC. Based on applications filed during FYs 2016 and 2017, more than 81 percent of employer applications were submitted electronically to the NPC for processing. Expanding OFLC's technology system to include the electronic submission of the new Form ETA–790/790A, prior to the filing of an *Application for Temporary Employment Certification,* will save employers time and money preparing, scanning, and mailing the job order to the SWA, and streamline the filing process by providing a single point-of-access to H–2A program services.

To implement this proposal, OFLC's technology system will allow an employer to initiate the new Form ETA–790/790A online, pre-populate all business contact information from their account, and save a partially completed form as a ''draft'' that the employer can access and complete later. As the Form ETA–790/790A is prepared online, the system will provide the employer with a series of electronic data checks and prompts to ensure each required field is completed and values entered on the form are valid and consistent with regulatory requirements. An online glossary and ''help'' function will allow the employer to refer to explanations of key terms along with access to frequently asked questions designed to clarify instructions on completing the form. For an employer that has recurring seasonal job opportunities, the system will allow the preparation of multiple Forms ETA–790/790A and ''reuse'' previously filed job orders. This ''reuse'' capability is similar to the one currently available for preparing the Form ETA–9142A, and will save the employer significant time and expense by pre-populating key sections into the draft Form ETA–790/790A, including information related to the job opportunity, crops or agricultural activities, wage offers, place of employment and housing locations, and other worker guarantees (*e.g.,* meals and transportation).

The newly designed Form ETA–790/790A will also contain a standardized set of terms and conditions of employment, as required by §§ 653.501(c) and 655.122, that the employer will review, sign, and date online prior to submission. The Department proposes to standardize these required terms and conditions of employment to ensure greater consistency in disclosure to prospective U.S. worker applicants and reduce the frequency of inadvertent errors or omissions that lead to processing delays. After agreeing to these standard, required terms and conditions of employment, the employer will affix its electronic signature in order to submit the job order for processing. Once submitted, the OFLC technology system will automatically transmit the electronic Form ETA–790/790A to the SWA serving the area of intended employment, thereby eliminating the need for the employer to send the job order to the SWA.

For the Department and SWAs, electronic submission of job orders will decrease data entry, improve the speed with which job order information can be retrieved and shared with the SWAs, reduce staff time and storage costs, and improve storage security. Since the new Form ETA–790/790A will be stored electronically, it also eliminates the need for manual corrections of errors and other deficiencies and improves the efficiency of posting and maintaining

approved job orders on the Department's electronic job registry. This may result in more efficient use of Department and SWA staff time. Further, the Department already provides the SWAs with access to OFLC's technology system for purposes of communicating any deficiencies with job orders associated with employer-filed H–2A and H–2B applications and uploading inspection reports of employer housing. Incorporating a capability for the SWAs to access and retrieve the Form ETA–790/790A assigned by the NPC, virtually in real time after submission by employers, is a logical next step in enhancing OFLC's technology system and creating a seamless delivery of program services for employers.

b. SWA Review of the Job Order

The Department proposes minor revisions to the timeframes and procedures under which the SWA performs a review of the employer's job order. The SWA will continue to provide written notification to the employer of any deficiencies within 7 calendar days from the date the SWA received the job order from the NPC. The Department proposes editorial changes to clarify that the notification issued by the SWA must state the reasons the job order fails to meet the applicable requirements and state the modifications needed for the SWA to accept the job order. The employer will continue to have an opportunity to respond to the deficiencies within 5 calendar days from the date the notification is issued by the SWA, and the SWA will issue a final notification to accept or deny the job order within 3 calendar days from the date the employer's response is received.

To ensure a timely disposition is issued on all job orders, the Department proposes the job order be deemed abandoned if the employer's response to the notification is not received within 12 calendar days after the SWA issues the notification. In this situation, the SWA will provide written notification and direct the employer to submit a new job order to the NPC that satisfies all the requirements of this section. The 12-calendar-day period provides an employer with a reasonable maximum period within which to respond, given the Department's concern for timely processing of the employer's job order. The Department is also clarifying that any notice sent by the SWA to an employer that requires a response must be sent using a method that assures next day delivery, including email or other electronic methods, and must include a copy to the employer's representative, if applicable.

If the employer is not able to resolve the deficiencies with the SWA or the SWA does not respond within the stated timelines, the Department will continue to permit the employer to file its *Application for Temporary Employment Certification* and job order to the NPC using the emergency filing procedures contained in § 655.134. With the newly designed Form ETA–790/790A, the Department anticipates fewer discrepancies and inconsistencies between SWA determinations in various States. The Department continues to encourage employers to work with the SWAs early in the process to ensure that their job orders meet applicable state-specific laws and regulations and are accepted timely for intrastate and interstate clearance.

c. Intrastate and Interstate Clearance of Approved Job Orders

The Department proposes minor changes to the process by which the SWA circulates the approved job order for intrastate clearance and posts a copy of the job order for interstate clearance to other designated SWAs.

Under the current regulation, once the SWA accepts the job order, it must place the job order in intrastate clearance and commence recruitment of U.S. workers. Where the employer's job order covers an area of intended employment that falls within the jurisdiction of more than one SWA, the originating SWA initiates limited interstate clearance by circulating a copy of the job order to the other SWAs serving the area of intended employment. The Department proposes changes to this process to accommodate the new requirement that employers file job orders directly with the NPC. Upon its acceptance of the job order, the SWA will continue to place the job order in its intrastate job clearance system. However, rather than circulating the job order to other SWAs covering the area of intended employment or waiting for instructions from the CO in the NOA, the Department proposes that the SWA notify the NPC that the job order is approved and must be placed into interstate clearance. Upon receipt of the SWA notification, the NPC is responsible for promptly transmitting an electronic copy of the approved job order for interstate clearance to all SWAs with jurisdiction over the area of intended employment and the States designated by the OFLC Administrator as potential sources of traditional or expected labor supply, in accordance with § 655.150.

The Department has concluded that these proposed changes will provide U.S. worker applicants with greater exposure to the job opportunity and facilitate a more efficient process for circulating the employer's job order through the interstate clearance system. Circulation of the approved job order for interstate clearance prior to the filing of the *Application for Temporary Employment Certification* will significantly increase the amount of time that job orders are initially available to prospective U.S. worker applicants, including in labor supply States designated by the OFLC Administrator. Additionally, the SWAs will save time and resources because the proposed changes will eliminate the need to prepare, scan, and transmit copies of approved job orders to other SWAs. Since the job order is electronically available to the NPC, the NPC can transmit a copy of the approved job order to other SWAs with minimal effort and expense.

Where modifications to the job order are required under this section, the NPC can serve as a single source of authority for all modifications to ensure greater accuracy and consistency in disclosing the modified terms and conditions of employment. Once the modifications are complete, the NPC will promptly re-circulate an electronic copy of the job order to all affected SWAs, as well as the employer. Consequently, the SWAs will be able to focus their resources on recruiting U.S. workers and conducting timely inspections of employer housing.

d. Other Proposed Changes

To clarify procedures and as a result of other proposed changes, the Department is retaining but reorganizing several components of § 655.121. For example, the Department proposes to move the timeliness requirement for submitting a job order from paragraph (a)(1) to a new paragraph (b) that focuses solely on the timeliness requirements. The change in the location of this timeliness language, combined with new paragraphs (c) and (d) to accommodate the e-filing of job orders and *Applications for Temporary Employment Certification* with the designated NPC, required renumbering of subsequent paragraphs. The Department also proposes procedures to allow employers that lack adequate access to e-filing to file the job order by mail and for employers that are unable or limited in their ability to use or access the electronic application due to a disability to request an accommodation to allow them to access and/or file the job order through other means.

The Department also proposes minor changes to paragraph (a)(2) and new

paragraph (a)(3) to clarify procedures for an agricultural association's submission of a job order in connection with a future master application, as permitted by proposed § 655.131(a), and for two or more employers seeking to submit a job order in connection with a future joint employment application, as permitted by proposed § 655.131(b). While only one joint employer will submit the job order to the NPC, the job order must identify names of all employers included in that job order. Proposed paragraph (a)(4) retains former paragraph (a)(3), with technical changes, and continues to require the employer's job order to satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and § 655.122.

Finally, the Department has made a technical correction in proposed paragraph (g), changing *Application for Temporary Employment Certification* to ''application'' to accurately reflect that the term ''application'' refers to a U.S. worker's application for the employer's job opportunity during recruitment, and has made similar conforming edits throughout this subpart.

3. Section 655.122, Contents of Job Offers

a. Paragraph (d), Housing

The Department proposes several revisions to its regulations at § 655.122(d) governing housing inspections and certifications. Pursuant to the statute and the Department's regulations, an employer must provide housing at no cost to all H–2A workers. The employer must also provide housing at no cost to those non-H–2A workers in corresponding employment who are not reasonably able to return to their residences within the same day. *See* section 218(c)(4) of the INA, 8 U.S.C. 1188(c)(4); 20 CFR 655.122(d)(1). Generally, an employer may meet its housing obligations in one of two ways: (1) It may provide its own housing that meets the applicable federal standards; or (2) it may provide rental and/or public accommodations that meet the applicable local, state, or federal standards.[55] The statute further requires that the determination whether the housing meets the applicable standards must be made not later than 30 days before the first date of need. *See* section 218(c)(3)(A), (4) of the INA, 8 U.S.C. 1188(c)(3)(A), (4).

i. Employer-Provided Housing

Preoccupancy inspections of employer-provided housing are critical to ensure that sufficient and safe housing is available prior to the workers arriving for the work contract period. The Department is aware, however, that the current requirement of preoccupancy inspections of employer-provided housing for every temporary agricultural labor certification (regardless of the condition of the housing or how recently it may have been inspected) may result in delays in the labor certification process. These delays are often due to insufficient SWA capacity to conduct timely inspections of employer-provided housing. These delays—which are often beyond an employer's control regardless of how early it might request an inspection—may have a significant detrimental impact on the employer's operations.

To address these concerns, the Department proposes the following changes to its current regulations. First, the Department proposes to reiterate in its regulations the statutory requirement that determinations with respect to housing must be made not later than 30 days prior to the first date of need. Second, the Department proposes to clarify that other appropriate local, state, or federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs. Third, the Department proposes to authorize the SWAs (or other appropriate authorities [56]) to inspect and certify employer-provided housing for a period of up to 24 months. Twenty-four month certification would be subject to appropriate criteria and prior notice to the Department by the certifying authority. In light of the SWAs' longstanding expertise in conducting housing inspections, the Department proposes to authorize each SWA to develop its own criteria to determine, at its sole discretion, whether to certify specific employer-provided housing for a time period longer than the immediate work contract period, but in no case longer than 24 months. The Department invites comment on whether it should establish specific criteria that the SWAs must consider when determining the validity period of a housing certification (*e.g.,* history of housing compliance or age of the housing), and if so, what those criteria should be.

Under the proposal, an employer must self-certify that the employer-provided housing remains in compliance for any subsequent *Application for Temporary Employment Certification* filed during the validity period of the official housing certification previously received from the SWA (or other appropriate authority). To self-certify, an employer must re-inspect the employer-provided housing, which was previously inspected by the SWA or other authority. The employer must then submit to the SWA and the CO a copy of the valid certification for the housing previously issued by the SWA or other authority, and a written statement, signed and dated, attesting that the employer has inspected the housing, and that the housing is available and sufficient to accommodate the number of workers being requested and continues to meet all applicable standards.

ii. Rental and/or Public Accommodations

In its experience administering and enforcing the H–2A program, the Department increasingly encounters H–2A employers that provide rental and/or public accommodations to meet their H–2A housing obligations. Under the Department's current regulations at § 655.122(d)(1)(ii), such housing must meet the applicable local standards for such housing. In the absence of applicable local standards, state standards apply. In the absence of applicable local or state standards, DOL OSHA standards at 29 CFR 1910.142 apply. In addition, an employer that elects to provide such housing must document to the satisfaction of the CO that the housing complies with the local, state, or federal housing standards. Through guidance, the Department has explained that such documentation might include, but is not limited to: A SWA inspection report (where required); a certificate from the local or state health department or building department (where required); or a signed, written statement from the employer.[57]

Despite these requirements, in WHD's enforcement experience, H–2A employers often fail to secure sufficient rooms and/or beds for workers. This results in unsafe and unsanitary conditions for workers. Overcrowding, which is among one of the most common issues the Department encounters in rental and/or public accommodations, may result in unsanitary conditions, pest infestations, and outbreaks of communicable

[55] Housing for workers principally engaged in the range production of livestock must meet the minimum standards required by § 655.122(d)(2).

[56] *See* 20 CFR 653.501(b)(3).

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

diseases. In some cases, for example, employers required workers to share a bed, required workers to sleep on the floor in a sleeping bag, or converted laundry or living spaces into sleeping facilities by putting mattresses on the ground. In other situations, as many as eight workers have been housed in a single room. Moreover, in rooms where workers also cook, the failure to provide sufficient space for workers to cook and sleep and/or to provide sanitary facilities for preparing and cooking can lead to health issues from improperly cooked food and/or pest and rodent issues. WHD also often encounters employers that do not provide sufficient access to laundry facilities when housing workers in rental and/or public accommodations. Sufficient access to laundry is critical to ensure the health of workers, as workers often perform work in fields sprayed with pesticides, which comes in contact with workers' clothing. Further, WHD has encountered numerous instances of faulty or improperly installed heating, water heating, and cooking equipment in rental and/or public accommodations, posing serious safety risks to workers. In some instances, for example, electrical currents have run through water faucets. In other instances, workers have used hot plates that were not plugged into a grounded electrical line, causing the hot plates to catch fire.

Where there are no local or state standards for rental and/or public accommodations, the DOL OSHA standards at 29 CFR 1910.142 apply, and these standards include specific requirements addressing these safety and health concerns. However, even where local and state standards for rental and/or public accommodations exist, these standards often do not include requirements addressing overcrowding and other basic safety and health concerns. The Department, therefore, is concerned that its current regulations may be interpreted to mean that where any local or state standards for rental and/or public accommodations exist, only those standards will apply, even where those standards do not address basic safety and health concerns applicable to rental and/or public accommodations.

To address these concerns, the Department proposes the following revisions to its regulations. First, the Department proposes that, in the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the OSHA temporary labor camp standards at 29 CFR 1910.142(b)(2) (''each room used for sleeping purposes shall contain at least 50 square feet for each occupant''), § 1910.142(b)(3) (''beds . . . shall be provided in every room used for sleeping purposes''); § 1910.142(b)(9) (''In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.''); § 1910.142(c) (water supply); § 1910.142(b)(11) (heating, cooking, and water heating equipment installed properly); § 1910.142(f) (laundry, handwashing, and bathing facilities); and § 1910.142(j) (insect and rodent control), the relevant state standards will apply; in the absence of applicable state standards addressing such concerns, the relevant OSHA temporary labor camp standards will apply. For example, under this proposal, where local standards for rental and/or public accommodations exist, but do not include a standard that requires a certain minimum square footage per person, all of the existing local standards will apply in addition to any state standard that addresses square footage. If there is no state standard addressing minimum square footage, then the DOL OSHA standard at 29 CFR 1910.142(b)(2) (or, where cooking facilities are present, § 1910.142(b)(9)) will apply, in addition to the existing local standards. The Department welcomes comment on this proposal, specifically on whether the applicable standards should address any additional safety and health concerns relevant to housing temporary workers in rental and/or public accommodations that are otherwise addressed in the DOL OSHA standards at 29 CFR 1910.142, such as screens on exterior openings (see § 1910.142(b)(8)).

Second, the Department proposes to specify in the regulations that an employer must submit to the CO a signed, dated, written statement, attesting that the rental and/or public accommodations meet all applicable standards and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). Where the applicable local or state standards under § 655.122(d)(1)(ii) require an inspection, the employer also must submit a copy of the inspection report or other official documentation from the relevant authority. Where no inspection is required, the employer's written statement must confirm that no inspection is required.

iii. Housing for Workers Covered by 20 CFR 655.200 Through 655.235

The Department proposes clarifying edits to paragraph (d)(2) to reflect that §§ 655.230 and 655.235 establish the housing requirements for workers primarily engaged in the herding and production of livestock on the range. The Department has established separate requirements for these workers for the entirety the H–2A program due to the unique nature of the work performed.

b. Paragraph (g), Meals

The Department is retaining the current regulation at § 655.122(g) that requires an employer to provide each worker three meals a day or furnish free and convenient cooking and kitchen facilities so that the worker can prepare meals. Where an employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. Although the Department does not propose any changes to § 655.122(g), the Department frequently encounters violations of this provision and thus provides the following information to clarify the provision's requirements.

Should an employer elect to provide kitchen and cooking facilities—in lieu of providing meals—the facilities must be free, convenient, and adequate for workers to prepare three meals a day. These facilities must include clean space intended for food preparation as well as necessary equipment, including working cooking appliances, refrigeration appliances, and dishwashing facilities (*e.g.,* sinks designed for this purpose). The types of cooking appliances may vary but must allow workers to sufficiently prepare three meals a day. For example, an employer has not met its obligation to provide kitchen and cooking facilities by merely providing an electric hot plate, a microwave, or an outdoor community grill. Similarly, an employer has not met its obligation if the workers are required to purchase cooking appliances or accessories, such as portable burners, charcoal, propane, or lighter fluid.

In the Department's enforcement experience, it has found that public accommodations (*e.g.,* hotels or motels) frequently do not have adequate cooking facilities that allow workers to prepare three meals a day. Specifically, public accommodations frequently lack stoves, dishwashing facilities, and clean space for workers to safely prepare and store food apart from their sleeping facilities. Should such public accommodations lack adequate cooking and kitchen facilities for workers to prepare and store their own meals, the employer must provide three meals a day to each worker in order to satisfy the employer's obligations under § 655.122(g).

Where an employer elects to provide meals, the employer may deduct any

previously disclosed allowable meal charges from the worker's pay; however, it must either obtain prepared meals or prepare the meals itself.[58] An employer may not pass on to the worker any costs that the employer has incurred for the provision of the meal that exceeds the allowable meal charge. Where a worker elects to purchase food in excess of the meal provided (*e.g.,* additional servings or premium items), the worker may bear the additional cost (assuming the provided meal was adequate, as discussed below).

Providing access to third-party vendors and requiring workers to purchase meals from the third-party vendor does not constitute compliance with the requirement to provide meals or facilities, even if the employer provides a meal stipend.[59] An employer may arrange for a third party vendor and pay for the workers' meals, or use a voucher or ticket system where the employer initially purchases the meals and distributes vouchers or tickets to workers to obtain the meals from the third-party vendor. With such an arrangement, the employer may deduct the corresponding allowable meal charge if previously disclosed and in compliance with the procedures described under proposed § 655.173.

Should an employer elect to house workers in public accommodations, the employer may receive the appropriate pro-rated credit for a meal provided by the public accommodation (*e.g.,* continental breakfasts, buffets, etc.) towards its daily meal obligation as long as the workers can readily access the meal. Such credit shall not be allowed if the daily start time for the work day prohibits the worker from accessing the meal prior to departure to the place of employment. Similarly, when prepared meals are delivered, the delivery must occur in a timely and sanitary fashion. For example, food requiring refrigeration cannot be delivered hours before an anticipated mealtime. If meals are not delivered in a timely or sanitary fashion, the employer has not satisfied its meal obligation.

c. Paragraph (h), Transportation; Daily Subsistence

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

The Department proposes to revise the beginning and end points from and to which an employer must provide or pay for transportation and subsistence costs for certain H–2A workers. The Department's current regulation at § 655.122(h)(1) requires, in part, that an employer pay a worker for the reasonable transportation and subsistence costs incurred when traveling to the employer's place of employment, provided that the worker completes at least 50 percent of the work contract period and the employer has not previously advanced or otherwise provided such transportation and subsistence.[60] Specifically, an employer must provide or pay for transportation and subsistence costs from ''the place from which the worker has come to work for the employer.'' The Department currently interprets the ''place from which the worker has come to work for the employer'' to mean the ''place of recruitment,'' which sometimes is the worker's home.[61] Additionally, for a worker who completes the work contract period or is terminated without cause, and who does not have immediate subsequent H–2A employment, § 655.122(h)(2) requires the employer to provide or pay for return transportation and subsistence costs to the place from which the worker ''departed to work for the employer,'' disregarding intervening employment.[62]

The proposed rule largely retains the current requirements of § 655.122(h)(1) and (2) without change. However, in the Department's experience administering and enforcing the current H–2A regulations, it is often challenging to ascertain the place of recruitment and calculate travel expenses for H–2A workers departing to work for the employer from a location outside of the U.S.[63] In many cases, foreign recruitment is not an official process but an informal network of former H–2A workers, their friends, families, and neighbors. Some H–2A workers may not actually speak with the employer or the employer's representative until arriving at the U.S. Consulate or Embassy for visa processing or arriving at the appropriate port of entry to seek admission to the United States.[64]

In light of these challenges, the Department proposes to revise § 655.122(h)(1) to require an employer to provide or pay for inbound and return transportation and subsistence costs (where otherwise required by the regulation) from and to the place from which the worker departed to the employer's place of employment. For an H–2A worker departing from a location outside of the United States, the place from which the worker departed will mean the appropriate U.S. Consulate or Embassy. For those H–2A workers who must obtain a visa, the Department will consider the ''appropriate'' U.S. Consulate or Embassy to be the U.S. Consulate or Embassy that issued the visa. The Department recognizes, however, that the specific procedures for processing visas may differ among U.S. Consulates and Embassies and seeks comment on whether a different designation of the ''appropriate'' U.S. Consulate or Embassy is warranted.

Additionally, the Department recognizes that certain H–2A workers do not require a visa to obtain H–2A status, and so will not need to visa a consulate or embassy prior to entering the United States. *See* 8 CFR 212.1(a). Accordingly, the Department seeks comment on what the ''place from which the worker department'' should mean for those workers who do not require a visa to

[58] The maximum allowable meal charge to workers is governed by the daily subsistence rate as defined in § 655.173.

[59] *See Wickstrum Harvesting, LLC,* 2018–TLC–00018 (May 3, 2018). The ALJ affirmed an ETA determination denying certifications based on the employer's practice of providing workers with a stipend for meals instead of providing meals or furnishing free and convenient cooking facilities.

[60] Section 655.122(h)(1) further requires that, when it is in the prevailing practice among non-H–2A employers in the area to do so, or when offered to H–2A workers, the employer must advance transportation and subsistence costs to workers in corresponding employment. Section 655.122(h)(1) also places employers on notice that they may be subject to the FLSA, which operates independently of the H–2A program and imposes independent requirements relating to deductions from wages. *See also* 20 CFR 655.122(p). The proposed rule does not affect an FLSA-covered employer's obligations under the FLSA.

[61] *See, e.g.,* Preamble to 2009 NPRM, 74 FR 45906, 45915 (''this Proposed Rule requires the employer to pay for the costs of transportation and subsistence from the worker's home to and from the place of employment''); OFLC FAQ Sept. 15, 2010 (subsistence costs must be paid for costs incurred ''during the worker's inbound trip from the point of recruitment to the employer's worksite . . . and during the worker's outbound trip from the employer's worksite to the worker's home or subsequent employment'').

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

[63] Unless the location outside the United States is the consulate or embassy that issued the visa.

[64] Citizens or nationals of certain localities may directly seek admission to the United States in H–2A classification with Customs and Border Protection at a U.S. port of entry. *See* 8 CFR 212.1(a).

obtain H–2A status. For workers in corresponding employment and those H–2A workers who depart to the employer's place of employment from a location within the United States, the place from which the worker departed will continue to mean the place of recruitment. The Department also proposes conforming revisions throughout the NPRM to refer to the place from which a worker departs rather than the place from which the worker has come to work for the employer.

This proposal will provide the Department with a more consistent place from and to which to calculate travel costs and obligations for H–2A workers departing from a location outside of the United States. It will also provide H–2A workers and employers more precision when estimating the costs associated with H–2A employment. This proposal is also consistent with the 2008 Final Rule, wherein the Department defined the place of departure for H–2A workers coming from outside of the United States as the ''place of recruitment,'' which meant the appropriate U.S. Consulate or port of entry. 73 FR 77110, 77151–52, 77217–18. As the Department explained then, the consulate or port of entry provides the Department with an ''administratively consistent place from which to calculate charges and obligations.'' *Id.* at 77151–52. In the current regulation, the Department required reimbursement of travel costs from and to the place of recruitment. *See* 75 FR 6884, 6912. However, when promulgating the current regulation, the Department did not fully anticipate the difficulties of determining transportation costs on a basis that is unique to the facts of each individual worker's place of recruitment. Based on the Department's enforcement of the current regulation, a single gathering point from which transportation costs can be anticipated, measured, and paid, is necessary to the efficient administration of the H–2A program, simplifies the process for employers, and provides a reasonable transportation reimbursement to workers.

Finally, the Department recognizes that before continuing on to the employer's place of employment, a prospective H–2A worker requiring a visa often must complete several steps (such as medical exam or fingerprinting appointments) over the course of several days between applying for and receiving a visa at the U.S. Consulate or Embassy. Some workers make multiple, distinct trips to the U.S. consulate or Embassy to complete these steps, though most workers complete these steps over one longer stay immediately prior to departing to the employer's place of employment. In either case, under the proposed rule, the employer must provide or pay for all reasonable subsistence costs (including lodging) that arise from the time at which the worker first arrives in the consular/embassy city for visa processing until the time the worker arrives at the employer's place of employment, regardless of whether the worker completes these activities over the course of one or multiple trips. This requirement is consistent with § 655.135(j) of these regulations which prohibits an employer or its agent from seeking or receiving payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H–2A labor certification. As noted above, however, the employer is only required to provide or pay for the worker's reasonable transportation costs from the appropriate U.S. Consulate or Embassy to the place of employment.

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

The Department proposes to clarify the minimum safety standards required for employer-provided transportation in the H–2A program. The Department's current regulation at § 655.122(h)(4) provides that employer-provided transportation must comply with applicable federal, state, or local laws and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance required under MSPA at 29 U.S.C. 1841, 29 CFR 500.105, and 29 CFR 500.120 to 500.128. 20 CFR 655.122(h)(4). Employers seeking to employ H–2A workers must also recruit and hire any available U.S. workers. Because many H–2A employers also employ U.S. workers who may be covered by MSPA, it would not be a burden for these employers to adhere to the MSPA transportation safety standards when transporting H–2A workers. Section 1841 of MSPA provides that employers must comply with transportation safety regulations promulgated by the Secretary, including 29 CFR 500.104 and 500.105. In order to clarify the H–2A requirement to comply with § 500.104, the Department's proposal adds a citation specifically to § 500.104.

The Department also seeks comments concerning how its H–2A regulations can be modified to improve transportation safety. Currently, § 500.104 applies to automobiles, station wagons, and all vehicles that are used for trips of no more than 75 miles. It contains minimum safety standards for mechanisms such as operable brakes, lights, tires, steering, windshield wipers, and securely-fastened seats, but lacks protections against driver fatigue. The regulation at § 500.105 provides transportation safety standards, including measures to prevent driver fatigue, which are applicable to drivers and vehicles, other than passenger automobiles and station wagons, that transport agricultural workers pursuant to a day-haul operation or for any trip covering a distance greater than 75 miles. Despite these transportation safeguards, vehicle accidents involving H–2A and other agricultural workers continue to be a recurring problem, and are often attributable to unsafe vehicles and driver fatigue.[65] In the agricultural industry, it is common for drivers to be agricultural workers themselves, who after a long day or season of arduous agricultural work, transport other agricultural workers from one worksite to another or to the workers' home country after completing their work contracts in the United States. In a recent accident, a tractor-trailer hit a bus carrying 34 agricultural workers when the bus driver, an agricultural worker, failed to stop at a traffic signal apparently no more than 75 miles from the point of origin. The tractor-trailer driver and three bus passengers died. The bus driver, 28 bus passengers, and a passenger on the truck sustained injuries. The National Transportation Safety Board found that the accident was likely caused by driver fatigue.[66]

In light of this finding, the Department invites comments about additional protections that may be considered to help ensure against driver fatigue and other unsafe driving conditions in order to improve safety in the transportation of H–2A and corresponding U.S. workers.

d. Paragraph (j), Earning Records

The lack of permanent addresses makes it difficult to contact H–2A workers after they return to their home country should the Department need to contact a worker to distribute back wages, conduct an employee interview as part of an investigation, or to secure

[65] The measures that address driver fatigue under § 500.105 include the requirement that drivers of vehicles covered by this section make meal stops once every 6 hours and at least one rest stop between meals. 29 CFR 500.105(b)(2)(viii). Additionally, § 500.105 requires that drivers and passengers of trucks traveling more than 600 miles stop and rest for a period of at least 8 consecutive hours either before or upon completion of 600 miles. 29 CFR 500.105(b)(2)(x).

[66] National Transportation Safety Board Public Meeting Report, pg. 4, *available at https://www.ntsb.gov/news/events/Documents/2017-HWY16MH019-BMG-abstract.pdf.*

employee testimony during litigation. The Department, therefore, proposes to clarify that an employer must collect and maintain a worker's permanent address in the worker's home country. The Department's current regulation at § 655.122(j)(1) requires an employer to maintain a worker's home address, among other information. The regulation, however, does not define ''home address.'' Consequently, in administering and enforcing the H–2A program, the Department often encounters employers who maintain only the worker's temporary address at the worker's place of employment in the United States. Employers must maintain the worker's actual permanent home address—which is usually in the worker's country of origin. Accordingly, the Department proposes to clarify that an employer must collect and maintain a worker's permanent address in the worker's home country.

As part of its efforts to modernize and enhance its administration and enforcement of the H–2A program, the Department is also considering whether to require an employer to maintain a worker's email address and phone number(s) in the worker's home country when available. This information would greatly assist the Department in contacting an H–2A worker in the worker's home country, should the Department need to do so for the reasons outlined above. However, the Department understands that not all workers possess an email address or a private phone number or may not want to disclose such information to the employer for personal reasons. This, in turn, could make it difficult for an employer to demonstrate that it requested but did not receive such information from a worker. The Department, therefore, requests comments on potential benefits and implications of these additional recordkeeping requirements on H–2A employers. Finally, the Department proposes minor, nonsubstantive revisions to this section.

e. Paragraph (l), Rates of Pay

The Department proposes several changes to paragraph (l). First, the Department proposes to remove the statement ''[i]f the worker is paid by the hour'' and replace it with ''[e]xcept for occupations covered by §§ 655.200 through 655.235.'' This change is proposed consistent with the explanation provided above for § 655.120(a) because the only occupations with a different wage methodology are those covered by the regulatory provisions for workers primarily engaged in the herding or production of livestock on the range as discussed in §§ 655.200 through 655.235. The Department is concerned that the existing language ''[i]f the worker is paid by the hour,'' might create confusion about the fact that all other employers, including those who pay a monthly salary and those who pay based on a piece rate, must pay the highest applicable wage as set forth in § 655.120(a). This revision also clarifies that if the employer is certified for a monthly salary because, for example, the prevailing wage rate is a monthly rate, the employer must still pay the highest applicable wage rate. The requirement to pay the highest applicable wage means that if paying the AEWR for all hours worked in a given month would result in a higher wage than the certified monthly salary, the employer must pay the AEWR for all hours worked in that month.

Due to the requirement that the employer pay the highest applicable wage, regardless of the unit of pay, all employers except those employing workers covered by §§ 655.200 through 655.235 are required to keep a record of all hours worked. Consistent with FLSA principles, which provide a longstanding and generally recognized definition of ''hours worked,'' the term includes, but is not limited to, travel time between places of employment; driving vehicles to transport equipment or workers between housing and the place of employment, other than a bona fide carpool arrangement; time spent engaged to wait, such as waiting for the fields to dry or necessary equipment to arrive; and preparing tools for work. In addition, if the Department certifies the employer with a monthly wage rate that specifies that food will be provided (*e.g.,* $2,000 per month plus room and board), the employer must provide food in addition to wages, and the employer cannot take a credit for the cost of food if the credit would bring the worker below the wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. Further, because all H–2A employers are required to provide housing without charge to the worker, an employer also cannot not take a credit for the cost of housing.

The Department also proposes to make corresponding changes to align this paragraph with the proposed changes to § 655.120. Those changes are discussed in the preamble to § 655.120.

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

The Department's current regulation at § 655.122(n) provides relief from the requirements relating to return transportation and subsistence costs [67] as well as the three-fourths guarantee [68] when an employer notifies the NPC, and DHS in the case of an H–2A worker, if a worker voluntarily abandons employment before the end of the contract period or is terminated for cause.[69] It should be noted that the employer's timely notification to DHS of H–2A workers who voluntarily abandon employment or are terminated for cause is vital to ensuring program integrity and identifying workers who had been, but may no longer be, in the United States lawfully.

This provision also protects employers from disrupting their farming operations and incurring other costs and obligations to workers who voluntarily abandon employment, such as the obligations to provide housing and meals, and to solicit the return of U.S. workers to the job next season.

The Department's current regulation at § 655.153 requires an employer to contact the U.S. workers it employed in the previous year to solicit their return to the job unless the workers abandoned employment or were dismissed for cause during the previous year. The Department's proposal related to § 655.153 would require an employer to provide timely notice to the NPC of such abandonment or termination in the manner described in § 655.122(n) to receive relief from its otherwise applicable contact obligation. The employer may email the notification or send it by facsimile or U.S. mail to the contact information provided on OFLC's website at *www.foreignlaborcert.doleta.gov.* The Department proposes to revise § 655.122(n) to require an employer to maintain records of the notification detailed in the same section, including records related to U.S. workers' abandonment of employment or termination for cause during the previous year, for not less than 3 years from the date of the certification. *See* 20 CFR 655.153.

In its experience administering and enforcing the H–2A program, the Department encounters H–2A employers that claim that they have made proper notification in a timely manner in regard to workers who have abandoned employment or have been terminated for cause. Employers, however, frequently cannot produce records of such notification when requested. In order to promote its enforcement policy of appropriately

[67] *See* 20 CFR 655.122(h).

[68] *See* 20 CFR 655.122(i).

[69] *See* 20 CFR 655.122(n).

investigating claims of abandonment or termination because of the potential for abuse in an effort to evade transportation, subsistence, three-fourths guarantee, or U.S. worker contact obligations,[70] the Department proposes to require each employer to maintain records of the notification to the NPC, and DHS in the case of a worker in H–2A visa status, for not less than 3 years from the date of the certification. The requirement to maintain records of the notification assists in protecting the interests of able, willing, and qualified U.S. workers who might be available to perform the agricultural work, consistent with the INA and E.O. 13788. In addition, these records could assist growers in the event U.S. workers who have abandoned employment or been terminated for cause later assert the employer failed to contact them as required by proposed § 655.153.

The Department additionally notes that abandonment of employment, which can occur at any time during the contract period, will sometimes be apparent. For example, a worker may simply fail to report for work without the employer's consent, in which case the regulations deem the worker to have abandoned employment upon a failure to report to work for 5 consecutive working days. *See* 20 CFR 655.122(n). In order for an employer to avail itself of the abandonment exception to the typical requirement to contact a U.S. worker, however, the U.S. worker's abandonment of employment must have been voluntary. Thus, if a U.S. worker discontinues employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute an involuntary constructive discharge. Specific factual circumstances dictate whether a constructive discharge has occurred. Although the constructive discharge inquiry is inherently fact-specific, the Department has previously identified circumstances which likely support, and circumstances which likely do not support, a finding of constructive discharge rather than job abandonment.[71]

g. Paragraph (p), Deductions

The Department's current regulation at § 655.122(p) prohibits unauthorized deductions. An employer must disclose any deductions not required by law in the job offer. The Department, however, routinely encounters employers who fail to disclose deductions; improperly withhold FICA taxes; or properly disclose and withhold federal income tax at the worker's request, but fail to remit the withholding to the proper agencies. These actions, although sometimes inadvertent, constitute violations of the H–2A statute and regulations.

The Department does not propose any change to the regulation at § 655.122(p), but seeks to clarify that according to the Internal Revenue Service (IRS), an employer may not withhold Federal Insurance Contributions Act (FICA) taxes from an H–2A worker's paycheck; and that an employer generally is not required to withhold federal income tax from an H–2A worker's paycheck. In some situations, employers may be prohibited from withholding federal income tax under the H–2A program.

i. FICA Taxes

The Department follows IRS rulings with respect to taxes and withholdings. IRS guidelines provide that H–2A workers are exempt from FICA taxes, which include social security and Medicare taxes.[72] An employer, therefore, may not withhold FICA taxes from an H–2A worker's paycheck.

ii. Federal Income Tax Withholding

Compensation paid to an H–2A worker for agricultural labor performed in connection with an H–2A visa is not subject to mandatory federal income tax withholding if the worker provides the employer a Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN).[73] The employer may voluntarily withhold federal income tax when it is disclosed in the job order, provided the withholding is requested by the H–2A worker. The employer, however, is required to make ''backup withholding'' if an H–2A worker fails to provide an SSN or ITIN and receives aggregate annual compensation of $600 or more.[74]

Employers should continue to consult with the IRS or their tax consultants regarding federal withholding requirements and consult with applicable local and state tax authorities for compliance with their standards. Additionally, employers are encouraged to review WHD Field Assistance Bulletin No. 2012–3 [75] for further information on compliance with the requirements for deductions under the H–2A program.

h. Paragraph (q), Disclosure of Work Contract.

The Department's current regulation at § 655.122(q) requires an employer to disclose a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. The time by which the work contract must be provided depends on whether the worker is entering the U.S. to commence employment or is already present in the U.S.; however, for most H–2A workers, this must occur by the time the worker applies for a visa. The Department is retaining the current disclosure requirements with one minor revision. The Department proposes to specify that the work contract must be disclosed to those H–2A workers who do not require a visa to enter the United States under 8 CFR 212.1(a)(1) not later than the time of an offer of employment. This is the same point at which H–2A workers who are already in the United States because they are moving between H–2A employers receive the work contract.

4. Section 655.123, Positive Recruitment of U.S. Workers

The Department proposes a new section describing employers' positive recruitment obligations. The statute requires the Secretary to deny the temporary agricultural labor certification if the employer has not made positive recruitment efforts 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. Section 218(b)(4) of the INA, 8 U.S.C. 1188(b)(4). The requirement for employers to engage in positive recruitment is in addition to, and occurs within the same time period as, the circulation of the job order through the

[70] *See* Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2012–1, H–2A ''Abandonment or Termination for Cause'' Enforcement of 20 CFR 655.122(n) (Feb. 28, 2012), *https://www.dol.gov/whd/FieldBulletins/fab2012_1.pdf.*

[71] *See* Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2012–1, H–2A ''Abandonment or Termination for Cause'' Enforcement of 20 CFR 655.122(n) (Feb. 28, 2012), *https://www.dol.gov/whd/FieldBulletins/fab2012_1.pdf.*

[72] *See* IRS, Publication 51 (Circular A), Agricultural Employer's Tax Guide 2018 11 (Jan. 25, 2018), *http://www.irs.gov/pub/irs-pdf/p51.pdf.*

[73] *See* IRS, Publication 5144, Federal Income Tax and FICA Withholding for Foreign Agricultural Workers with an H–2A Visa (June 2014), *https://www.irs.gov/pub/irs-pdf/p5144.pdf.*

[74] *See* Internal Revenue Service, Foreign Agricultural Workers on H–2A Visas (June 5, 2018), *http://www.irs.gov/individuals/international-taxpayers/foreign-agricultural-workers.*

[75] *See* Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2012–3, General Guidance on Voluntary Assignments of Wages under the H–2A Program (May 17, 2012), *https://www.dol.gov/whd/FieldBulletins/fab2012_3.pdf.*

interstate clearance system maintained by the SWAs. *Id.* Proposed paragraph (a) reiterates these statutory requirements.

Proposed paragraph (b) permits employers to conduct their positive recruitment efforts after the SWA serving the area of intended employment has reviewed and accepted the employer's job order for intrastate clearance and before the employer files an *Application for Temporary Employment Certification.* Specifically, upon acceptance of the job order by the SWA under § 655.121, the NPC will transmit the accepted job order to other appropriate SWAs, thereby initiating the interstate clearance of the job order as set forth in § 655.150. The employer then may commence the required positive recruitment, as set forth in §§ 655.151 through 655.154.

Under proposed paragraph (c), if the employer chooses to engage in prefiling positive recruitment, the employer must begin its positive recruitment efforts within 7 calendar days of the date on which the SWA accepted the job order and must continue recruiting until the date specified in § 655.158. This timeframe will ensure that the employer begins its prefiling positive recruitment in a timely manner, and that such efforts are conducted within the same time period as the interstate clearance of the approved job order, as required by the statute.

Permitting positive recruitment to commence prior to the filing an *Application for Temporary Employment Certification* will clearly benefit those employers that consistently file job orders in compliance with program requirements because they may be able to obtain certification more quickly without the need for the Department to first issue a NOA or a NOD. The proposal will also provide the Department with better information with which to make its certification determinations.

To ensure recruitment of U.S. workers continues for an adequate period of time, proposed paragraph (f) prohibits the employer from preparing a recruitment report for submission with the *Application for Temporary Employment Certification* more than 50 calendar days before the first date of need. The initial recruitment report assures the Department that the employer is actively making efforts to conduct positive recruitment of U.S. workers, as required by the statute and this subpart.

Proposed paragraph (e) requires the employer to accept and hire all qualified, available U.S. worker applicants through the end of the recruitment period set forth in § 655.135(d), clarifying that this requirement applies to employers who engage in pre-filing recruitment. In addition, proposed paragraph (d) ensures U.S. workers have a fair opportunity to apply for these jobs by prohibiting preferential treatment of potential H–2A workers through interview requirements.

5. Section 655.124, Withdrawal of a Job Order

The Department proposes to reorganize the current withdrawal provisions at § 655.172 by moving the job order withdrawal provision from § 655.172(a) to proposed § 655.124, ''Withdrawal of a job order,'' in the sections of the regulation governing ''Prefiling Procedures,'' which address job orders filed in anticipation of future *Applications for Temporary Employment Certification.* The Department proposes placing the job order withdrawal procedures and the job order filing and review procedures together in ''Prefiling Procedures'' to make the rule better organized and more user-friendly.

In addition to relocating the job order withdrawal provision, the Department proposes minor edits to the job order withdrawal provision for both clarity and consistency with other proposed changes. For example, removing ''from intrastate posting'' is necessary because both intrastate and interstate posting may have begun under proposed § 655.121(f). Consistent with the proposal that employers submit their job orders to the NPC, proposed § 655.124(b) would establish the NPC as the recipient of job order withdrawal requests. An employer would submit its request to the NPC in writing, identifying the job order and stating its reason(s) for requesting withdrawal.

The Department proposes no change to an employer's continuing obligations to workers recruited in connection with the job order; these obligations attach at recruitment and continue after withdrawal.

C. Application for Temporary Employment Certification Filing Procedures

1. Section 655.130, Application Filing Requirements

a. Paragraph (a), What To File

The Department proposes to modernize and clarify the procedures by which an employer files an *Application for Temporary Employment Certification* for H–2A workers under this subpart. Based on the Department's experience administering the H–2A program under the current regulation, a common reason for issuing a NOD on an employer's application includes failure to complete all required fields on a form, failure to submit one or more supporting documents required by the regulation at the time of filing, or both. Under the current regulation, the NPC must issue non-substantive NODs to obtain information or documentation from the employer that the regulation expressly requires the employer to submit at the time of filing. This use of NPC staff resources increases processing times for all employers, including employers that consistently file complete and accurate applications.

To address these concerns and create an incentive for employers to file complete applications, § 655.130(a) would continue to require employers to file a completed *Application for Temporary Employment Certification.* For applications submitted electronically, OFLC's technology system will not permit an employer to submit an *Application for Temporary Employment Certification* until the employer completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all documentation and information required at the time of filing, including a copy of the job order submitted in accordance with § 655.121. For applications permitted to be filed by mail pursuant to the procedures discussed below, if an employer submits an application that is incomplete or contains errors, completing the application would require the Department to issue a NOD identifying any deficiencies, and for the employer to mail back a revised application, thus requiring a timely back-and-forth.

b. Paragraphs (c) and (d), Location and Method of Filing

In paragraph (c), the Department proposes to require an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator. The Department also proposes procedures to allow employers that lack adequate access to e-filing to file by mail and, for employers who are unable or limited in their ability to use or access the electronic application due to a disability, to request an accommodation to allow them to access and/or file the application through other means. Employers who are limited in their ability or unable to access electronic forms or communication due to a disability may use the procedures in § 655.130(c)(2) to request an accommodation. Proposed paragraph (d)

adopts the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney agent or surety.

Unless the employer requests an accommodation due to a disability or adequate access to e-filing, the NPC will return, without review, any *Application for Temporary Employment Certification* submitted using a method other than the electronic method(s) designated by the OFLC Administrator. For reasons discussed earlier in this preamble, the Department believes this proposal will modernize and streamline the application filing process, will not require a change in practice for the overwhelming majority of employers and their authorized attorneys or agents, and will create significant administrative efficiencies for employers and the Department.

c. Paragraph (e), Scope of Applications

The Department proposes a new paragraph (e) to clarify the scope of all *Applications for Temporary Employment Certification* submitted by employers to the NPC. First, proposed paragraph (e) clarifies that each *Application for Temporary Employment Certification* must be limited to places of employment within a single area of intended employment, except where otherwise permitted by the subpart (*e.g.,* under § 655.131(a)(2), a master application may include places of employment within two contiguous States). This proposal addresses the lack of clarity in the 2010 Final Rule regarding whether an application could include places of employment that span more than one area of intended employment. The 2010 Final Rule also introduced some ambiguity by its revisions to § 655.132(a), which specifically limited H–2ALC applications to places of employment within a single area of intended employment.

In both the temporary and permanent labor certification programs, the Department has historically used the area of intended employment for the purpose of determining recruitment requirements employers must follow to locate qualified and available U.S. workers, and to aid the Department in assessing whether the wages, job requirements, and terms and conditions of the job opportunity will adversely affect workers in the United States similarly employed in that same local or regional area.

Whether an employer is a fixed-site employer or H–2ALC, the area of intended employment is an essential component of the labor market test necessary to determine availability of U.S. workers for the job opportunity and to ensure that U.S. workers in the local or regional area have an opportunity to apply for those job opportunities located within normal commuting distance of their permanent residences. Qualified U.S. workers may be discouraged from applying for these job opportunities if the employer's offer of employment is conditioned on workers being available to perform the labor or services at places of employment both within and outside the normal commuting area or assignment to places of employment outside normal commuting distance from their residences, despite the availability of closer work. In addition, monitoring program compliance becomes more difficult and the potential for violations increases when workers employed under a single *Application for Temporary Employment Certification* are dispersed across multiple areas of intended employment. For those reasons, applications in the H–2A program, unless a specific exception applies, must generally be limited to one area of intended employment, based on which other regulatory requirements attach (such as recruitment, housing, and wages). The Department therefore proposes to make this requirement clearer in § 655.130(e).

Second, paragraph (e) clarifies that an employer may file only one *Application for Temporary Employment Certification* for place(s) of employment covering the same geographic scope, period of employment, and occupation or comparable work. This provision will prevent the Department from receiving and processing duplicate applications. This provision will also reduce duplicative efforts by preventing an employer from filing a new application for the same job opportunity while an appeal is pending. In addition, it clarifies that filing more than one *Application for Temporary Employment Certification* is necessary when an employer needs workers to perform full-time job opportunities that do not involve the same occupation or comparable work, or workers to perform the same full-time work, but in different areas of intended employment or with different starting and ending dates (*e.g.,* ramping up or winding down operations).

d. Paragraph (f), Staggered Entry of H–2A Workers

The Department proposes to add a new paragraph (f) to § 655.130, which permits the staggered entry of H–2A workers into the United States. Under this proposal, any employer that receives a temporary agricultural labor certification and an approved H–2A Petition may bring nonimmigrant workers into the United States at any time during the 120-day period after the first date of need identified on the certified *Application for Temporary Employment Certification* without filing another H–2A Petition. If an employer chooses to stagger the entry of its workers, it must continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified *Application for Temporary Employment Certification,* whichever is longer, as described in more detail in the preamble discussing § 655.135(d). Additionally, the employer must comply with the requirement to update its recruitment report as described in § 655.156.

The Department preliminarily concludes that due to the uncertain nature of agricultural work, permitting the option to stagger the entry of workers under a single *Application for Temporary Employment Certification* is necessary to provide employers with the flexibility to accommodate changing weather and production conditions. Agriculture, especially in more labor-intensive crops and commodities, is different from other economic sectors and has unique implications for the availability of labor. The agricultural production process is highly dependent on changing climatic and biological conditions that create seasonal cycles for planting, cultivating, and harvesting crops. Although farmers have some degree of control over when they plant their crops each year, there is great uncertainty regarding when and how much of the crop will be harvestable and, depending on its commercial value, how quickly the crop needs to get to the marketplace. Because agricultural production is highly seasonal and generally dispersed over a broad geographic area, timely access to the right amount of labor at the right places becomes essential to the success of farming operations. This situation becomes even more critical for small farms that grow a wide array of diversified crops where the planting, cultivating, and harvesting periods are not the same, but may occur sequentially or in close proximity to one another.

Currently, employers whose needs for agricultural workers occur at different points of a season must file separate *Applications for Temporary Employment Certification* containing a new start date of work for each group of job opportunities. This means employers must repeat each step of the

labor certification process with the Department and the visa petition process with DHS, even though the agricultural labor or services to be performed is in the same occupational classification and the only difference is the expected start date of work. For agricultural associations filing as joint employers with a number of its employer-members, the master applications are more complex and burdensome to prepare and file, because the agricultural association must coordinate the amount and timing of labor needed across numerous employer-members growing a wide array of different crops under the same start date of work. Consequently, the Department receives and processes numerous master applications filed by the same agricultural association, often one every calendar month, covering substantially the same employer-members who need workers to perform work in the same occupational classification based on a different start date of work. For these reasons, the Department proposes to permit H–2A employers to stagger the entry of nonimmigrant workers into the United States.

Furthermore, requiring those employers that choose to stagger to accept referrals of U.S. workers through the period of staggering or the first 30 days of the contract period, whichever is longer, sufficiently ensures that the job opportunity will remain available to qualified U.S. workers and that the employment of H–2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. Under this proposal, for as long as there is a job opportunity that has not yet been filled by an H–2A worker, the job opportunity remains open, and qualified, eligible U.S. workers must be hired. The Department has chosen 120 days as the maximum period of staggering because enough has changed in the available labor market pool after a 4-month period that it needs to be retested. Limiting the staggering period to 120 days or fewer ensures that DOL satisfies its statutory mandate to certify that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition.'' 8 U.S.C. 1188(a)(1)(A).

Employers that wish to stagger the entry of their H–2A workers into the United States, including a joint employer filing an *Application for Temporary Employment Certification* under § 655.131(b), must notify the NPC in writing of their intent to stagger and identify the period of time, up to 120 days, during which the staggering will take place. This notice must be filed electronically, unless the employer was permitted to file by mail as set forth in § 655.130(c). An agricultural association filing as a joint employer with its members (that may have different staggered entry needs) must make a single request on behalf of all its members duly named on the *Application for Temporary Employment Certification* and provide the NPC with the maximum staggered entry timeframe (*i.e.,* the longest period of time any one member plans to stagger the entry of its H–2A workers). Since agricultural associations have a unique statutory ability to transfer H–2A workers among any of their certified job opportunities, the Department proposes that associations must accept qualified, eligible U.S. workers at any time during the provided staggered entry timeframe.

Under this proposal, employers may submit notice of their intent to use the staggering provisions at any time after the *Application for Temporary Employment Certification* is filed through 14 days after the first date of need certified by the NPC, including any modifications approved by the CO. This timeframe balances employers' need for flexibility with prospective workers' need for certainty in the terms of employment offered. Thus, the Department proposes that an employer who does not submit notice of intent to use the staggering provisions during the requirement timeframe (*i.e.,* no later than 14 days after the first date of need listed on the temporary agricultural labor certification issued) is not permitted to stagger entry of its workers and must submit a separate *Applications for Temporary Employment Certification* containing a new first date of need for those job opportunities with a later start date. Upon receipt of the employer's notice of intent to stagger, the NPC will inform all SWAs that received a copy of the employer's job order to extend the period of recruitment by the provided staggered entry timeframe, if applicable. In accordance with § 655.121(g), the SWA(s) will keep the employer's job order in its active file and refer any U.S. worker who applies for the job opportunity through the end of the new recruitment period. In addition, the NPC will update the electronic job registry to ensure that the job order remains active through the new recruitment period, in accordance with § 655.144(b).

The Department modeled this new proposed paragraph on the staggered entry provision available to seafood employers in the H–2B program. *See* 20 CFR 655.15(f)(2). That provision was added to the Interim Final Rule pursuant to section 108 of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, 128 Stat. 2130, 2464, and differs from the provision proposed in this NPRM in several respects. *See* 80 FR 24041, 24060. First, in the H–2B program, staggered entry is available only to employers in the seafood industry, while in this proposal, it is available to all H–2A employers that receive a temporary agricultural labor certification and an approved H–2A Petition. Because all H–2A employers may require flexibility to accommodate changing weather and production conditions, the staggered entry procedures are available to any employer participating in the program.

Second, H–2B employers who stagger the entry of their nonimmigrant workers into the United States between 90 and 120 days after the start date of need must complete a new assessment of the local labor market during the period that begins at least 45 days after the start date of need and ends before 90 days after the start date of need, which includes listing the job in local newspapers, placing new job orders with the SWA, posting the job opportunity at the place of employment for at least 10 days, and offering the job to any qualified, available U.S. worker who applies. *See* 20 CFR 655.15(f)(2). Here, the Department has proposed that the approved job order being circulated for recruitment by the SWA remain open and that employers must hire all qualified, eligible U.S. workers who apply through the period of staggering, but the Department has not proposed employers to conduct a new assessment of the local labor market for staggering periods that exceed 90 days. For purposes of this NPRM, the Department determined that its proposal sufficiently protects U.S. workers and fulfills its statutory obligations. The Department, however, welcomes comments on whether additional recruitment for employers that stagger the entry of workers beyond 90 days should be required and what form that recruitment should take.

Third, H–2B employers must sign and date an attestation form stating the employer's compliance with the regulatory requirements for staggered entry and provide a copy of the attestation to the H–2B worker seeking entry to the United States with instructions that the workers present the documentation upon request to the Department of State's (DOS's) consular officers when they apply for a visa and/or DHS's U.S. Customs and Border Protection officers when seeking

admission to the United States. *See* 20 CFR 655.15(f)(3). Here, in order to streamline the process and avoid additional paperwork, the Department plans to update Appendix A to the Form ETA–9142A to make clear that recruitment obligations and assurances are extended for those employers who stagger the entry of their H–2A workers. Furthermore, the Department does not propose to require H–2A workers to present documentation to DOS or DHS, but invites the public to comment on this or other aspects of the proposed procedures.

e. Paragraph (g), Information Dissemination

Finally, the Department proposes minor editorial changes to newly designated paragraph (g) that permits OFLC to provide information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity measures not only to the WHD, but to any other Federal agency, as appropriate, for investigative and/or enforcement purposes. The Department proposes this change to promote greater collaboration among Federal agencies with authority to enforce compliance with program requirements and combat fraud and abuse.

2. Section 655.131, Agricultural Association and Joint Employer Filing Requirements

The Department proposes to revise this section to include provisions that govern the filing of *Applications for Temporary Employment Certification* by joint employers other than agricultural associations that file master applications. To reflect these new provisions, the Department proposes to rename this section, ''Agricultural association and joint employer filing requirements.'' The Department is otherwise retaining the provisions at § 655.131 that govern the filing of an *Application for Temporary Employment Certification* by an agricultural association on behalf of its employer-members, with minor revisions to the procedures for applications by agricultural associations. The INA requires that agricultural associations be permitted to file H–2A applications, including master applications, and that they be permitted to do so either as employers or agents. Section 218(c)(3)(B)(iv), (d) of the INA; 8 U.S.C. 1188(c)(3)(B)(iv), (d). Therefore, the Department is continuing its longstanding practice of permitting an agricultural association to file an application as an employer or agent on behalf of its employer-members, including the option to file a master application as a joint employer.

a. Agricultural Association Filing Requirements

The Department's proposed rule makes no substantive changes to agricultural associations' filing requirements. Accordingly, the proposed rule permits an agricultural association to file an application as a sole employer, joint employer, or agent, as contemplated in the INA. *See* section 218(c)(3)(B)(iv), (d) of the INA; 8 U.S.C. 1188(c)(3)(B)(iv), (d). The proposed rule renumbers the introductory paragraph as paragraph (a), and the current paragraph (a) would become paragraph (a)(1). The Department proposes to add a new paragraph (a)(3) codifying the Department's longstanding practice that an agricultural association that files a master application as a joint employer with its employer-members may sign the application on behalf of the employer-members, but an agricultural association that files as an agent may not and must obtain each member's signature on the application. Finally, the Department proposes to divide the current paragraph (b) into a new paragraph (a)(2), which addresses master application filing requirements, and a new paragraph (a)(4), which addresses the procedure for issuing a final determination to the association that approves the application, consistent with the proposed revisions to § 655.162.

b. Master Applications

Master applications are contemplated by section 218(d) of the INA, 8 U.S.C. 1188(d), and the Department has permitted the filing of master applications as a matter of practice. The proposed rule retains the master application filing requirements currently described in paragraph (b), but will describe these requirements in paragraphs (a)(2) and (4), with minor amendments necessary to ensure the provisions are consistent with proposed revisions to the definition of master application in § 655.103 and the modernization proposals that revise the § 655.162 procedures for issuance of certifications. Under the current regulation, the Department only certifies a master application if all employer-members have the same first dates of need. The Department proposes to permit a master application if the employer-members have different first dates of need, provided no first date of need listed in the application differs by more than 14 calendar days from any other listed first date of need, consistent with the proposed revision to the definition of master application in § 655.103, as explained further above. The Department also proposes to delete the phrase ''just as though all of the covered employers were in fact a single employer'' because this phrase was open to the misinterpretation that the provisions of the regulation that govern the geographic scope of a master application apply to single employer filers as well. Removal of this phrase clarifies that this paragraph applies only to agricultural associations and their employer-members.

The Department also proposes to revise the procedures for issuing certified applications to an agricultural association. Paragraph (b) of the current regulation requires the CO to send the certified *Application for Temporary Employment Certification* to the association and contemplates that the association will send copies of the certified application to its employer-members for inclusion in petitions to USCIS. Consistent with the proposed revisions to § 655.162 below, proposed paragraph (a)(4) states that the CO will send the agricultural association a Final Determination using electronic method(s).

c. Joint Employer Filing Requirements

The Department proposes a new paragraph (b) to codify the Department's longstanding practice of permitting two or more individual employers to file a single *Application for Temporary Employment Certification* as joint employers. This situation arises when two or more individual employers operating in the same area of intended employment have a shared need for the workers to perform the same agricultural labor or services during the same period of employment, but each employer cannot guarantee full-time employment for the workers during each workweek. This allows smaller employers that do not have full time work for an H–2A worker and lack access to an association, to utilize the H–2A program. Typically, there is an arrangement among the employers to share or interchange the services of the workers to provide full-time employment during each workweek and guarantee all the terms and conditions of employment under the job order or work contract.

This proposal establishes the procedures and requirements under which two or more individual employers may continue to participate in the H–2A program as joint employers. Under proposed paragraph (b)(1)(i), any one of the employers may file the *Application for Temporary Employment*

Certification with the NPC, so long as the names, addresses, and the crops and agricultural labor or services to be performed are identified for each employer seeking to jointly employ the workers. Consistent with longstanding practice, any applications filed by two or more employers will continue to be limited to places of employment within a single area of intended employment covering the same occupation or comparable work during the same period of employment for all joint employers, as required by § 655.130(e). Typically, this allows neighboring farmers with similar needs to use the program, though they do not, by themselves, have a need for a full time worker.

The proposed application filing procedures for two or more employers under proposed § 655.131(b) are different from the procedures for a master application filed by an agricultural association as a joint employer in several ways. First, unlike the master application provision, the employers filing a single *Application for Temporary Employment Certification* under proposed paragraph (b) would not be in joint employment with an agricultural association of which they may be members. Thus, if an agricultural association assists one or more of its employer-members in filing an *Application for Temporary Employment Certification* under proposed paragraph (b), the agricultural association would be filing as an agent for its employer-members. Second, all employers filing an *Application for Temporary Employment Certification* under proposed paragraph (b) would have to have the same first date of need and require the agricultural labor or services of the workers requested during the same period of employment in order to offer and provide full-time employment during each workweek. In contrast, in a master application filed by an agricultural association, each employer-member would offer and provide full-time employment to a distinct number of workers during a period of employment that may have first dates of need differing by up to 14 calendar days. Finally, unlike a master application where the places of employment for the employer-members could cover multiple areas of intended employment within no more than two contiguous States, the employers filing a single application as joint employers under proposed paragraph (b) would have to identify places of employment within a single area of intended employment.

Proposed paragraph (b)(1)(ii) provides that each joint employer must employ each H–2A worker the equivalent of 1 workday (*e.g.,* a 7-hour day) each workweek. This requirement is in keeping with the purpose of this filing model, which is to allow smaller employers in the same area and in need of part-time workers performing the same work under the job order, to join together on a single application, making the H–2A program accessible to these employers. This requirement provides a limiting principle that is intended to assure that individual employers with full time needs use the established application process for individual employers, that association members use the statutory process provided for associations, and that joint applications are restricted to employers with a simultaneous need for workers that cannot support the full time employment of an H–2A worker. In this way, the Department can carry out the statutory requirements applicable to individual employers and to associations. The Department invites comments on this requirement, and how to best effectuate the purposes of joint employer applications.

Each employer seeking to jointly employ the workers under the *Application for Temporary Employment Certification* would have to comply with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of the chapter. Therefore, proposed § 655.131(b)(1)(iii) would require each joint employer to sign and date the *Application for Temporary Employment Certification.* By signing the application, each joint employer attests to the conditions of employment required of an employer participating in the H–2A program, and assumes full responsibility for the accuracy of the representations made in the application and job order, and for all of the assurances, guarantees, and requirements of an employer in the H–2A program. In the event the Department determines any employer named in the *Application for Temporary Employment Certification* has committed a violation, either one or all of the employers named in the *Application for Temporary Employment Certification* can be found responsible for remedying the violation(s) and for attendant penalties.

Where the CO grants temporary agricultural labor certification to joint employers, proposed § 655.131(b)(2) provides that the joint employer that filed the *Application for Temporary Employment Certification* would receive the Final Determination correspondence on behalf of the other joint employers in accordance with the procedures proposed in § 655.162.

3. Section 655.132, H–2A Labor Contractor Filing Requirements; and 29 CFR 501.9, Enforcement of Surety Bond

The Department proposes to revise the additional filing requirements for H–2ALCs at § 655.132. First, the Department proposes to move language addressing the scope of H–2ALC applications in current paragraph (a) to proposed paragraph (e) in § 655.130 to clarify that the geographic scope of an *Application for Temporary Employment Certification* is limited to one area of intended employment, except as otherwise permitted by this subpart, without regard to the type of employer filing the application (*i.e.,* fixed-site employer, joint-employers, agricultural association filing as a sole employer or agent, or H–2ALC). An H–2ALC application and job order will continue to be limited to places of employment within a single area of intended employment. However, pursuant to the Department's proposed § 655.130(e) that this same limitation applies to all applications and job orders, the Department proposes to remove current paragraph (a) to eliminate any confusion or redundancy in the regulatory text.

Therefore, the Department proposes that current paragraph (b) becomes paragraph (a) in the proposed rule. This paragraph continues to explain the enhanced documentation requirements for H–2ALCs with minor amendments. The Department observes that the number of H–2ALCs applying for temporary agricultural labor certifications has risen dramatically in recent years and is expected to continue to increase.[76] Given the increased use of the H–2A program by H–2ALCs and the relatively complex and transient nature of their business operations, the Department has determined the enhanced documentation requirements for H–2ALCs, provided at the time of filing an *Application for Temporary Employment Certification,* continue to be necessary in order to protect the safety and security of workers and ensure basic program requirements are met. Under this paragraph, H–2ALCs

[76] Based on an analysis of *Applications for Temporary Employment Certification* processed for FYs 2014 and 2017, the number of applications filed by H–2ALCs more than doubled from 660 (FY 2014) to 1,410 (FY 2017), and the number of worker positions certified for H–2ALCs nearly tripled from approximately 24,900 (FY 2014) to 72,400 (FY 2017). Between FYs 2014 and 2017, the average annual increase in H–2ALC applications requesting temporary labor certification was 29 percent, compared to only 18 percent for agricultural associations and 11 percent for individual farms and ranches.

will continue to include in or with their *Applications for Temporary Employment Certification* at the time of filing the information and documentation listed in redesignated paragraphs (a) through (e) to demonstrate compliance with regulatory requirements, with the following proposed revisions.

In proposed paragraph (e)(2), the Department proposes a minor editorial clarification and a technical correction. Because H–2ALC operations typically require transporting workers to multiple worksite locations owned or operated by the fixed-site agricultural business, the Department proposes to replace the term ''the worksite'' with ''all place(s) of employment'' to clarify that transportation provided by the fixed-site agricultural business between all the worksites and the workers' living quarters must comply with the requirements of this section. Additionally, the Department has corrected the reference for workers' compensation coverage of transportation from § 655.125(h) to § 655.122(h).

In proposed paragraph (c), the Department is retaining the requirement that an H–2ALC is required to submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations in the form of a surety bond. 20 CFR 655.132(b)(3); 29 CFR 501.9. This bonding requirement, which became effective in 2009, allows the Department to ensure that labor contractors, who may be transient and undercapitalized, can meet their payroll and other program obligations, thereby preventing program abuse. 20 CFR 655.132(b)(3); 29 CFR 501.9. Following a final decision that finds violations, the WHD Administrator may make a claim to the surety for payment of wages and benefits owed to H–2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced, up to the face amount of the bond. Currently, bond amounts range from $5,000 to $75,000 depending on the number of H–2A workers employed by the H–2ALC under the labor certification. 29 CFR 501.9(c).

Based on the Department's experience implementing the bonding requirement and its enforcement experience with H–2ALCs, the Department proposes updates to the regulations. These updates are intended to clarify and streamline the existing requirement and to strengthen the Department's ability to collect on such bonds, including by accepting electronic surety bonds and requiring the use of a standard bond form. Further, the Department proposes adjustments to the required bond amounts to reflect annual increases in the AEWR and to address the increasing number of certifications covering a significant number of workers (*e.g.,* more than 150 workers).

Under the current regulations, application requirements for an H–2ALC, including obtaining a surety bond, are found in 20 CFR 655.132. Most of the requirements pertaining to bonds, however, including the required bond amounts and scope of bond coverage, are found in 29 CFR 501.9. The Department has observed that a large proportion of the surety bonds submitted by labor contractors do not meet the requirements of 29 CFR 501.9. This hinders the Department's ability to effectively collect wages and benefits owed to workers when violations are found. Therefore, to make these regulations more accessible to the regulated community, the Department proposes moving the substantive requirements governing the content of labor contractor surety bonds to 20 CFR 655.132(c) so that these requirements are in the same section as other requirements for the *Application for Temporary Employment Certification*.[77] Requirements that pertain solely to the WHD's procedures for enforcing bonds will remain in 29 CFR 501.9.

To further address the issue of noncompliant bonds and streamline its review of bond submissions, the Department proposes to expand the capabilities of the iCERT System to permit the electronic execution and delivery of surety bonds and to adopt a bond form that will include standardized bond language.

Since the implementation of e-filing in December 2012, OFLC has permitted employers to upload a scanned copy of the surety bond at the time of filing and, upon acceptance of the application under § 655.143, provided a written notice reminding employers to submit the original surety bond during processing, before issuance of the certification.[78] Implementing a process to accept electronic surety bonds will eliminate delays associated with the mailing of an original paper bond and promote efficiency in the review of the bonds without compromising program integrity. The Department, therefore, proposes to develop a process for accepting electronic surety bonds that would involve a bond form to be completed through the iCERT System, verify the identity and authority of signatories to the bond (the H–2ALC and surety's representative), allow both parties to sign the bond form electronically, and securely store and transmit the executed bond to the Department along with the rest of the application. Under this proposal, electronic surety bonds are required for all H–2ALCs subject to the Department's proposed mandatory e-filing requirement. H–2ALCs exempt from mandatory e-filing under § 655.130(c) due to a disability or lack adequate access to e-filing would be permitted to submit paper surety bonds, along with the rest of their paper application.

Until such time as the Department's proposed process for accepting electronic surety bonds is operational, the Department will allow H–2ALCs to submit an electronic (scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the certification is issued. To ensure that the original bond is received within this time period, the Department proposes to revise § 655.182 to specify that failure to submit a compliant, original surety bond within this time period will constitute a substantial violation that may warrant debarment. This proposed addition means that the failure to submit a compliant, original surety bond is also grounds for revoking the certification. This will allow greater flexibility and efficiency in the processing of applications while protecting the Department's ability to enforce the bonds. Under this alternative proposal, the Department still requires the use of a standardized form bond.

The use of a standardized form bond will also streamline the processing and improve compliance with the bonding requirement. Currently, the bonds received by the Department vary considerably in wording and form. Not only does this make it more difficult to discern whether a bond is sufficient for the purposes of the *Application for Temporary Employment Certification,* it also results in different sureties and labor contractors believing they are subject to differing legal requirements. For instance, as discussed below, different bonding companies have interpreted the current regulatory language in different ways. The Department's proposed bond form is ETA–9142A—Appendix B. The Department seeks comments from the public, and particularly from stakeholders and those in the bond industry, on the feasibility and accessibility of its proposals to implement a process for accepting

[77] *Available at https://www.foreignlaborcert.doleta.gov/h-2a.cfm.*

[78] Notice, *Electronic Filing of H–2A and H–2B Labor Certification Applications Through the iCERT Visa Portal System,* 77 FR 59672 (Sept. 28, 2012).

electronic surety bonds and to use a standardized bond form.

The proposed bond form with its standardized language is intended to incorporate the existing bond requirements in most respects, while clarifying certain requirements for the regulated community. For example, the proposed bond language still requires a surety to pay sums for wages and benefits owed to H–2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced based on a final decision finding a violation or violations of 20 CFR part 655, subpart B, or 29 CFR part 501, but clarifies that the wages and benefits owed may include the assessment of interest.

Similarly, the proposed language also clarifies the time period during which liability on the bond accrues, as distinguished from the time period in which the Department may seek payment from the surety under the bond. Currently 29 CFR 501.9(b) provides that bonds must be written to cover ''liability incurred during the term of the period listed in the *Application for Temporary Employment Certification*.'' Language in paragraph (d), pertaining to the time period in which claims can be made against a bond, permits cancellation or termination of the bond with 45 days' written notice to the WHD Administrator. 29 CFR 501.9(d). This provision was intended to permit a surety to end the period in which a claim can be made against a bond provided that the minimum claims period of paragraph (d) had elapsed. Instead, some sureties have interpreted this language as permitting the early termination of the bond during the period in which liability accrues. The proposed bond language described below makes it clear that liability accrues for the duration of the period covered by the labor certification.

The Department proposes several changes to the bond requirements. Currently, a bond must be written to cover liability incurred during the period of the labor certification and the labor contractor is required to amend the surety bond to cover any requested and granted extensions of the labor certification. 29 CFR 501.9(b). The standardized bond language proposed by the Department provides that liability accrues during the period of the labor certification, including any extension, thereby eliminating the need to amend the surety bond, streamlining the extension process, and reducing the risk of errors introduced when amending the bonds.

The Department also proposes extending and simplifying the time period in which a claim can be filed against the surety. As currently written, the Department must be given no fewer than 2 years from the expiration of the labor certification in which to enforce the bond. This is tolled when the Administrator commences enforcement proceedings. After this time, sureties are permitted to terminate this claims period with 45 days' written notice to the WHD Administrator. Under the proposed rule, this period of enforcement is extended to 3 years (and is still tolled by the commencement of enforcement proceedings). This does not extend the accrual of liability. Instead, it allows the Department more time to complete its investigations while retaining the ability to seek recovery from the surety. Because the Department's proposed standardized bond language provides more specificity as to the length of the claims period (3 years as opposed to ''no less than [2] years''), the provision allowing cancellation or termination of the claims period with 45 days' written notice has been eliminated.

Further, the Department proposes adjusting the required bond amounts annually to reflect increases in the AEWR and increasing the bond amounts required for certifications covering a significant number of workers (*e.g.,* 150 or more workers). The bonding requirement for H–2ALCs was created because, in the Department's experience, these employers can be transient and undercapitalized, making it difficult to recover the wages and benefits owed to their workers when violations are found.[79] Current required bond amounts range from $5,000 to $75,000, based on the number of H–2A workers to be employed under the labor certification, with the highest amount required for certifications covering 100 or more workers. 29 CFR 501.9(c). However, the Department has found that the current bond amounts often are insufficient to cover the amount of wages and benefits owed by labor contractors, limiting the Department's ability to seek back wages for workers. The Department seeks comment on the specific adjustments proposed, as well as alternative means of adjusting the bond amounts to better reflect risk and ensure sufficient coverage.

First, the Department proposes adjusting the current bond amounts to reflect the annual increase in the AEWR. For certifications covering fewer than 75 workers, the bond amounts have remained the same since 2009, when the bonding requirement was implemented; for certifications covering 75 or more workers, the bond amounts have been unchanged since 2010. *See* 2008 Final Rule, 73 FR 77110, 77231. As a result, as the AEWR rises, the bonds are less likely to cover the full amount of wages and benefits owed to workers. When the Department examined the required bond amounts in its 2009–2010 rulemaking, it proposed and adopted additional bond amounts for certifications covering 75 to 99 workers and those covering 100 or more workers. 2009 NPRM, 74 FR 45906, 45925; 2010 Final Rule, 75 FR 6884, 6941. In so doing, it based the new bond amount for certifications covering 100 or more workers on the amount of wages 100 workers would be paid over a 2-week period (80 hours) assuming an AEWR of $9.25. 2009 NPRM, 74 FR 45906, 45925. Therefore, the Department proposes to adjust the existing required bond amounts proportionally on an annual basis to the degree that a nationwide average AEWR exceeds $9.25. The Department will calculate and publish an average AEWR annually when it calculates and publishes AEWRs in accordance with § 655.120(b). The average AEWR will be calculated as a simple average of these AEWRs applicable to SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). To calculate the updated bond amounts, the Department will use the current bond amounts as a base, multiply the base by the average AEWR, and divide that number by $9.25. Until the Department publishes an average AEWR, the updated amount will be based on a simple average of the 2018 AEWRs, which the Department calculates to be $12.20. For instance, for a certification covering 100 workers, the Department would calculate the required bond amount according to the following formula:

$75,000 (base amount) × $12.20 ÷ $9.25 = $98,919 (updated bond amount).

In subsequent years, the 2018 average AEWR of $12.20 would be replaced in this calculation by the average AEWR calculated and published in that year.

Second, the Department proposes increasing the required bond amounts for certifications covering a significant number of workers (*e.g.,* 150 or more workers). In recent years, the

[79] *See* 2008 Final Rule, 73 FR 77110, 77163; *see also* 2010 Final Rule, 75 FR 6884, 6941 (''The Department's enforcement experience has found that agricultural labor contractors are more often in violation of applicable labor standards than fixed-site employers. They are also less likely to meet their obligations to their workers than fixed-site employers.'').

Department has observed more certifications for which the current bond amounts do not provide adequate protection. In the first half of FY 2018 alone, OFLC issued 75 certifications to labor contractors that planned to employ 150 or more workers (9.8 percent of the certifications issued to labor contractors). In contrast, during the entire FY 2014 (the first year with easily comparable data), only 28 (4.7 percent) of the certifications issued by OFLC covered 150 or more workers. This represents more than a two-fold increase between 2014 and 2018 in the percentage of certifications for crews of 150 or more workers; and more than a five-fold increase in the total number of such certifications over the same time period. Further, certifications are being issued that cover even larger numbers of workers. In FY 2014, no certifications were issued for 500 or more workers. In contrast, in the first half of FY 2018, several certifications have been issued which each cover nearly 800 workers.

Given these dramatic increases in crew sizes, the Department proposes increasing the required bond amount for certifications covering 150 or more workers. For such certifications, the bond amount applicable to certifications covering 100 or more workers is used as a starting point and is increased for each additional set of 50 workers. The interval by which the bond amount increases will be updated annually to reflect increases in the AEWR. This value will be based on the amount of wages earned by 50 workers over a 2-week period and, in its initial implementation, would be calculated using the 2018 average AEWR as demonstrated:

$12.20 (2018 Average AEWR) × 80 hours × 50 workers = $48,800 in additional bond for each additional 50 workers over 100.

For example, a certification covering a crew of 150 workers would require additional surety in the amount of $48,800 (150 − 100 = 50; 1 additional set of 50 workers). For a crew of 275 workers, additional surety of $146,400 would be required (275 − 100 = 175; 175÷50 = 3.5; this is 3 additional sets of 50 workers). As explained above, this additional surety is added to the bond amount required for certifications of 100 or more workers. Thus, for a crew of 150 workers the required bond amount would be $147,719 ($98,919 required for certifications of 100 or more workers + $48,800 in additional surety). Likewise, for a crew of 275 workers, the required bond amount would be $245,319 ($98,919 + $146,400 in additional surety).

While this may represent a significant increase in the face value of the required bond, the Department understands that employer premiums for farm labor contractor surety bonds generally range from 1 to 4 percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better); therefore, any increase in premiums will be reasonably calculated given the large number of workers potentially impacted. Further, the Department believes this is necessary to ensure fairness among labor contractors and for workers. The current framework ''disproportionately advantages larger H–2ALCs while providing diminishing levels of protection for employees of such contractors''—the very concerns which led the Department to create higher bond amounts for certifications covering 75 to 99 and 100 or more workers. 2010 Final Rule, 75 FR 6884, 6941.

Finally, because the proposed rule in § 655.103 expands the definition of agriculture to include reforestation and pine straw activities, employers in these industries may qualify as H–2ALCs and therefore would be required to comply with the surety bond requirements described in this section.

The Department seeks comments on the impact of the Department's proposed updates to the required bond amounts and whether these appropriately reflect the amount of risk that would otherwise be borne by workers.

Additionally, the Department seeks comments as to whether any additional filing requirements for H–2ALCs are needed to ensure that labor contractors are able to meet H–2A program obligations.

4. *Section 655.134, Emergency Situations*

The Department proposes minor amendments to § 655.134 to provide greater clarity with respect to the procedures for handling *Applications for Temporary Employment Certification* filed on an emergency basis. Proposed paragraph (a) contains minor technical changes, including moving a parenthetical example of ''good and substantial cause'' to paragraph (b), where the meaning of ''good and substantial cause'' is discussed in more detail.

Paragraph (b) continues to address what an employer must submit to the NPC when requesting a waiver of the time period for filing an *Application for Temporary Employment Certification,* including a statement describing the emergency situation that justifies the waiver request. The factors that may constitute good and substantial cause will continue to be nonexclusive, but the Department has clarified that these situations involve the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (*e.g.,* a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control. The minor clarifications do not materially change the regulatory standards, but establish greater consistency with a similar provision contained in the H–2B regulation at § 655.17.[80]

The Department also proposes changes to paragraphs (b) and (c) to simplify the emergency application filing process for employers and provide greater clarity with respect to the procedures for handling such applications. Consistent with the proposal in § 655.121(a) to require employers to submit job orders to the NPC, rather than a SWA, the Department proposes to eliminate the requirement that an employer requesting an emergency situation waiver submit a copy of the job order concurrently to both the NPC and the SWA serving the area of intended employment. Rather, the employer must submit the required documentation to the NPC. Upon receipt of a complete waiver request, the CO promptly will transmit a copy of the job order, on behalf of the employer, to the SWA serving the area of intended employment and request review for compliance with the requirements set forth in §§ 653.501(c) and 655.122. This proposed change simplifies the application filing process by providing one point of submission (*i.e.,* the NPC) for all job orders and will save employers time and cost by eliminating the need to file a duplicate copy of the job order concurrently with the NPC and the SWA. In addition, it makes the process for filing job orders in emergency situations consistent with the process for filing job orders under proposed § 655.121.

Under this proposal, the CO will continue to process emergency

[80] Pursuant to 20 CFR 655.17(b), the employer may request a waiver of the required time period(s) for filing an *H–2B Application for Temporary Employment Certification* based on good and substantial cause that ''may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues.'' 80 FR 24041, 24116, 24117.

Applications for Temporary Employment Certification in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make final determinations in accordance with §§ 655.160 through 655.167. The CO will concurrently review the *Application for Temporary Employment Certification,* job order, other documentation, and statement submitted by the employer that details the reason(s) that necessitate the waiver request. The Department's proposed paragraph (c)(1) requires that the SWA inform the CO of any deficiencies in the job order within 5 calendar days of the date the SWA receives the job order. Under proposed paragraph (c)(2), if the employer's submission does not justify waiver of the filing timeframe and/or the CO determines there is not sufficient time to undertake an expedited test of the labor market, the CO will issue a NOD under § 655.141 that states the reason(s) the waiver request cannot be granted. The NOD will also provide the employer with an opportunity to submit a modified *Application for Temporary Employment Certification* or job order that brings the requested workers' anticipated start date into compliance with the required time periods for filing. In providing these clarifying amendments, the Department proposes to eliminate current procedures that require the CO to deny certification under in § 655.164 if the waiver cannot be granted, without first providing the employer with an opportunity to modify the application or job order to bring it into compliance with the non-emergency job order filing timeliness requirement at § 655.121(b).

The Department believes that providing employers with an opportunity to submit a modified *Application for Temporary Employment Certification* or job order before a denial determination is issued will result in better customer service and more efficient processing for OFLC and employers. The Department's experience under the current regulation demonstrates that employers prefer to adjust their first date of need to comply with regulatory requirements, and thereby continue the application process, rather than receive a denial determination and either follow the procedures under § 655.121 to submit the same job order to the NPC, revised only to list the anticipated start date as at least 60 days from the filing date, or face a time-consuming and costly appellate process. More importantly, the COs and SWAs expend considerable time and effort reviewing *Applications for Temporary Employment Certification* and job orders for compliance with regulatory requirements, and if those efforts result in denials, employers begin the process again and file duplicate applications and job orders with modified periods of employment. For these reasons, when an employer has failed to justify a waiver request and/or there is not sufficient time to undertake an expedited test of the labor market, the Department proposes that employers be provided an opportunity to modify their applications or job orders.

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

a. Paragraph (d), 30-Day Rule

The Department proposes to replace the 50 percent rule in § 655.135(d) with a 30-day rule requiring employers to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days from the employer's first date of need on the certified *Application for Temporary Employment Certification,* including any modifications thereof, and a longer recruitment period for those employers who choose to stagger the entry of H–2A workers into the United States under proposed § 655.130(f). The 50 percent rule, which requires employers of H–2A workers to hire any qualified, eligible U.S. worker who applies to the employer during the first 50 percent of the work contract period, was originally created by regulation as part of the predecessor H–2 agricultural worker program in 1978.[81] In 1986, the 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 as well as review of ''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 under this section, to continue to accept qualified, eligible United States workers for employment after the date the H–2A workers depart for work with the employer.'' Section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii). In the absence of the enactment of Federal legislation prior to the end of the 3-year period, the statute instructed the Secretary to publish the findings immediately and promulgate an interim or final regulation based on the findings.

To comply with these requirements, the Secretary hired a research firm to analyze the cost-benefit impact of the 50 percent rule on U.S. workers, growers, and the general public. *See* 2008 NPRM, 73 FR 8538, 8553. The research firm studied the impact of the 50 percent rule in just Virginia and Idaho, the two States that were determined to have the highest number of U.S. worker referrals made pursuant to the 50 percent rule. The number of growers interviewed was extremely small, as the firm interviewed only those growers that actually hired U.S. workers because of the 50 percent rule—only 66 growers (0.1 percent) in all of Virginia and Idaho's total 64,346 farms (according to USDA). The study sought to determine the costs to employers that hire referred 50 percent rule workers and the concomitant benefits to the U.S. workers hired under the rule. Even with this narrow focus, the study made it clear that the H–2A program was not regarded as desirable by growers. Of those questioned, 6 percent said they were dropping out of the H–2A program because of the 50 percent rule. Forty percent wanted the rule eliminated entirely and 33 percent wanted to alter the requirement by, for example, requiring the 50 percent rule workers to finish the season or modifying substantially the 50 percent rule by requiring the hiring of U.S. workers only up to a certain point before the first date of need.

In 1990, pursuant to what is now section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii), ETA published an interim final rule to continue the 50 percent requirement.[82] That rule was never finalized. In 2007, the Department commissioned a survey of stakeholder representatives to evaluate the effectiveness of the 50 percent rule as a mechanism to minimize adverse impacts of the H–2A rule on U.S. farmworkers. *See* 2008 Final Rule, 73 FR 77110, 77127 n.3. The surveyors for this study conducted interviews with a number of stakeholders to gather information on the impact of the 50 percent rule, including employers, SWAs, and farm worker advocacy organizations. The researchers found that the rule played an insignificant role in the program overall, hiring-wise, and had not contributed in a meaningful way to protecting employment for domestic agricultural workers. The researchers estimated that the number of agricultural hires resulting from

[81] *See* 20 CFR 655.203(e) (1978); Final Rule, *Temporary Employment of Alien Agricultural and Logging Workers in the United States,* 43 FR 10306, 10316 (Mar. 10, 1978).

[82] Continuation of Interim Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; ''Fifty-Percent Rule'',* 55 FR 29356 (July 19, 1990).

referrals to employers during the 50 percent rule period was exceedingly small, with H–2A employers hiring less than 1 percent of the legal U.S. agricultural workforce through the 50 percent rule. All surveyed stakeholder groups reported that U.S. workers hired under the 50 percent rule typically did not stay on the job for a significant length of time once hired.

In 2008, the Department eliminated the 50 percent rule, based on its determination that the rule created substantial uncertainty for employers in managing their labor supply and labor costs during the life of an H–2A contract and served as a substantial disincentive to participate in the program. 2008 Final Rule, 73 FR 77110, 77127. The Department determined that the obligation to hire additional workers mid-way through a season was disruptive to agricultural operations and made it difficult for agricultural employers to be certain they would have a steady, stable, properly trained, and fully coordinated workforce. *Id.* On the other hand, the Department found that some U.S. workers secured jobs through referrals made pursuant to the rule, but that the number of hires was small, and that many workers hired pursuant to the rule did not complete the entire work period. *Id.* at 77127–28. Therefore, the Department concluded that the costs of the rule substantially outweighed any potential benefits for U.S. workers. *Id.* at 77128. However, in order to prevent the disruption of access of U.S. workers to agricultural employment activities and allow for the collection of additional data about the costs and benefits of mandatory post-date-of-need hiring, the Department created a 5-year transitional period under the Final Rule during which mandatory post-date-of-need hiring of qualified and eligible U.S. workers would continue to be required of employers for a period of 30 days after the employer's first date of need. *Id.* In effect, the Department replaced the 50 percent rule with a 30-day rule for the transitional period.

In 2010, the Department reinstated the 50 percent rule, concluding that the potential costs to employers incurred as a result of the 50 percent rule were outweighed by the benefits to U.S. workers of having access to these jobs through 50 percent of the contract period. 2010 Final Rule, 75 FR 6884, 6922. The Department cited the lack of definitive data as the basis for its reinstatement of the rule. *Id.*

Since the implementation of the current regulation, the Department has gained additional experience and collected a significant amount of data that can assess whether the 50 percent rule is an effective means of protecting the employment opportunities of U.S. workers from potential adverse impact resulting from the employment of foreign workers. Specifically, as part of the audit examination process under § 655.180, the recruitment reports submitted by employers to the Department are a relevant and readily available source of information in assessing how many U.S. workers applied for the certified job opportunities and at what point in time, as well as the disposition of each U.S. worker. Under the current regulation, an employer granted temporary agricultural labor certification must continue to provide employment to any qualified, eligible U.S. worker who applies until 50 percent of the period of the work contract has elapsed, and update the recruitment report for each U.S. worker who applied through the entire recruitment period.[83]

The Department examined the recruitment reports of 1,824 certified H–2A applications covering more than 33,510 jobs selected for audit examination and fully audited during calendar years 2016 to 2018.[84] Approximately 87 percent (1,582) of the recruitment reports of 1,824 certified H–2A applications reviewed, covering 23,324 jobs, reported that no U.S. workers applied for the job opportunities at any point during the 50 percent recruitment period. Of the remaining 13 percent (242) of the 1,824 certified H–2A applications, covering 10,186 jobs, employer recruitment reports revealed that 3,392 U.S. workers applied for the available job opportunities at some point from the beginning of the employer's H–2A recruitment efforts through 50 percent of the work contract period. Of those who applied, only 2,053 were reportedly hired, accounting for approximately 6 percent of the total 33,510 jobs available.

Of that 13 percent, the Department conducted a detailed review of 52 recruitment reports showing that U.S. workers applied for available jobs from the beginning of the employer's H–2A recruitment efforts through 50 percent of the work contract period. That review revealed that more than 84 percent of the U.S. workers who applied for the available job opportunities did so during the active recruitment period before the start date of work and through the first 30 days after the start date of work.[85] For the remaining 16 percent of U.S. workers who applied and/or were hired more than 30 days after the start date of work, employer recruitment reports revealed that the overwhelming majority of the referral and hiring activities occurred within the next 60 days of the recruitment period. Employers also reported that many of these U.S. workers who were hired either did not report to work or voluntarily resigned or abandoned the job shortly after beginning work.

The language of section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii), suggests that when issuing regulations dictating whether agricultural employers should be required to hire U.S. workers after H–2A workers have already departed for the place of employment, the Department should weigh the ''benefits to United States workers and costs to employers.'' Based on the data described above, it appears that a very low number of U.S. workers apply for the job opportunity within thirty days after the start date of work, and even fewer after that; therefore, the costs of the rule to employers, including the actual or potential cost of returning displaced H–2A workers to the place from which they departed, outweigh any benefits the rule may provide to U.S. workers. The 50 percent rule is not an effective method of filling available jobs for employers needing a stable workforce and, according to the data, provides little benefit to U.S. workers who, based on the data described above, apply for jobs either before the start date of work or during the first 30 days after the start date of work. In order to balance the needs of workers and employers, proposed paragraph (d)(1) replaces the 50 percent rule with a rule requiring employers to hire qualified, eligible U.S. worker applicants for a period of 30 days after the employer's first date of

[83] In accordance with § 655.156(b), this updated written recruitment report is retained by the employer and must be made available to the Department in the event of a post-certification audit or upon request by authorized representatives of the Secretary.

[84] In accordance with § 655.180(a), the 1,824 certified H–2A applications were selected for audit examination between October 1, 2015 and April 2, 2018, at random and based on the discretion of the CO. Nearly 75 percent (24,782) of the 33,500 jobs covered by the 1,824 audited H–2A applications were located in the states of Florida, Georgia, New York, Louisiana, California, Kentucky, Washington, North Carolina, South Carolina, and Mississippi—the same states that consistently constitute more than 68 percent of all certified jobs in the H–2A program during FY 2015, 2016, and 2017.

[85] Of the 2,809 U.S. workers who applied for the certified jobs, 50 percent (1,393) applied before the start date of work; 36 percent (1,002) applied within 30 days after the start date of work; and 15 percent (414) applied more than 30 days after the start date of work. Of the 1,843 U.S. workers hired for the certified jobs, 47 percent (862) were hired before the start date of work; 37 percent (687) were hired within 30 days after the start date of work; and 16 percent (294) were hired more than 30 days after the start date of work.

need. Requiring employers to hire workers 30 days into the contract period, while still disruptive to agricultural operations, shortens the period during which such disruptions may occur and restores some stability to employers that depend on the H–2A program. Moreover, it is clear from the data provided above that the vast majority of U.S. workers hired after the first date of need were hired within the first 30 days of the period of need. Providing U.S. workers the ability to apply for these job opportunities 30 days into the contract period ensures that U.S. workers still have access to these jobs after the start of the contract period during the period of time they are most likely to apply.

Furthermore, the Department notes that the impact of this proposed change on U.S. workers is minimized by the staggered entry proposal, discussed further in the preamble to § 655.130(f). Under that proposal, if a petition for H–2A nonimmigrant workers filed by an employer is granted, the employer may bring the H–2A workers described in the petition into the United States at any time up to 120 days from the first date of need stated on the *Application for Temporary Employment Certification.* Proposed paragraph (d)(2) of § 655.135 provides that if an employer chooses to stagger the entry of H–2A workers, it must hire any qualified, eligible U.S. worker who applies for the job opportunity through the period of staggering or the end of the 30-day period, whichever is longer, for a period of up to 120 calendar days from the first date of need. The Department has determined that in order to fulfill its statutory duty to ensure that foreign workers are not admitted unless sufficient U.S. workers are unavailable, the period during which employers are obligated to hire qualified and eligible U.S. workers must extend beyond 30 days to the last date on which the H–2A workers enter the country.

Under proposed § 655.135(d), an employer may choose the relative stability and predictability of a shorter recruitment period, or may choose the flexibility of staggering the entry of its H–2A workers that comes with a longer recruitment period, depending on its needs. In the case of staggered entry, the resulting longer recruitment period should be less disruptive than the 50 percent rule, since, in most cases in which the employer chooses to stagger the entry of its workers, a U.S. worker hired after the beginning of the contract period would not displace an H–2A worker who has already begun employment. Rather than displacing an H–2A worker who has already entered the United States and begun work, the U.S. worker would most likely fill one of the positions with a later start date (*i.e.,* one of the staggered positions). Regardless of the employer's choice, U.S. workers will continue to have access to these job opportunities for a significant period of time after the work contract has commenced and, in the case of staggered entry, for a period of time almost comparable to that available under the 50 percent rule.

The Department proposes conforming changes to those sections of the current rule that refer to the 50 percent rule. In §§ 655.122(h)(2) and (i)(4), 655.144(b), 655.150(b), 655.156(b), 655.157(c), 655.220(c), and 655.225(b), the Department has replaced references to the 50 percent rule with language referring to the recruitment periods described in § 655.135(b). These changes account for the Department's proposals both to replace the 50 percent rule with a 30-day rule and to require a longer recruitment period for those employers who choose to stagger the entry of their H–2A workers into the United States.

In making the proposal to replace the 50 percent rule, the Department has considered available data as well as its experience administering the H–2A program, but it would like to consider additional information from the public before making a final decision. To that end, the Department invites comments from parties who may have data illustrating the costs and benefits of the 50 percent rule in the current labor market, particularly, comprehensive studies of the frequency with which H–2A employers hire U.S. workers pursuant to the 50 percent rule. The Department also invites comments on whether, if the employer chooses to stagger the entry of H–2A workers, the resulting recruitment period should run to the last date on which the employer expects foreign workers to enter the country, as proposed herein, or if the recruitment period should extend 30 days beyond the period of staggering.

b. Paragraph (k), Contracts With Third Parties Comply With Prohibitions

Finally, the Department proposes to clarify that employers engaging any foreign labor contractor or recruiter ''must contractually prohibit in writing'' the foreign labor contractor or recruiter, or any agent of such contractor or recruiter, from seeking or receiving payments from prospective employees. For employers' convenience and to facilitate more consistent and uniform compliance with this regulatory provision, the Department proposes contractual language employers must use to satisfy this requirement.

The Department makes this proposal because when employers use recruiters, they must make it abundantly clear that their foreign labor contractors or recruiters and their agents are not to receive remuneration from prospective employees recruited in exchange for access to a job opportunity. The proposed contractual language specifies that foreign labor contractors and recruiters, and their agents and employees, are not to receive payments of any kind from any prospective employee subject to 8 U.S.C. 1188 for any activity related to obtaining H–2A labor certification. To help monitor compliance with this prohibition, the Department is retaining the requirement that employers make these written contracts or agreements available upon request by the CO or another Federal party.

6. Section 655.136, Withdrawal of an Application for Temporary Employment Certification and Job Order

As discussed in the preamble discussing § 655.124 above, the Department proposes to reorganize the current withdrawal provisions at § 655.172 by moving withdrawal procedures for specific stages of H–2A processing to the portion of the regulation that addresses that processing stage. The Department proposes to move the current *Application for Temporary Employment Certification* and related job order withdrawal provision from § 655.172(b) to new § 655.136, located in the ''*Application for Temporary Employment Certification* Filing Procedures'' portion of the regulation, which begins at § 655.130. By placing the provisions for *Application for Temporary Employment Certification* filing and withdrawal together, the Department anticipates employers will be able to find these withdrawal procedures more easily.

In addition, the Department proposes to revise the current provision by removing language limiting withdrawal to the period after formal acceptance. Instead, the proposal permits employers to submit a withdrawal request at any time before the CO makes a final determination. Employers may realize after filing and before formal acceptance that they cannot comply with certification requirements (*e.g.,* after reviewing a NOD), or for some other reason, they may no longer wish to pursue the application. Withdrawal is an efficient mechanism to end processing of the application and job order. Finally, proposed § 655.136(b) clarifies that employers must submit

withdrawal requests in writing to the NPC, identifying the *Application for Temporary Employment Certification* and job order to be withdrawn and stating the reason(s) for requesting withdrawal.

The Department proposes no change to an employer's continuing obligations to workers recruited in connection with the job order and/or *Application for Temporary Employment Certification;* these obligations attach at recruitment and continue after withdrawal.

D. Processing of Applications for Temporary Employment Certification

1. Section 655.140, Review of Applications

The Department proposes minor amendments to § 655.140 to clarify existing procedures and explain the first actions available to the CO after initial review of the *Application for Temporary Employment Certification,* job order, and any necessary supplementary documentation. Under current paragraph (a), the CO conducts an initial review of the application and issues a NOA to the employer under § 655.143 if the application meets acceptance requirements or a NOD under § 655.141 if the application contains deficiencies. The Department proposes to amend paragraph (a) by adding language that explains that in addition to issuance of a NOA or NOD, the CO's first action may be issuance of a Final Determination under § 655.160. As explained in the preamble discussing § 655.123 above, the Department proposes to permit the employer to conduct recruitment prior to filing its application. Consistent with that proposal, a Final Determination to certify the application may be the appropriate first action if the employer conducts pre-filing recruitment, provided the application meets all certification criteria and the employer has complied with all regulatory requirements necessary for certification. Likewise, a Final Determination to deny the application may be the appropriate first action if the application is incurably deficient at the time it is filed, such as an application filed by a debarred employer.

The Department proposes to amend paragraph (b) to include language that permits the CO to send electronic notices and requests to the employer and permits the employer to send electronic responses to these notices and requests, which is consistent with current practice and other modernization proposals explained in this NPRM. The Department encourages electronic communication and OFLC currently permits H–2A employers to respond to notices and requests electronically. Proposed paragraph (b) retains the option to issue and respond to notices and requests using traditional methods that assure next day delivery, which is necessary in some cases, such as when the employer does not have access to e-filing methods. Proposed paragraph (b) also clarifies that the CO will send notices and requests to the address the employer provides in the *Application for Temporary Employment Certification.*

2. Section 655.141, Notice of Deficiency

In paragraph (b), the Department proposes to remove language that allows an employer to request expedited administrative review or a de novo hearing of a NOD. The Department proposes this change to conform to the language of the INA, which requires expedited administrative review, or a de novo hearing at the employer's request, only for a denial of certification or a revocation of such a certification. *See* section 218(e)(1) of the INA, 8 U.S.C. 1188(e)(1). Because the NOD is neither a denial of certification nor a revocation of such a certification, this proposal better conforms with statutory requirements under the INA. For the same reason, the Department also proposes to remove current paragraph (c), which permits employers to appeal a NOD. Additionally, the Department proposes to remove language from paragraph (b)(5) that prohibits the employer from appealing the denial of a modified *Application for Temporary Employment Certification.* This change aligns this section with the language in § 655.142(c), which permits the appeal of a denial of a modified application.

In paragraph (b)(3), the Department proposes to add language to clarify that the employer may submit a modified job order in response to a NOD. This proposal conforms paragraph (b)(3) with the language in paragraphs (a), (b)(1), and (b)(2) of the current rule, which allows the CO to issue a NOD for job order deficiencies and provides the employer an opportunity to submit a modified job order to cure those deficiencies.

3. Section 655.142, Submission of Modified Applications

The Department proposes amendments to clarify the provisions at § 655.142 that govern the employer's submission of a modified *Application for Temporary Employment Certification* or job order. The Department proposes to add language to paragraphs (a) and (b) that clarifies the employer may submit a modified job order in response to a NOD, which conforms these paragraphs to the provisions at § 655.141 that permit the CO to issue a NOD for job order deficiencies and provide the employer opportunity to submit a modified job order to cure those deficiencies. Proposed paragraph (a) also clarifies that if the employer submits a modified application or job order, the CO will postpone the Final Determination for a maximum of 5 calendar days, consistent with the current provision that the CO's Final Determination will be postponed by 1 calendar day for each day the employer's response is untimely (*i.e.,* past the due date for submitting a modification under § 655.141(b)(2)).

In addition, proposed paragraph (a) explicitly authorizes the CO to issue multiple NODs, if necessary, which mirrors language included at § 655.32(a) of the 2015 Interim Final Rule that governs the H–2B temporary labor certification program. *See* 80 FR 24041, 24122. Authority to issue multiple NODs provides the CO with the necessary flexibility to work with employers to resolve deficiencies that prevent acceptance of their *Applications for Temporary Employment Certification* or job orders. For example, a CO may discover a deficiency while reviewing submissions by the employer, such as an employer's response to a NOD, which raises other issues that require the CO to request additional modifications.

4. Section 655.143, Notice of Acceptance

The Department proposes revisions to § 655.143 to clarify current policy and to reflect proposed changes to the organizing structure of this section to ensure the NOA content requirements reflect the proposals to amend positive recruitment requirements, such as labor supply State determinations in proposed § 655.154(d), requiring the CO to transmit the job order to the SWAs for interstate circulation, and permitting the employer to conduct prefiling recruitment. As explained in the preamble discussing § 655.123 above, the Department's proposed rule permits the employer to conduct the positive recruitment activities required by §§ 655.151 through 655.154 before filing its *Application for Temporary Employment Certification* (*i.e.,* prefiling recruitment). To ensure § 655.143 is consistent with this proposal, the proposed content requirements for NOAs account for whether the employer has conducted prefiling recruitment, and whether that recruitment is complete and compliant with the

employer's positive recruitment obligations.

Proposed paragraphs (b)(1)(i) through (iii) correspond with paragraphs (b)(1) through (3) in the current regulation and describe the content requirements for NOAs sent to an employer that has not chosen to commence positive recruitment prior to filing the *Application for Temporary Employment Certification,* or an employer that has submitted, along with its *Application for Temporary Employment Certification,* evidence of satisfactorily fulfilling some, but not all, of its positive recruitment obligations following the procedures set forth in proposed § 655.123. The proposed content requirements are substantively the same as those described in current paragraphs (b)(1) through (3), but the Department has made minor editorial revisions to reflect the modification of the job order circulation procedure in proposed § 655.150, explained in the preamble for that section. Under proposed paragraph (b)(1)(i), the NOA will not direct the SWA serving the area of intended employment to send the job order to other SWAs for circulation because the CO will be responsible for sending the job order to the appropriate SWAs under the proposed rule. Under proposed paragraph (b)(1)(ii), the NOA continues to direct the employer to engage in positive recruitment and to submit a recruitment report, but the Department has replaced the reference to § 655.154 with §§ 655.151 through 655.154 to better reflect positive recruitment requirements. Finally, under proposed paragraph (b)(1)(iii), the NOA continues to state that the employer's positive recruitment must occur during and in addition to SWA recruitment, and continues to specify the date on which the employer's positive recruitment obligation terminates. However, the Department has simplified the language by stating the employer's recruitment obligation ends on the date specified in § 655.158, as amended in this proposed rule, instead of quoting that section unnecessarily.

Proposed paragraph (b)(2) describes the content of the NOA the CO will send to an employer who submitted, along with its *Application for Temporary Employment Certification,* evidence of having commenced some or all aspects of positive recruitment, as permitted by proposed § 655.123, but failed to comply with some or all of the requirements for the positive recruitment activities conducted. When an employer has engaged in prefiling recruitment activities, the CO will evaluate that recruitment to ensure positive recruitment requirements at §§ 655.151 through 655.154 have been met and, if not, direct the employer to bring its recruitment into compliance. Under proposed paragraph (b)(2)(i), the NOA will direct the employer to conduct corrective positive recruitment and to submit proof of compliant advertising concurrently with the recruitment report. Under proposed paragraph (b)(2)(ii), the NOA will state that the employer's positive recruitment must occur during and in addition to SWA recruitment, and will terminate on the date specified in § 655.158.

In addition, proposed paragraph (b)(3) will require all NOAs to specify any other documentation or assurances the employer must provide in order for the *Application for Temporary Employment Certification* to meet the requirements for certification. This might include, for example, a required original surety bond, housing documentation, or MSPA Farm Labor Contractor Certificate of Registration. Under this provision, the CO may issue a NOA in cases where the application is complete and compliant for recruitment purposes, but the employer has not submitted all documentation required for certification. This reflects current practice, which allows the employer to engage in positive recruitment while simultaneously gathering additional information that will be required for certification. This process is more efficient than requiring the employer to submit all information required for certification prior to allowing the employer to commence recruitment.

Finally, proposed paragraph (b)(4) retains the requirement that all NOAs state that the CO will issue a Final Determination not later than 30 calendar days prior to the employer's first date of need, except in cases where the employer's application requires modification under § 655.141. The Department proposes to amend paragraph (b)(4) by adding language that permits the CO to issue a Final Determination fewer than 30 calendar days prior to the employer's first date of need. The proposed revisions would allow the CO to hold an application that would otherwise be denied on the thirtieth day before the employer's start date to allow the employer more time to meet all certification requirements. For example, the SWA may have inspected the employer's housing and identified a repair that must be made before the housing certification can be issued, which the employer is in the process of addressing. Therefore, this proposal gives the employer a short period of time beyond the 30-day mark to submit the missing documentation, thereby minimizing unnecessary burdens and delays. Furthermore, the proposal minimizes inefficiencies for the NPC, which would otherwise be required to issue a denial and either reopen and certify the application following a successful appeal or fully process a second application for the same job opportunity.

5. Section 655.144, Electronic Job Registry

The Department is retaining the current language of the electronic job registry provisions at § 655.144, with the exception of three minor amendments to make this section consistent with other proposals and current practice. The Department's public disclosure of redacted job orders (Forms ETA–790/790A) through the electronic job registry on OFLC's website is essential to ensuring transparency and accountability in the Department's administration of the foreign labor certification program. In addition, the electronic job registry is a valuable resource for worker advocacy organizations, State and Federal agencies and public officials, and interested members of the public. OFLC's publication of job order information on the registry reduces Government costs and paperwork burdens by reducing the number of Freedom of Information Act requests the Department receives. Finally, placement of job orders on the electronic job registry helps to make information about employers' job opportunities more widely available to U.S. workers.

The Department also proposes to add the phrase ''in active status'' to clarify that job orders must remain in active status on the electronic job registry until the end of the recruitment period set forth in § 655.135(d); when the recruitment period ends, the job order remains on the electronic job registry in inactive status. Finally, the Department proposes to amend paragraph (a) by deleting the sentence that explains the Department will begin posting job orders on the registry once it has initiated operation of the registry. The registry is now fully operational; therefore, this sentence is unnecessary and should be removed.

E. Post-Acceptance Requirements

1. Section 655.150, Interstate Clearance of Job Order

The Department is retaining § 655.150, which addresses the process for placement of approved job orders into interstate clearance, with clarifying revisions necessary to conform this section to proposed revisions to the

recruitment and filing processes. The Department proposes to revise § 655.150 consistent with the centralization of job order submission to, and dissemination from, the NPC as proposed in § 655.121. Under proposed § 655.121(c), the employer files its job order with the NPC, rather than a SWA serving the area of intended employment. After receiving the job order from the employer, the NPC sends the job order to a SWA serving the area of intended employment for review and, after approval, circulation in that SWA's intrastate employment service system, as described in § 655.121. The CO, rather than the SWA, would then transmit the approved job order to the appropriate SWAs for interstate clearance (*e.g.,* SWAs serving other states where work will be performed) on the employer's behalf. Finally, proposed paragraph (a) also clarifies that the job order will be placed into interstate clearance in labor supply states designated by the OFLC Administrator, consistent with proposed changes to the labor supply state determination method in § 655.154(d).

2. Section 655.151, Advertising in the Area of Intended Employment

The Department recently proposed revisions to § 655.151 in a separate proposed rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.*[86] This Proposed Rule does not propose any revisions to this section, and the revisions proposed in the separate rulemaking are not reflected in this proposed rule.

3. Section 655.152, Advertising Content Requirements

The Department proposes only minor editorial amendments to the advertising content provisions in § 655.152 to clarify existing obligations and ensure consistency with changes made in other sections of this proposed rule. The Department will continue to require advertisements to state certain job offer information that complies with H–2A program requirements and is essential to apprising prospective workers of the job opportunity (*e.g.,* offered wage, or wage range floor, no lower than the amount required under §§ 655.120(a) and 655.122(l)).

The Department proposes to add the word ''content'' to the section title to clarify the section addresses advertising content requirements specifically. The Department proposes to amend the introductory paragraph to include a reference to § 655.154 to clarify that the § 655.152 content requirements apply to additional positive recruitment conducted under that section as well. The proposed revisions to paragraphs (a) and (d) explain that advertisements must include the names of each joint employer and the name of the agricultural association, if applicable. Finally, the Department proposes to delete references to employer interviews of U.S. applicants in paragraph (j) because the proposed rule includes this language in proposed § 655.123, ''Positive recruitment of U.S. workers.''

4. Section 655.153, Contact With Former U.S. Workers

The Department retains § 655.153 with some minor proposed revisions. Section 655.153 presently requires an employer to contact, by mail or other effective means (*e.g.,* phone or email),[87] U.S. workers it employed in the occupation at the place of employment during the previous year to solicit their return to the job. This obligation aims to ensure that these U.S. workers, who likely have an interest in these job opportunities, receive notice of the job opportunities and to prevent the employer from effectively displacing qualified and available U.S. workers by seeking H–2A workers. An employer, however, need not contact those U.S. workers it dismissed for cause or those who abandoned the worksite. The Department proposes to add language to § 655.153 requiring an employer to provide the notice described in § 655.122(n) [88] to the NPC with respect to a U.S. worker who abandoned employment or was terminated for cause in the previous year. The proposal also requires an employer to have provided the notice in a manner consistent with the NPC **Federal Register** notice issued under § 655.122(n).[89] This proposal is intended to ensure that there is virtually contemporaneous documentation to support an employer assertion that a U.S. worker abandoned employment or that it terminated the U.S. worker for cause. Under this proposal, the employer must contact former U.S. workers who abandoned employment or it terminated for cause if, while subject to H–2A program requirements, it fails to provide notice in the required manner.

The Department may not certify an application unless the prospective employer has engaged in positive recruitment efforts of able, willing, and qualified U.S. workers available to perform the work. *See* section 218(b)(4) of the INA, 8 U.S.C. 1188(b)(4). The prospective employer's positive recruitment obligation is distinct from, and in addition to, its obligation to circulate the job through the SWA system. *Id.* E.O. 13788 requires the Department, consistent with applicable law, to protect the economic interests of U.S. workers. *See* 82 FR 18837, sec. 2(a), 5. The requirement to notify the Department of abandonment and termination for cause would protect the interests of able, willing, and qualified U.S. workers who might be available to perform the agricultural work, consistent with the INA and E.O. 13788. In addition, the notice could assist growers in the event U.S. workers who have abandoned employment or been terminated for cause later assert the employer failed to contact them as required by § 655.153.

The proposed notice obligation should not increase the existing regulatory burden. Section 655.122(n) permits an employer to avoid the responsibility to satisfy the three-fourths guarantee as well as its return transportation and subsistence payment obligations when a U.S. worker voluntarily abandons employment or the employer terminates the worker for cause if the employer notifies the NPC not later than 2 working days after the abandonment or termination. Employers already have a strong financial incentive to submit this notice to avoid responsibility for the three-fourths guarantee and return transportation and subsistence costs and the requirement to submit the notice to avoid § 655.153's contact obligation is unlikely to change the current regulatory burden on employers.

As noted above, § 655.153 currently permits employers to contact U.S. workers by mail or other effective means. The regulatory text of the 2008 Final Rule specified that other effective means included phone and email contact. 73 FR 77110, 77215. The 2010 Final Rule removed the specific reference to phone or email contact from the text to simplify the regulatory language, but the 2010 preamble expressly stated that phone or email contact remained effective means to

[86] 83 FR 55994 (Nov. 9, 2018). On June 17, 2019, the Department submitted a final rule of that rulemaking to OMB for review. *See https://www.reginfo.gov/public/do/eoDetails?rrid=129233.*

[87] *See* 2010 Final Rule, 75 FR 6884, 6929.

[88] Under § 655.122(n), a worker's abandonment of employment or termination for cause relieves an employer of responsibility for subsequent transportation and subsistence costs and the obligation to meet the three-fourths guarantee for that worker, if the employer provides notice to the ETA NPC, and in the case of an H–2A worker DHS, of the abandonment or termination.

[89] *See* Notice, *Information about the DOL Notification Process for Worker Abandonment, or Termination for Cause for H–2A Temporary Agricultural Labor Certifications,* 76 FR 21041 (Apr. 14, 2011).

contact U.S. workers. 75 FR 6884, 6929. The Department hereby reaffirms that phone and email contact continue to be effective means to contact U.S. workers.

The Department understands there are circumstances where employers had not employed H–2A workers in the previous year but are now applying to employ H–2A workers for the current year. In those circumstances, employers often have employed U.S. workers in the occupation at the place of employment during the previous year. Similarly, a regular user of the H–2A program might employ U.S. workers in the pertinent occupation at the place of employment to provide agricultural services for the first time and then use the H–2A program in the succeeding year.

In each instance, § 655.153 requires these employers to contact the U.S. workers employed in the previous year. This obligation applies to entities that employed U.S. workers in the previous year under the common law definition of employer incorporated in § 655.103(b). For example, if a grower applying to employ H–2A workers used farm labor contractors to provide U.S. workers during the previous year and the grower employed the U.S. workers under the common law of agency, then § 655.153 requires the employer to contact those U.S. workers. In the event that the grower has not kept payroll records for such U.S. workers, the regulations implementing MSPA will typically have required the farm labor contractors to have furnished the grower with a copy of all payroll records including the workers' names and permanent addresses. The growers must maintain these records for 3 years. 29 CFR 500.80(a), (c). These records should provide the employer with contact information for the pertinent U.S. workers.

While the Department's proposal would continue to impose the contact obligation found in § 655.153 on employers that did not participate in the H–2A program in the previous year, the proposal would not require such employers to have provided the NPC the notice described in § 655.122(n) in order to avoid the obligation to contact U.S. workers the employer terminated for cause in the previous year or who abandoned the employment in the previous year.

Finally, the proposed rule clarifies that the employer's contact with former U.S. workers must occur during the positive recruitment period (*i.e.,* while the employer's job order is circulating with the SWAs in interstate clearance system and terminating on the date workers depart for the place of employment, as determined under § 655.158) by including a reference to § 655.158.

5. Section 655.154, Additional Positive Recruitment

The INA requires employers to engage in positive recruitment of U.S. workers within a multi-State region of traditional or expected labor supply. Section 218(b)(4) of the INA, 8 U.S.C. 1188(b)(4). The Department proposes to provide greater clarity with respect to the procedures OFLC will use to determine the States of traditional or expected labor supply.

Under the current regulation, the CO receives informal information from the SWAs at least once every 6 months on the availability of workers and interstate referrals to agricultural job openings. Based on that information, if traditional or expected labor supply States exist for an area of intended employment, the CO will designate such States in the NOA to inform the locations where the employer must conduct positive recruitment. The designation of traditional or expected labor supply States is not publicly accessible and, based on the Department's experience implementing the current regulation, has not resulted in any significant changes in State designations year to year.

The Department proposes to clarify the procedure for identifying traditional or expected labor supply States. The OFLC Administrator would make an annual determination of traditional or expected labor supply States based primarily on information provided by the SWAs within 120 calendar days preceding the determination. The OFLC Administrator may also consider information from other sources in making this determination. A listing of the States designated as States of labor supply for each State, if any, would be published by OFLC on an annual basis on the OFLC website at *www.foreignlaborcert.doleta.gov.* The State designations issued by OFLC would become effective on the date of publication for employers who have not commenced positive recruitment under this subpart and would remain valid until a new determination is published. The Department has determined that the increased transparency resulting from this proposal would provide clear expectations for employers to meet their positive recruitment obligations, especially employers who choose to begin their positive recruitment activities as soon as their job orders are approved by the SWA under § 655.121 and prior to the filing of an *Application for Temporary Employment Certification* under § 655.123.

6. Section 655.156, Recruitment Report

The Department proposes minor revisions to § 655.156, which requires the employer to prepare and maintain in its records a written report describing recruitment steps undertaken and the results of those efforts, including the name and contact information of U.S. worker applicants, identification of recruitment sources, confirmation of contact with former U.S. workers, the number of applicants hired and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections. The Department will maintain the requirement that employers must update their recruitment reports throughout the recruitment period to ensure the employers account for contact with each prospective U.S. worker during that time. The Department proposes minor revisions to paragraph (a) to simplify language and reflect procedural changes resulting from the proposed positive recruitment provisions at § 655.123. Finally, the Department proposes minor amendments to paragraphs (a)(1) and (3) to clarify existing obligations related to recruitment reports.

The Department's proposed positive recruitment provisions at § 655.123, explained in more detail above, will permit an employer with an approved job order to begin positive recruitment prior to submitting its *Application for Temporary Employment Certification* application and to submit its initial recruitment report simultaneously with the application. Under this proposal, if an employer chooses to conduct prefiling positive recruitment, does so properly, and submits a compliant initial recruitment report at the time of filing, the CO may determine certification is the appropriate first action under § 655.140. Under these circumstances, the employer would not receive a NOA. Consistent with these proposed changes, the Department proposes to amend paragraph (a) of § 655.156 by deleting the language that requires employers to submit the recruitment report on a date specified by the CO in the NOA. Under circumstances which require the CO to issue a NOA, § 655.143 specifies that the NOA must direct the employer to submit a recruitment report.

Additionally, the Department proposes to add language to paragraph (a)(1) to make explicit the employer's obligation to include in its recruitment report the date of advertisement for each recruitment source. The proposed rule also clarifies that the employer's recruitment report must identify the

specific, proper name of each recruitment source, rather than identifying the general type of recruitment source, like ''web page'' or ''online job board.'' Finally, paragraph (a)(3) of the proposed rule clarifies that if the employer has no former U.S. workers that it is required to contact, the employer must include an affirmative statement in the report explaining the reason(s) the recruitment report does not include confirmation of such contact. This amendment enables COs to confirm that the employer's omission of language describing contact with former U.S. workers was intentional, rather than inadvertent.

F. Labor Certification Determinations

1. Section 655.161, Criteria for Certification

The Department proposes amendments to this section to clarify existing rules and procedures. The Department proposes to revise paragraph (a) by replacing references to establishment of temporary need and compliance with specific sections of the regulation with clearer language stating the employer must comply with all requirements of 20 CFR part 655, subpart B, necessary for certification, which encompasses the requirements to establish temporary need and comply with the specific sections referenced in the current regulation. The revisions to paragraph (b) clarify that the CO will count as available any U.S. worker whom the employer must consider and whom the employer has not rejected for a lawful, job-related reason. The proposed language does not revise the substance of the paragraph, but sets out the current provision in clearer terms.

2. Section 655.162, Approved Certification

The Department proposes to amend § 655.162 to accommodate two procedural changes that will modernize the filing process, and streamline both the issuance of temporary agricultural labor certifications to employers and the delivery of those certifications to USCIS. Currently, the CO issues a certification to the employer by completing the last page of the Form ETA–9142A, *Application for Temporary Employment Certification,* printing it on blue security paper, and sending the original certification using means that normally assures next day delivery. The employer then includes this original Form ETA–9142A, printed on blue security paper, in its H–2A Petition to USCIS.

To both simplify and expedite this process, while maintaining program integrity, the Department proposes to issue certifications using a new Final Determination notice that would contain succinct, essential information about the certified application. The CO would send the Final Determination notice that confirms certification, as well as a copy of the certified *Application for Temporary Employment Certification* and job order, both to the employer and USCIS using an electronic method designated by the OFLC Administrator. In cases where an employer is permitted to file by mail as set forth in § 655.130(c), the Department would use the same electronic method to transmit the certification documentation directly to USCIS as all other electronically filed applications, but would deliver certification documentation to the employer using a method that normally assures next day delivery. Consistent with current practice, the Department would send a copy of the certification documentation to the employer and, if applicable, to the employer's agent or attorney.

In addition to increasing processing efficiency, the Department anticipates these proposed procedures would reduce paperwork, time, and resource burdens on employers that currently must receive hard-copy certifications from OFLC. The proposal would reduce paperwork and expedite processing of petitions at USCIS, in part, by providing certification information directly from OFLC to USCIS electronically. Further, in cases in which an original certification is lost or misplaced, the new procedure would also eliminate the need for an employer to request USCIS to obtain a duplicate certification directly from OFLC.

3. Section 655.164, Denied Certification

The Department proposes revisions to § 655.164 to modernize the procedure for transmission of Final Determination notices to employers and make this section consistent with the proposed appeal procedures at § 655.171. Consistent with proposed procedural changes to § 655.162 and other modernization proposals explained above in this NPRM, the Department proposes to require COs to send Final Determination notices to employers using an electronic method authorized by the OFLC Administrator, except where the Department has permitted an employer to file by mail as set forth in § 655.130(c), in which case the CO would send the notice using a method that normally assures next day delivery.

The Department proposes a revision to paragraph (a) specifying that, in addition to stating the reasons the certification is denied, the denial will cite to the relevant regulatory standards. Additionally, to streamline information on appealing a denied certification, the Department proposes to reference—in paragraphs (b) and (c)—the proposed appeal procedures outlined in § 655.171. Rather than duplicate information on the request for review in each section that contains an appealable decision by the CO, the Department's proposal consolidates that information in one location at § 655.171. In addition to decreasing duplicative information, this change would align the appeal information in § 655.164 with the corresponding section in the H–2B regulations. *See* 20 CFR 655.53.

Under this proposal, both regulations will house information on the request for review in a central location for ease of reference and consistency. The Department proposes, as part of this effort, to modify paragraph (c) to clarify that if a request for review is not submitted in accordance with § 655.171, the CO's decision is final and the Department will not accept an appeal of that determination. This change mirrors the language used in the corresponding H–2B section. *See* 20 CFR 655.53(c).

4. Section 655.165, Partial Certification

The Department proposes revisions to § 655.165 to streamline this section and make it consistent with other proposals in this NPRM. The proposed introductory paragraph explains that the CO will send Final Determination notices using the electronic transmission procedures proposed in § 655.162. This paragraph also proposes a minor amendment to clarify that partial certification is not limited to U.S. workers the SWA refers to the employer. The CO can issue a full certification only where the employer has fully considered each U.S. worker who applied, whether directly or through SWA referral, and identified a lawful, job-related reason for not hiring the worker.

The Department proposes a revision to paragraph (a) by specifying that the partial certification will cite the relevant regulatory standards supporting the reduction of the period of employment, the number of H–2A workers, or both. Additionally, as discussed in the preamble to § 655.164, the Department proposes to replace language discussing appeal procedures in paragraphs (b) and (c) with a reference to § 655.171. This proposal avoids the duplication of information and consolidates that information in one location at § 655.171. This change also aligns the appeal information in § 655.165 with the corresponding section in the H–2B regulations. *See* 20 CFR 655.54.

Lastly, as part of efforts to ensure ease of reference and consistency, proposed paragraph (c) clarifies that if a request for review is not submitted in accordance with § 655.171, the CO's decision is final and the Department will not accept an appeal of that determination. This change mirrors proposed changes to § 655.164 and the language used in the corresponding H–2B section on partial certification. *See* 20 CFR 655.54(d).

5. Section 655.166, Requests for Determinations Based on Nonavailability of U.S. Workers

The Department proposes clarifying amendments to § 655.166 to simplify the provision and to ensure consistency with the e-filing and certification procedures proposed in §§ 655.130 and 655.162, which require all such requests to be made and responded to in writing using electronic methods, unless the employer requests to file a request for new determination by mail or for a reasonable accommodation using the procedures set forth in § 655.130(c).

The Department proposes to amend paragraph (b) by replacing current language that permits employers to request new determinations telephonically or using email with language consistent with the electronic methods proposed in this NPRM.

Similarly, the proposal revises paragraph (c) by specifying that the CO would issue determination notices following the electronic or other methods proposed in §§ 655.162 and 655.165.

6. Section 655.167, Document Retention Requirements of H–2A Employers

The proposal retains, with minor clarifying amendments, the document retention requirements in § 655.167. The proposal revises paragraph (c)(1)(iii) by replacing the word ''or'' with ''and'' to clarify that employers must comply with each recruitment step applicable to the *Application for Temporary Employment Certification.* In addition, the proposal clarifies that if a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, as set forth in § 655.122(n), employers must retain records demonstrating they notified the NPC and DHS. The Department recently proposed revisions to § 655.167 in a separate proposed rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.*[90] Those proposed revisions are not reflected in this proposed rule.

G. Post Certification

1. Section 655.171, Appeals

a. General Changes

The Department proposes to conform the text in § 655.171 with the corresponding appeals section in the H–2B regulations to the extent possible. This change includes adding proposed paragraph (a) to describe the content of the request for review and the procedures for its submission. Proposed paragraph (a) draws on language from the H–2B appeals procedures at § 655.61 as well as existing text in the H–2A regulations. General information on the request for review was previously located in sections of the H–2A regulations that discussed the CO's authority and procedure for issuing a specific decision (*e.g.,* a denied certification). *See, e.g.,* 20 CFR 655.164. The Department's proposal seeks to consolidate this information in proposed paragraph (a) for ease of reference and consistency with the H–2B regulations.

In particular, the Department proposes to extend the time in which an employer may file a request for review from 7 calendar days to within 10 business days of the date of the CO's decision. This proposal aligns with the timeframe to request review under the H–2B regulations, except in one aspect. Unlike the timeframe to request review under the H–2B regulations, the proposal requires the request for review in H–2A to be received by—rather than sent to—the Chief ALJ and the CO within 10 business days of the CO's decision. However, the Department believes that specifying a time for receipt of the request for review is a reasonable modification of the H–2B timeframe because it enables the Department to more easily determine if a request was filed in a timely manner. The proposal also allows the employer more time to develop a robust request, which in the case of a request for administrative review will serve as the employer's brief to the Office of Administrative Law Judges (OALJ). To this end, the Department seeks to clarify that the request must include the specific factual issues the employer seeks to have examined as part of its appeal. Having this information allows for the prompt and fair processing of appeals by providing the ALJ and the CO adequate notice regarding the nature of the appeal.

The Department has additionally found that in the past, some requests did not identify the type of review sought by the employer, which could result in delays (as the ALJ asked for clarification) or a type of review not desired by the employer (as the ALJ presumed the employer requested a hearing). To avoid this situation, the Department proposes to include language in proposed paragraph (a) that the request for review clearly state whether the employer is requesting administrative review or a de novo hearing. The Department proposes to add that the case will proceed as a request for administrative review if the request does not clearly state the employer is seeking a hearing. *See* 8 U.S.C. 1188(e)(1) (noting the regulations must provide for expedited administrative review or, at the employer's request, for a de novo hearing). Similarly, an employer requesting a de novo hearing should state whether it is requesting an expedited hearing in accordance with proposed paragraph (e)(1)(ii), or its request for a hearing will be construed as requesting a non-expedited hearing. Taken together, this proposed change is expected to improve judicial efficiency and the orderly and consistent administration of appeal proceedings, which allows the parties and the ALJ, in turn, to adequately prepare for the case at hand.

The Department proposes to clarify that where the request is for administrative review, the request may only contain such evidence that was before the CO at the time of his or her decision. The Department seeks the addition of this language in proposed paragraph (a), which tracks language in the administrative review section (proposed paragraph (d)), so that employers or their representative(s) can prepare their requests accordingly. The Department also proposes to add language that an employer may submit new evidence with its request for a de novo hearing, which will be considered by the ALJ if the new evidence is introduced during the hearing. The Department seeks the inclusion of this language in proposed paragraph (a), which tracks language in the de novo hearing section (proposed paragraph (e)), so that employers or their representative(s) can assemble their requests and prepare their cases accordingly.

Similar to the reorganization of information in proposed paragraph (a), proposed paragraphs (b) and (c) draw on existing language in the H–2A regulations and language from the H–2B appeals procedures to reorganize information on the appeal file and the assignment of the case into separate sections. The Department proposes

[90] 83 FR 55994 (Nov. 9, 2018). On June 17, 2019, the Department submitted a Final Rule of that rulemaking to OMB for review. *See https://www.reginfo.gov/public/do/eoDetails?rrid=129233.*

minor amendments to the language of proposed paragraph (c) to clarify that the ALJ assigned to the case may be a single member or a three-member panel of the BALCA. The proposed amendments to paragraphs (b) and (c) mirror the wording and organization of the appeals section in the H–2B regulations. *See* 20 CFR 655.61(b), (d).

Finally, the Department proposes changes to the issuance of the ALJ's decision for both an administrative review and a de novo hearing. Proposed paragraphs (d)(4) and (e)(3) modify the individuals and entities that receive the ALJ's decision to align with the recipients of ALJ decisions under the H–2B regulations, namely, the employer, the CO, and counsel for the CO. *See* 20 CFR 655.61(f). This proposed change also removes language from current paragraphs (a) and (b)(2) stating the ALJ's decision is the final decision of the Secretary because the language is unnecessary in light of the OALJ's Rules of Practice and Procedure for Administrative Hearings. Under those rules, the ALJ's decision is the final agency action for purposes of judicial review when the applicable statute or regulation does not provide for a review procedure, as here. *See* 29 CFR 18.95; 20 CFR 655.171. In addition, the removal of the ''final decision'' language is consistent with the H–2B regulations, which lacks similar language, and does not affect the issue of whether the parties may appeal to the ARB, which is governed by other authorities issued by the Department. *See* 20 CFR 655.61; Secretary's Order 02–2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 FR 69378 (Nov. 16, 2012). To clarify an employer's existing administrative exhaustion obligations, however, the Department proposes to specify in proposed paragraph (a) that when a hearing or administrative review of a CO's decision is authorized in this subpart, an employer must request such review in accordance with § 655.171 in order to exhaust its administrative remedies.

b. Paragraph (d), Administrative Review

The Department proposes specific changes to address the briefing schedule, standard and scope of review, and the timeline for a decision in cases of administrative review. In proposed paragraph (d)(1), the Department seeks to clarify the briefing schedule so that it is consistent across cases of administrative review and better informs the ALJ's decision-making process. The current H–2A regulations governing administrative review do not provide for a briefing schedule,[91] and the Department has found that the briefing schedule has varied across cases as a result. In most cases, the ALJ has permitted the CO and the employer to file a brief simultaneously within a certain period, usually 2 to 4 business days, after receipt of the OFLC administrative file. However, this current practice of simultaneous briefing results in situations where issues raised in the employer's brief are not addressed in the CO's brief. The CO and the employer, moreover, do not know when briefing is due until the issuance of the order setting the briefing schedule.

In contrast, the proposed briefing schedule allows an employer that wishes to file a brief as part of its appeal to do so with its request for review. To provide the employer time to develop a brief that sets forth the specific grounds for its request and corresponding legal argument, the Department proposes to extend the time in which the employer may request review from 7 calendar days to within 10 business days of the CO's decision. The CO may then respond to the employer's brief within 7 business days of the receipt of the OFLC administrative file. Under this proposed schedule, an employer is afforded a predictable amount of time to present its legal arguments in one place and the CO may then respond to those arguments within a set timeframe. Similar to current practice, the employer and the CO each file one brief to allow for an accelerated briefing schedule. But compared with the practice of simultaneous briefing, the proposal more effectively assists the ALJ's decision-making process by allowing for a complete set of arguments by the employer and responses by the CO while providing the parties a predictable briefing schedule that remains expedited. The Department invites the public to comment on other ways, including alternative briefing procedures that address the concern for a predictable, effective, yet expedited briefing schedule for cases of administrative review.

In proposed paragraph (d)(2), the Department seeks to incorporate the arbitrary and capricious standard of review into requests for administrative review. This proposed change codifies the Department and OALJ's well-established and longstanding interpretation of the standard of review for such requests. *See J and V Farms, LLC,* 2016–TLC–00022, at 3 & n.2 (Mar. 7, 2016). As the regulation is currently silent on the standard of administrative review, this proposed change provides helpful clarity and ensures the OALJ is conducting its administrative review in a consistent manner.

In proposed paragraph (d)(3), the Department seeks to include clarifying language that the scope of administrative review is limited to evidence in the OFLC administrative file that was before the CO when the CO made his or her decision. The Department proposes this clarifying language because the administrative file may contain new evidence submitted by the employer to the CO after the CO has issued his or her decision, such as when the employer submits a request for review with new evidence, or a corrected recruitment report with new information, after the CO has denied certification. Although such evidence is in the administrative file, the ALJ may not consider this new evidence because it was not before the CO at the time of the CO's decision. This amendment incorporates legal principles already in existence for H–2A cases, namely, that administrative review is limited to (1) evidence in the written record that was (2) before the CO when the CO made his or her decision.[92]

In proposed paragraph (d)(4), the Department has modified the timeline in which the ALJ should issue a decision from 5 business days to 10 business days after receipt of the OFLC administrative file, or within 7 business days of the submission of the CO's brief, whichever is later. This schedule conforms to the timeline in the H–2B appeals procedures while continuing to provide for an expedited review procedure. *See* 20 CFR 655.61(f).

c. Paragraph (e), De Novo Hearing

The Department proposes specific changes to proposed paragraphs (e)(1), the conduct of a de novo hearing, and (e)(2), the standard and scope of review for such hearings. In proposed paragraph (e)(1), if the employer requests an expedited hearing, the Department proposes to change the time in which such a hearing must occur from 5 to 14 business days after the ALJ's receipt of the OFLC administrative file. This proposed change is based on the Department's administrative experience and is intended to allow the parties reasonable time to adequately

[91] *See* 20 CFR 655.171(a).

[92] *See* 20 CFR 655.171(a) (allowing written submissions ''which may not include new evidence''); *Keller Farms, Inc.,* 2009–TLC–00008, at 5 (Nov. 21, 2008) (''all evidence . . . not before ETA at the time it made its decision will not be considered''); *see also J and V Farms,* 2016–TLC–00022, at 3 n.2 (the ''substance of [the appeals regulation] has remained the same since 1987'') (citation and internal quotation marks omitted).

prepare for a hearing while effectuating the INA's concern for prompt processing of H–2A applications.

Additionally, the Department proposes to clarify that the ALJ has broad discretion to limit discovery and the filing of pre-hearing motions in a way that contributes to a fair hearing while not unduly burdening the parties. As is the case with the 2010 Final Rule, 29 CFR part 18 governs rules of procedure during the hearing process, subject to certain exceptions discussed in this section and part 18. Although 29 CFR 18.50 *et seq.* permits an ALJ to exercise discretion in matters of discovery, the Department's proposed language makes explicit the ALJ's broad discretion to limit discovery and the filing of pre-hearing motions in the circumstances of a hearing under the H–2A program. The Department proposes to include this language because in the H–2A program, the time to hold a hearing and to issue a decision following that hearing are expedited, such that the need for limits on requests for discovery and the filing of pre-hearing motions is particularly pronounced. The administrative procedures in 29 CFR part 18, and particularly the sections on discovery and motions, were not specifically designed for the H–2A program, nor for situations that require an accelerated adjudication process, as is required by the H–2A program. As such, the Department's proposal provides the ALJ with broad discretion to restrict discovery and the filing of pre-hearing motions to situations where they are needed to ensure the fundamental fairness of the proceedings.

The Department has retained the 10-calendar-day timeframe in which an ALJ must issue a decision after a hearing, but invites the public to comment on whether this time period should be modified. For cases in which the employer waives its right to a hearing, the Department proposes to clarify that the proper standard and scope of review is the standard and scope used for administrative review. This is because under the INA, the regulations must provide for expedited administrative review or, at the employer's request, a de novo hearing. *See* section 218(e)(1) of the INA, 8 U.S.C. 1188(e)(1). If the employer requests a de novo hearing, but then waives its right to such a hearing, the case reverts to the other option—administrative review. In that circumstance, the standard and scope of review for administrative review applies. Similarly, should an ALJ determine that a case does not contain disputed material facts to warrant a hearing, review must proceed under the standard and scope used in cases of administrative review.

With regard to the standard and scope of review, the Department proposes to clarify that the ALJ will review the evidence presented during the hearing and the CO's decision de novo. This standard of review recognizes that new evidence may be introduced during the hearing and allows the ALJ, as permitted under section 218(e)(1) of the INA, to review such evidence and other evidence introduced during the hearing de novo. *See* 8 U.S.C. 1188(e)(1) (noting regulations shall provide for a de novo administrative hearing at the applicant's request). Similarly, the INA permits the ALJ to review the CO's decision de novo when the employer requests a de novo administrative hearing. *See id.* As the INA supports a de novo standard of review, the Department proposes to codify it in the regulations so that the standard is clearly and consistently applied.

In addition, the Department has recognized that there may be instances when the issues are purely legal, or when only limited factual matters are necessary to determine the issues in the case. Proposed paragraphs (e)(2) and (e)(1)(ii) have been revised to address this possibility and provide that the ALJ may determine the issues following a hearing only on the disputed factual issues, if any. The OALJ already relies on mechanisms, including, but not limited to, status conferences and prehearing exchanges, to determine which issues raised in the request for review can be resolved as a matter of law and which issues involve disputed material facts requiring the introduction of new evidence during a hearing. The Department's proposed language acknowledges and codifies this existing practice.

The Department also proposes to clarify that if new evidence is submitted with a request for de novo hearing, and the ALJ determines that a hearing is warranted, the new evidence submitted with the request for review must be introduced during the hearing to be considered by the ALJ. This proposed change continues to allow for the introduction of new evidence, and for the de novo review of that evidence by the ALJ, while ensuring new evidence submitted with a request for review is subject to the same procedures that apply to new evidence introduced during a hearing, such as the opportunity for cross-examination and rebuttal.

Finally, as part of its efforts to conform this section with the appeals section in the H–2B regulations, the Department intends to move language that the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action from proposed paragraph (e)(3) to proposed paragraph (e)(2), which addresses the standard and scope of review.

2. Section 655.172, Post-Certification Withdrawals

The Department proposes to revise § 655.172 by relocating the job order withdrawal provision from § 655.172(a) to proposed § 655.124 and the *Application for Temporary Employment Certification* withdrawal provision from § 655.172(b) to proposed § 655.136, as discussed in the preamble for those sections. As a result, proposed § 655.172 addresses only the withdrawal of certifications, which is appropriate because § 655.172 is located in the post-certification section of the regulation. This new provision includes proposed procedures for requesting withdrawal that are consistent with those an employer must follow to request withdrawal of a job order or an *Application for Temporary Employment Certification* and job order: all withdrawal requests must be made in writing and submitted to the NPC, and must identify the certification to be withdrawn and state the reasons for the employer's request. Also, the proposed language reiterates that withdrawal does not nullify an employer's obligations to comply with the terms and conditions of employment under the certification.

3. Section 655.173, Setting Meal Charges; Petition for Higher Meal Charges

The Department is retaining the methodology used to adjust meal charge rates annually and the requirement that an employer charge workers no more than the allowable meal charge set by the regulation, unless the CO approves a higher meal charge amount and, then, only after the effective date the CO specifies. For clarity, in paragraph (a) the Department proposes to replace the standard meal charge in effect in 2010 when the current regulations were published (*i.e.,* $10.64) with the current amount of $12.26 per day. The Department proposes one additional revision in paragraph (a), which would make the annually adjusted meal charge effective on a date specified in the **Federal Register** notice, which would be no more than 14 calendar days after publication in the **Federal Register**. This proposal would provide a brief period for adjustment to updated rates.

In paragraph (b), the Department will continue to allow employers to petition for authorization to charge workers more than the standard meal charge set

under paragraph (a), provided the employer justifies the requested higher meal charge. The provision retains the basic process for requesting higher meal charges, with clarifying edits, including a revision to clarify that a request to charge a higher amount will be denied if the employer's documentation does not justify the amount requested, or if the amount requested exceeds the permitted maximum higher meal charge. In addition, the proposal provides that the maximum higher meal charge would be adjusted in the same manner as the standard meal charge.

The Department is retaining the requirement that an employer that directly provides meals to workers (*i.e.,* through its own kitchen facilities and cooks) submits the documentation specified in paragraph (b)(1)(i) and ensures that its requested higher meal charge includes only permitted costs. Increasingly, however, employers submit higher meal charge requests based on the employer's costs to provide meals to workers through a third party (*e.g.,* hiring a food truck to prepare and deliver meals or engaging restaurants near the housing or place of employment to provide meals). Therefore, the Department proposes documentation requirements in new paragraph (b)(1)(ii) that address situations in which the employer has engaged the services of a third party to provide meals to workers. Proposed paragraph (b)(1)(ii) would require documentation identifying each third party engaged to prepare meals, describing how the employer's agreement with each third party will fulfill the employer's obligation to provide three meals a day to workers, and documenting each third party's charges to the employer for the meals to be provided. Proposed paragraph (b)(1)(ii) would also prohibit the employer, or anyone affiliated with the employer, from receiving a direct or indirect benefit from a higher meal charge to a worker. Finally, this paragraph requires the employer to retain records of payments to the third party and deductions from worker's pay.

The Department proposes minor revisions to paragraph (b)(2) to clarify that the employer may not begin charging higher rates for meals until it has received the CO's approval and it has disclosed the new rate to workers. The proposed changes also clarify that a CO's decision approving a request to charge a higher rate is valid only with respect to the arrangement described in the documentation submitted with the employer's request. If such arrangement changes, the employer may charge no more than the maximum amount permitted under paragraph (a), until the employer submits, and the CO approves, a new petition for a higher meal charge.

As a further measure to ensure that an employer's choice to engage a third party to provide three meals a day to workers does not unreasonably reduce workers' wages, in paragraph (b), the Department proposes implementing a ceiling on the maximum amount the CO may approve as a higher meal charge amount. An objective ceiling on allowable higher meal charges would not only ensure workers' wages are not subject to improper deductions, but also would provide predictability on meal charges, enabling employers and workers to make more informed financial decisions involving the meal charge included in the job offer. An employer would be able to make informed business decisions, knowing the maximum amount it may be permitted to charge workers for providing meals, regardless of the specific way in which it chooses to provide meals to workers, while the worker would be assured that the worker will not be charged more than the maximum higher meal charge amount set by the regulation.

The proposed maximum allowable higher meal charge is consistent with the Department's use of a ceiling on higher meal charge amounts prior to the implementation of the 2008 Final Rule.[93] The proposed ceiling of $14.94 per day is derived from the last maximum allowable higher meal charge amount published in the **Federal Register** and effective in 2008 (*i.e.,* $12.27 per day), updated using the same methodology as in paragraph (a) to adjust the standard meal charge amount.[94] This higher meal charge ceiling would be adjusted annually using the same methodology as is currently in place for adjusting standard meal charge amounts in paragraph (a).

The Department invites comments on methods for processing and evaluating higher meal charge requests involving third-party prepared meals, including documentation requirements and the process for determining and updating a higher meal charge ceiling. In particular, the Department invites comments on alternative methods for determining and updating a higher meal charge ceiling that will not inhibit the provision of sufficient, adequate meals and will not reduce workers' wages without justification. For example, the Department invites comments on whether an appropriate higher meal charge ceiling could be set in relation to worker's wages (*e.g.,* as proportion of the AEWR applicable to the job opportunity or the actual wage offered to the worker, or average local, regional, or national meal costs).

4. Section 655.175, Post-Certification Amendments

The Department proposes to add a new § 655.175 that would permit an employer to request minor amendments to the places of employment listed in an approved certification under certain limited conditions. The Department's current regulations offer some options for an employer to address changed circumstances after certification, such as the option to file a new *Application for Temporary Employment Certification* based on good and substantial cause under the emergency processing provisions at § 655.134. However, the current rule does not permit amendments to an application after the CO has issued a Final Determination. Therefore, the Department proposes this new section to provide employers some flexibility to respond to unforeseen circumstances arising after certification is granted. The Department continues to expect an employer to ensure bona fide work is available at all places of employment disclosed in its *Application for Temporary Employment Certification* and to take into consideration all foreseeable circumstances and factors within its control when describing the need for H–2A workers on its application. This is critically important so that the recruitment conducted in connection with that application appropriately tests the U.S. labor market and the Department's determination as to whether insufficient U.S. workers are available at the time and place needed by the employer is accurate.

In proposed paragraph (a), the Department proposes to permit post-certification amendments to the certified places of employment as long as (1) the employer has good and substantial cause for the requested amendment; (2) the circumstances underlying the amendment request

[93] Notice, *Allowable Charges for Agricultural and Logging Workers' Meals,* 73 FR 10288 (Feb. 26, 2008). *See* page I–28 of the ETA Handbook NO. 398, discussing the methods used to provide meals and meal charge limits. At that time, employers used a centralized cooking and feeding facility at the place of employment; arranged for a catering service to prepare meals elsewhere and deliver them to the employer's place of employment; or furnished at no cost to the workers convenient cooking and eating facilities of sufficient size and capacity (including utensils) which would enable workers to prepare their own meals. Where the employer provided meals, its daily charge for providing three meals could not exceed the standard amount permitted by the regulations, absent a higher meal charge request at 20 CFR 655.102 or the maximum higher meal charge amount permitted at 20 CFR 655.111.

[94] 73 FR 10288.

could not have been reasonably foreseen before certification and are outside the employer's control; (3) the material terms and conditions of the job order are not affected by the requested amendment; and (4) the new places of employment requested are within the certified areas of intended employment. The proposal limits post-certification amendments to situations in which good and substantial cause exists, such as when an employer requires immediate adjustments to places of employment within the certified area of intended employment in order to respond to unforeseen emergent situations that may jeopardize or severely damage crops or other agricultural commodities. For example, a post-certification amendment may be available when an Act of God severely damages some of the employer's crops and, as a result, the work scheduled to be performed at that places of employment is no longer needed, while crops at other locations within the same area of intended employment need urgent attention. As defined in the emergency situations provision at § 655.134, ''[g]ood 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.''

The proposal also limits post-certification amendments to situations in which the reasons for the request could not have been reasonably foreseen before certification and are wholly outside the employer's control. In situations where the employer could foresee the need for amendment after filing, but prior to the CO issuing a Final Determination, the employer may request amendment under the provisions set forth at § 655.145. For example, if unusually heavy storms and rains occur before the employer files its *Application for Temporary Employment Certification,* impacts on crop conditions are known or reasonably foreseeable before the CO issues the Final Determination. Further, staffing levels are within the employer's control. Therefore, related minor modifications to the job order and *Application for Temporary Employment Certification* would be appropriately addressed through a pre-certification amendment request under § 655.145. If the employer experiences normal, predictable, or foreseeable circumstances within its control that would cause a reasonable employer to take mitigation measures in advance of receiving certification, the employer will be required to submit a new *Application for Temporary Employment Certification.* For example, in an area where the local or State government has announced plans to release water from a reservoir to provide more water to farmers, which has become an annual event, and the employer's fields are known to be more productive when they receive more water, the release of reservoir water is a normal, predictable, and foreseeable event that is not extraordinary or unforeseeable.

The circumstances under which the Department proposes to permit post-certification amendments are limited to ensure the amendments will not compromise the terms and conditions of the job offer contained in the certification, apart from the specific places of employment within the certified area of intended employment. In addition, post-certification amendments must not compromise the underlying determinations the CO made when issuing the certification, most importantly the determinations ''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.'' Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii); 20 CFR 655.103(a).

Finally, under this proposal, all places of employment an employer requests to add to the certification must be located within the same areas of intended employment as the certification issued. When an employer requires agricultural labor or services at a place of employment not located within the area of intended employment certified, the employer would be required to file a new *Application for Temporary Employment Certification,* and engage in a labor market test to support the determinations required by § 655.100.

Proposed paragraph (b) outlines the procedures for requesting post-certification amendments. An employer desiring amendment to its approved places of employment would submit a written request to the NPC. The request would specify the certified places of employment the employer wishes to add or remove from the certification, the expected start and end dates of work at each place of employment, and if the places of employment are not owned or operated by the employer, the fixed-site agricultural businesses to which the employer would be providing labor or services. In addition, the employer must provide a description of the good and substantial cause justifying the need for the amendments requested and explain how the circumstances were not reasonably foreseeable and are wholly outside the employer's control.

Proposed paragraph (b) would also require the employer's amendment request to include three assurances. First, the employer would assure the amendments requested would not change the material terms and conditions of the work contract underlying the certification. This assurance informs the CO that the employer has taken necessary steps to ensure that it continues to meet its program obligations. For example, if an employer sought to add a place of employment across a State border from its certified places of employment, the employer would be required to have or secure workers' compensation coverage adequate for the new State and pay the required wage rate for the new State, if higher than the certified wage offer, as appropriate. An employer seeking to add a place of employment it does not own or control would be required to secure additional documents to cover the new location where it will be acting as an H–2ALC (*e.g.,* a fully-executed contract for that place of employment and any additional employee transportation authorizations required by the MSPA Farm Labor Contractor Certificate of Registration provisions due to the changed circumstances). Further, this assurance informs the CO that the labor or services to be provided at the new place of employment are the same as the work performed under the temporary agricultural labor certification.

Second, the employer would be required to assure that it complied with its duty to provide a copy of the modified job order to workers. *See* 20 CFR 655.122(q). Third, the employer would assure that it will retain and make available all documentation substantiating the amendment request, if approved by the CO, following the procedures at § 655.167. For example, an H–2ALC would be required to retain, and submit upon request, the fully-executed work contract with the grower at each place of employment added.

Proposed paragraph (c) sets forth the procedures for processing amendment requests. Given the urgency of the circumstances under which an employer would submit a post-certification amendment request, the Department proposes the CO to review the employer's request and issue a decision within 3 business days of receipt. In deciding whether to grant the request, the CO would take into

consideration whether the employer sufficiently justified its request, whether the employer provided the necessary assurances, and how the amendment will affect the underlying labor market test for the job opportunity. Amendments would not be effective unless and until approved by the CO.

The Department invites comments on all aspects of the proposal to allow post-certification amendments. For example, the Department seeks comments on whether post-certification amendments should be permitted and, if so, the conditions under which an employer should be permitted to request amendments to a certification. The Department is particularly interested in comments that address the types of circumstances that should be considered extraordinary and unforeseeable for the purposes of post-certification amendments and the volume and frequency of post-certification amendments anticipated. The Department also invites comment on methods through which the Department can balance employers' needs to adapt quickly to changed circumstances with the Department's need to protect the integrity of the labor certification program, such as comments that explain the advantages or disadvantages of an attestation-based amendment process and alternative processes. The Department is especially interested in comments that specify the types of limitations it should impose on post-certification amendments, such as comments that address the necessity of a time limit on post-certification amendment requests, and whether the Department should consider alternatives, such as limiting requests to 45 days after certification, after which time the employer could submit an emergency processing request; 30 days after certification, consistent with the proposed end of the recruitment period for the certification; or 60 days after certification, consistent with the normal timeframe for submitting the job order. Finally, the Department seeks comments regarding the reasonableness of the timeframe for CO review and determination.

H. Integrity Measures

1. Section 655.180, Audit

The Department proposes minor revisions to this section to clarify the procedures by which OFLC conducts audits of applications for which certifications have been granted. Proposed revisions to paragraphs (b)(1) and (2) clarify that audit letters will specify the documentation that employers must submit to the NPC, and that such documentation must be sent to the NPC not later than the due date specified in the audit letter, which will be no more than 30 calendar days from the date the audit letter is issued. In paragraph (b)(2), the Department proposes to revise the timeliness measure from the date the NPC receives the employer's audit response to the date the employer submits its audit response. This change is more consistent with other filing requirements contained in this proposed rule and better ensures employers' ability to timely submit their responses. Proposed revisions to paragraph (b)(3) clarify that partial audit compliance does not prevent revocation or debarment. Rather, employers must fully comply with the audit process in order to avoid revocation under § 655.181(a)(3) or debarment under § 655.182(d)(1)(vi) based on a finding that the employer impeded the audit.

The Department proposes adding language to paragraph (c) to clarify that the CO can issue more than one request for supplemental information if the circumstances warrant. It is current practice for the CO to issue multiple requests for supplemental information to ensure employers have every opportunity to comply fully with audit requests and to ensure the CO's audit findings are based on the best record possible; this proposal would codify that practice.

Finally, the Department proposes revisions in paragraph (d) to clarify the referrals a CO may make as a result of audit, including updating the name of the office within the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, that will receive referrals related to discrimination against eligible U.S. workers.

2. Section 655.181, Revocation

The Department proposes minor revisions to paragraph (b)(2) of this section to clarify that if an employer does not appeal a final determination to revoke a certification according to the procedures in proposed § 655.171, that determination will become final agency action. The Department has removed language referring to the timeline for filing an appeal, as that information is provided in proposed § 655.171.

3. Section 655.182, Debarment; 29 CFR 501.16, Sanctions and Remedies—General; 29 CFR 501.19, Civil Money Penalty Assessment; 29 CFR 501.20, Debarment and Revocation; 29 CFR 501.21, Failure To Cooperate With Investigations; 29 CFR 501.41, Decision and Order of Administrative Law Judge; 29 CFR 501.42, Procedures for Initialing and Undertaking Review; 29 CFR 501.43, Responsibility of the Office of Administrative Law Judges; 29 CFR 501.44, Additional Information, if Required; and 29 CFR 501.45, Final Decision of the Administrative Review Board

The Department proposes to revise the debarment provision for the H–2A labor certification program to improve integrity and promote compliance with program requirements. Under the INA, the Department may not issue a certification for an H–2A worker if the Secretary has determined that the employer substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. Section 218(b)(2)(A) of the INA, 8 U.S.C. 1188(b)(2)(A). The Department implemented this INA provision by enacting regulations allowing the debarment of employers, and later agents and attorneys, and their successors in interest, who appeared before it, and the effect of the debarment was that a debarred entity will not be issued future labor certifications. *See* 20 CFR 655.182(a), (b); 20 CFR 655.118(a) (2008); 20 CFR 655.110(a) (1987). The Department proposes to revise § 655.182 to clarify that if an employer, agent, or attorney is debarred from participation in the H–2A program, the employer, agent, or attorney, or their successors in interest, may not file future *Applications for Temporary Employment Certification* during the period of debarment. *See* proposed 20 CFR 655.182(b). If any such applications are filed, the Department will deny them without review. *See id.* The proposed revision to § 655.182 does not change the regulation's current prohibition on debarred entities' participation in the H–2A program in ways other than the filing of the *Application for Temporary Employment Certification,* such as placing advertisements, or recruiting workers.

When an application is filed by a debarred entity under the current regulations, the Department's practice has been to issue a NOD before denying the application pursuant to § 655.182. However, the INA does not require the issuance of such a notice in this

instance. Section 218(c)(2) of the INA, 8 U.S.C. 1188(c)(2), requires that an employer be notified within 7 days of the date of filing if the application does not meet the standards for approval. The INA's grant of debarment authority for the H–2A labor certification program appears in the section dealing with the conditions for denial of certification and requires the Department to deny certification on any application sought by a debarred employer. *See* section 218(b) of the INA, 8 U.S.C. 1188(b). Thus, when a debarred employer files an application, the Department is statutorily required to deny the application. There would be little to be gained from issuing a NOD and offering the employer an opportunity to correct the deficiency where the deficiency cannot be overcome.[95] Processing applications filed by, or through, an entity that has been debarred imposes a resource burden for the Department though the Department has no discretion over the issuance of such certifications.

Under the proposal, if an employer represented by a debarred agent or attorney files an application, the application would be denied without review. Following the denial, in order to obtain certification, the employer would need to submit a new application without the debarred entity as the employer's representative. Finally, as with all certification denials, denials on the basis of debarment will be appealable to OALJ pursuant to § 655.164.

The Department also proposes to revise § 655.182 to allow for the debarment of agents or attorneys, and their successors in interest, based on their own misconduct. Since the 2008 Final Rule, the H–2A regulations have allowed the Department to debar an agent or attorney based on its participation in the employer's substantial violation. *See* 20 CFR 655.182(b); 2010 Final Rule, 75 FR 6884, 6936–37; 2008 Final Rule, 73 FR 77110, 77188. The Department proposes to hold agents and attorneys of the employer accountable in debarment for their own violations as well as for their participation in the employer's violation. Under proposed § 655.182(a), the Department may debar an agent or attorney for its own substantial violations, as those are defined in § 655.182(d). The Department also proposes conforming revisions to the definition of ''successor in interest'' in § 655.103(b) to reflect that a debarred agent's or attorney's successor in interest may be held liable for the debarred agent's or attorney's violation.

The Department has had concerns about the role of agents in the H–2A program, and has questioned whether agents' participation in the H–2A labor certification process is undermining compliance with program requirements. However, the current H–2A debarment provision does not provide a mechanism for holding the agent or attorney accountable for its own violation unless the Department finds that it participated in the employer's violation. Nevertheless, there may be situations where an agent or attorney commits a violation that the Department finds it cannot or, in its discretion, should not, attribute to the employer. For example, if an agent that is responsible for conducting recruitment for an H–2A employer fails to refer U.S. worker applicants to the employer, the Department may find, in appropriate circumstances, that only the agent should be debarred. In addition, if an agent forges employer signatures to file fraudulent applications for H–2A workers, or if an agent or attorney commits a heinous act within the meaning of § 655.182(d), the employer may not necessarily be responsible for such misconduct.

The Department has determined that in order to improve program integrity and compliance, agents and attorneys should be accountable for their own misconduct independent of the employer's violation. This revision would make agent and attorney misconduct debarrable to the same extent as the misconduct of the employer-clients. Further, the proposal would institute consistency between the H–2A regulations and the other labor certification programs the Department administers. *See* 20 CFR 655.73(b) (H–2B); 20 CFR 656.31(f) (PERM).

The Department has inherent power to regulate the conduct of agents and attorneys who practice before it, as well as the authority to debar such individuals for unprofessional conduct. As the Department has previously explained, administrative agencies have the authority to regulate who can practice and participate in administrative proceedings before them. *See Goldsmith* v. *U.S. Board of Tax Appeals,* 270 U.S. 117, 121 (1926); *Koden* v. *U.S. Dep't of Justice,* 564 F.2d 228, 232–33 (7th Cir. 1977). Such power exists even if they do not have express statutory authority to prescribe the qualifications of those entities. *Touche Ross & Co.* v. *SEC,* 609 F.2d 570, 582 (2d Cir. 1979). In addition, agencies with the authority to determine who may practice before them have the power to debar or discipline such individuals for unprofessional conduct. *Koden,* 564 F.2d at 233.

The Department has exercised the authority to debar agents and attorneys from the H–2A program for the last decade. In the 2008 Final Rule, the Department revised the debarment provision to permit the debarment of employers' agents and attorneys. 73 FR 77110, 77188. The 2010 Final Rule maintained the provision permitting the debarment of agents and attorneys for participating in the employer's violation to ''ensure that we are able to address substantial violations committed by the attorneys or agents themselves, or committed in concert with the employers.'' 75 FR 6884, 6936–37. The preamble explained that debarment of agents and attorneys was necessary to uphold the integrity and effectiveness of the H–2A program. *Id.*

As the examples provided above illustrate, where an agent or attorney commits a substantial violation, though generally the employer would be responsible for the misconduct, the Department believes it is necessary to have the ability to target debarment actions at the bad actor directly. Under this proposal, and as has been the case in the H–2A program for the last decade, agents and attorneys could still be debarred for participating in the employer's substantial violation, just as the employer could be debarred based on the agent or attorney's misconduct.

I. Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Operations

The Department proposes changes to this section mainly to conform the labor certification process for herding and the production of livestock on the range to other revisions in the proposed rule, as appropriate. Minor proposed changes include replacing a dash between two sections with the word ''through'' (*e.g.,* replacing ''§§ 655.200–655.235'' with ''§§ 655.200 through 655.235'') for technical consistency with other sections of the proposed rule. The Department seeks public comment on the substantive changes, which are discussed below, and affect portions of proposed §§ 655.205, 655.211(a)(2), 655.215(b) introductory text and (b)(1), 655.220(b), (c), and 655.225(b), (d). Except for these minor and substantive proposed changes, the Department is not reconsidering—and therefore not requesting comment on—any other portions of §§ 655.200 through 655.235. In particular, the Department is neither

[95] Any challenges to the debarment would be raised separately. Under current regulations, the employer, agent, or attorney has an opportunity to challenge the debarment before it becomes effective. *See* 20 CFR 655.182(f), 29 CFR 501.20(e).

reconsidering nor seeking comment on the wage rate methodology for herding and range livestock job opportunities. Instead, the entirety of §§ 655.200 through 655.235 are reprinted in subpart B of this proposed rule for ease of reference only.

1. Section 655.205, Herding and Range Livestock Job Orders

The Department proposes to revise § 655.205 to reflect proposed revisions to the normal job order filing procedures in § 655.121 and to clarify variances from proposed § 655.121 that remain for job opportunities involving herding or production of livestock on the range. Consistent with current procedures, a job order filed under § 655.205 would not be subject to the timeframe requirements specified in paragraphs (a) and (b) of § 655.121 or the SWA job order review procedure described in paragraphs (e) and (f). Rather, an employer qualifying for processing under §§ 655.200 through 655.235 would submit its completed job order to the NPC at the same time as the related *Application for Temporary Employment Certification,* which it must submit no less than 45 days before its first date of need in compliance with the timeframe requirement of § 655.130(b), unless the application qualifies for emergency situations processing under § 655.134. The NPC would coordinate review of the job order with the SWA and address any job order and *Application for Temporary Employment Certification* deficiencies in a manner consistent with the provisions set forth in §§ 655.140 through 655.145.

2. Section 655.211, Herding and Range Livestock Wage Rate

The Department proposes to revise § 655.211 for consistency with the annual AEWR update notice procedure proposed in § 655.120(b). As discussed in relation to § 655.120(b), providing a short transition period (*i.e.,* no more than 14 days) for an employer to implement a new higher AEWR prevents adverse effect on the wages of U.S. workers by quickly implementing any newly required higher wage rate, while giving employers a brief window to update their payroll systems to implement a newly-issued wage.

3. Section 655.215, Procedures for Filing Herding and Range Livestock Applications for Temporary Employment Certification

The Department proposes revisions to simplify § 655.215 and conform to revisions in this proposed rule. In paragraph (b) detailed language about required additional information is obsolete, as the job order Form ETA–790/790A addenda include data fields for employers to provide detailed information about the job opportunity. Revised language in paragraph (b)(1) clarifies that an *Application for Temporary Employment Certification* for herding or production of livestock on the range may cover multiple areas of intended employment in one state or in two or more contiguous states.

4. Section 655.220, Processing Herding and Range Livestock Applications for Temporary Employment Certification

In addition to minor revisions to § 655.220 proposed for consistency within the proposed rule, the Department proposes to revise paragraph (b) to reflect the centralization of job order dissemination from the NPC to the SWAs as proposed in § 655.121. Consistent with § 655.121, after the content of a job order for herding or production of livestock on the range has been approved, the NPC would transmit the job order to all applicable SWA to begin recruitment.

5. Section 655.225, Post-Acceptance Requirements for Herding and Range Livestock

The Department proposes minor revisions in § 655.225 to simplify language and reflect procedural changes proposed in this proposed rule, such as the proposed revision of the duration of the recruitment period at § 655.135(d). The Department recently proposed revisions to § 655.225 in a separate proposed rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.*[96] Those proposed revisions are not reflected in this proposed rule.

J. Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations

1. Section 655.300, Scope and Purpose

The introductory provision proposes to establish that, because of the unique nature of the occupations, employers who seek to hire temporary agricultural foreign workers to perform animal shearing, commercial beekeeping, custom combining, and reforestation as defined in proposed §§ 655.103 and 655.301, are subject to certain standards that are different from the regular H–2A procedures in subpart B of the part. To date, the Department has processed these applications using Departmental guidance letters (TEGLs), one specific to each occupation, containing variances that are substantially similar to those standards and procedures the Department now proposes.[97] In this proposed rule, the Department proposes to create a set of procedures for employers who employ workers engaged in these four occupations. Establishing a single set of procedures, with certain variations where appropriate, for these occupations will create administrative efficiencies for the Department, promote greater consistency in the review of H–2A applications, provide foreign workers and workers in the United States similarly employed with largely the same benefits and guarantees, and provide greater clarity for employers with respect to program requirements. The Department seeks comments from the public on all aspects of these proposed regulations.

In order to employ foreign workers under these procedures, an employer's job opportunity must possess all of the characteristics described in §§ 655.300 through 655.304. As a preliminary matter, the job opportunity must involve work in one of the covered occupations: Animal shearing, commercial beekeeping, custom combining, or reforestation. In addition, the procedures apply to job opportunities in those occupations where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment in one or more contiguous States. Unless otherwise specified in the proposed procedures, employers whose job opportunities meet the criteria under §§ 655.300 through 655.304 must comply with the H–2A requirements in

[96] 83 FR 55994 (Nov. 9, 2018). On June 17, 2019, the Department submitted a final rule of that rulemaking to OMB for review. *See https://www.reginfo.gov/public/do/eoDetails?rrid=129233.*

[97] *See* Training and Employment Guidance Letter, No. 17–06, Change 1, Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041*; Training and Employment Guidance Letter, No. 33–10, Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043*; Training and Employment Guidance Letter, No. 16–06, Change 1, Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040*; and Training and Employment Guidance Letter, No. 27–06, Special Guidelines for Processing H–2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations (June 12, 2007), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2446.*

§§ 655.100 through 655.185,[98] including payment of the highest applicable wage rate, determined in accordance with § 655.122(l) for all hours worked.[99]

Where the job opportunity does not fall within the scope of the covered occupations in §§ 655.300 through 655.304, the employer must comply with all of the regular H–2A procedures. If an employer submits an application containing information and attestations indicating that its job opportunity is eligible for processing under these proposed regulations but later, as a result of an investigation or other compliance review, it is determined that the employment was not eligible for inclusion under these regulations, the employer will be responsible for compliance with all of the regular H–2A procedures and requirements in §§ 655.100 through 655.185. In addition, the Department may seek other remedies, such as civil monetary penalties and potentially debarment from use of the H–2A program, for the violations.

2. Section 655.301, Definition of Terms

The proposed definitions contained in this section define the occupations subject to proposed §§ 655.300 through 655.304, and are intended to assist employers in understanding the only types of work that qualify for these regulatory variances. Though the TEGLs did not contain definitions of these terms, the proposed definitions are based on the Department's current understanding of what work in these occupations generally involves.

The proposed definition of *animal shearing* describes typical activities associated with the shearing and crutching of sheep, goats, or other animals producing wool or fleece. Those activities include gathering, moving, and sorting animals into shearing yards, stations, or pens; placing animals into position prior to shearing; selecting and using suitable equipment and tools for shearing; shearing animals with care according to industry standards; marking, sewing, or disinfecting any nicks and cuts due to shearing; cleaning and washing animals after shearing; gathering, storing, loading, and delivering wool or fleece to storage yards, trailers, or other containers; and maintaining, oiling, sharpening, and repairing equipment and other tools used for shearing. Wool or fleece grading constitutes animal shearing under the proposed definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew. In addition, for purposes of this definition, hauling shearing equipment would be considered animal shearing under the proposed definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the shearing crew.

The proposed definition of *commercial beekeeping* describes typical activities associated with the care or husbandry of bee colonies for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers. Those services include assembling, maintaining and repairing hives, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing, raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies.

The proposed definition of *custom combining* describes typical activities associated with combining crops for agricultural producers, including operating self-propelled combine equipment (*i.e.,* equipment that reaps or harvests, threshes, and swath or winnow the crop); performing manual or mechanical adjustments to cutters, blowers, and conveyers; performing safety checks on harvesting equipment; and maintaining and repairing equipment and other tools used for performing swathing or combining work. Transporting harvested crops to elevators, silos, or other storage areas constitute activities associated with custom combining for the purposes of the proposed definition only where such activities are performed by workers who are employed by the same employer as the combining crew and who travel and work with the custom combining crew. Though transporting equipment from one field to another does not constitute agricultural work, the Department finds it is appropriate to include those activities in the proposed definition of custom combining because such activities are a necessary part of performing combine work on an itinerary. Thus, solely for the purposes of the proposed variance in §§ 655.300 through 655.304, transporting combine equipment and other tools used for custom combining work from one field to another is included in the definition of custom combining only where such activities are performed by workers who are employed by the same employer as the custom combining crew and who travel and work with the custom combining crew. Component parts of custom combining not performed by the harvesting entity, such as grain cleaning, do not fall within the proposed definition. The planting and cultivation of crops, and other related activities, are not considered custom combining for the purposes of this proposed definition.

The Department proposes a definition of *reforestation* for inclusion in § 655.103, as discussed above. As noted above, the proposed rule states that reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way. As defined in proposed § 655.103, reforestation activities exclude right-of-way vegetation management activities such as the removal of vegetation that may interfere with utility lines or lines-of-sight, herbicide application, brush clearing, mowing, cutting, and tree trimming around roads, railroads, transmission lines, and other rights-of-way. Employers seeking workers for occupations involving these activities therefore would not be eligible to file under the provisions set forth in §§ 655.300 through 655.304.

The Department seeks comments on all the definitions. In particular, the Department seeks comments on whether the definitions accurately and comprehensively reflect the activities

[98] For example, covered employers must comply, as they do currently, with the processing procedures in 20 CFR 655.150–655.158 related to recruitment. Similarly, they must comply with § 655.122(g) and 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.

[99] Compliance with 20 CFR 655.122(l), as revised by this proposed rule, requires an employer to ''pay the worker at least the AEWR, a prevailing wage if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of § 655.120(c), the agreed-upon collective bargaining rate, the Federal minimum wage, or the State minimum wage rate, whichever is highest, for every hour or portion [of an hour] worked during a pay period.''

workers in these occupations perform and whether a final rule should limit additional job duties that workers may perform under certifications approved under §§ 655.300 through 655.304 beyond those duties outlined in this proposed section.

3. Section 655.302, Contents of Job Orders

a. Paragraph (a), Content of Job Offers

This provision addresses proposed variances from the job order filing requirements in § 655.121. Unless otherwise specified in proposed §§ 655.300 through 655.304, the employer must satisfy the requirements for job orders under § 655.121 and for the content of job orders established under part 653, subpart F, and § 655.122.

b. Paragraph (b), Job Qualifications and Requirements

The Department proposes variances addressing certain aspects of the job qualifications and requirements to clarify those the Department generally considers normal and accepted for these occupations, which may be included in job orders for each of the occupations subject to §§ 655.300 through 655.304. The provisions in this proposed rule, described below, are similar to those provided by the TEGLs for the itinerant animal shearing, commercial beekeeping, and custom combining employers in the H–2A program. The proposed rule does not include variances from the regular H–2A job order requirements for employers in the reforestation occupation. As with all other applications, the CO may require the employer to submit documentation to substantiate the appropriateness of any job qualifications and requirements specified in the job order. Each job qualification listed in the job offer must be bona fide. In all cases, the employer must apply all qualifications and requirements included in the job offer equally to U.S. and foreign workers in order to maintain compliance with the prohibition against preferential treatment of foreign workers contained at § 655.122(a).

i. Animal Shearing

Consistent with the TEGL, the Department proposes to allow a job offer in these occupations to include a statement that applicants must possess up to 6 months of experience in similar occupations and require references for the employer to verify this experience. The job offer may also specify that applicants must possess experience with an industry shearing method or pattern, must be willing to join the employer at the time the job opportunity is available and at the place the employer is located, and must be available to complete the scheduled itinerary under the job order. In addition, U.S. worker applicants who possess experience based on a similar or related industry shearing method or pattern must be afforded a break-in period of no less than 5 working days to adapt to the shearing method or pattern preferred by the employer.

ii. Commercial Beekeeping

Consistent with the TEGL, the Department proposes to allow a job offer in these occupations to include a statement that applicants must possess up to 3 months of experience in similar occupations and require references for the employer to verify this experience. The job offer for commercial beekeeping occupations may also specify that applicants may not have bee, pollen, or honey-related allergies, must possess a valid commercial U.S. driver's license or be able to obtain such license not later than 30 days after the first workday after the arrival of the worker at the place of employment, must be willing to join the employer at the time and place the employer is located, and must be available to complete the scheduled itinerary under the job order.

iii. Custom Combining

Consistent with the TEGL, the Department proposes to allow a job offer in these occupations to include a statement that applicants must possess up to 6 months of experience in similar occupations and require references for the employer to verify applicant experience. The job offer for custom combining occupations may also specify that applicants must be willing to join the employer at the time and place the employer is located and available to complete the scheduled itinerary under the job order.

c. Paragraph (c), Communication Devices

Employers are obligated under § 655.122(f) to provide each worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. Due to the potentially remote, isolated, and unique nature of the work to be performed by workers in animal shearing and custom combining occupations, the proposed procedures would require the employer to provide each worker, without charge or deposit charge, effective means of communicating with persons capable of responding to the worker's needs in case of an emergency. The procedures are consistent with those in place for workers primarily engaged in the herding and production of livestock on the range under the H–2A program. *See* 20 CFR 655.210(d)(2). Communication means are necessary to perform the work and can include, but are not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer would also have to specify in the job order the type(s) of electronic communication device(s) and that such devices will be provided without charge or deposit.

This proposed rule is similar to the Department's current policy in the TEGLs for the itinerant animal shearing and multi-state custom combining occupations.[100] Because of the remote, transient, and unique nature of these occupations, effective means of communication between the employer and the worker are necessary to ensure that the employer is able to check the worker's status, and that the worker is able to communicate an emergency to persons capable of responding.

The Department's current regulation at § 655.122(f) requires an employer to provide all tools, supplies, and equipment required to perform the duties assigned. All employers participating in the H–2A program must comply with the requirement in § 655.122(f), including those employers in the animal shearing, beekeeping, and custom combining industries. Similarly, the Department's current regulation at § 655.122(p) prohibits an employer from making an unlawful deduction that is primarily for the benefit or convenience of the employer. Though the TEGL covering reforestation may allow employers to require workers to provide their own tools and equipment in certain cases, the proposed rule does not provide a variance from the requirements in § 655.122(f) and (p), because all tools, supplies, and equipment required to perform the duties assigned are primarily for the benefit and convenience of the employer. Consequently, employers in the animal shearing, custom combining,

[100] Specifically, the Department's current policy in the TEGLs requires an employer to provide at no cost to each worker in animal shearing and custom combining occupations effective means of communicating with persons capable of responding to the worker's needs in case of an emergency. *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 17–06, Change 1 (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf. See also* Department of Labor, Employment and Training Administration, Advisory: Training and Employment Guidance Letter No. 16–06, Change 1 (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf.*

beekeeping, and reforestation industries must comply with § 655.122(f) and (p) and provide, without charge or deposit charge, to the workers all tools, supplies, and equipment to perform the duties assigned.

These tools, supplies, and equipment include any items required by law, the employer, or the nature of the work to perform the job safely and effectively. For example, if a reforestation employer requires its employees to wear a particular brand or type of boots for safety reasons, or for compliance with the OSHA standards or contractual obligations with upper-tier contractors, the employer must provide the boots without charge or deposit charge. Similarly, if an employer in beekeeping occupations requires certain equipment for safety reasons, such as a veil, gloves, or beekeeping suit, the employer must provide this equipment to the workers without charge or deposit charge. Additional examples of tools, supplies, and equipment that may be required by law, the employer, or the nature of the work in these occupations include combs, cutters, hand pieces, and grinders in the animal shearing occupations; bee brushes, hive tools, smokers, veils, and gloves in the commercial beekeeping occupations; and chainsaws, boots, seedling satchels, planting trowel, rain gear, gloves, ear and eye protection, and protective masks in the reforestation occupations. The Department invites comments as to whether it should require specific tools, supplies, and equipment in these industries, or whether it would be helpful to include in the regulation a list of items that typically are required by law, the employer, or the nature of the work and location, and which must be provided to the workers without charge or deposit.

d. Paragraph (d), Housing

For job opportunities involving animal shearing and custom combining, the employer must specify in the job order that housing will be provided as set forth in § 655.304. As discussed below, employers of workers in these occupations will be permitted to offer mobile housing that meets the standards set forth in § 655.304, except for situations when the mobile housing is located on the range as defined in § 655.201. When the housing unit is on the range, the mobile housing must meet the standards for range housing in § 655.235.

4. Section 655.303, Procedures for Filing Applications for Temporary Employment Certification

Under proposed § 655.303, employers in covered occupations will continue to satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132. In addition, the Department proposes to continue to require employers seeking workers in the covered occupations to provide the locations, estimated start and end dates, and, if applicable, names for each farmer or rancher for whom work will be performed under the job order when filing an *Application for Temporary Employment Certification.* The locations should be identified with as much specificity as possible in order to apprise potential U.S. workers of where the work will be performed and to ensure recruitment in all areas of intended employment.

The Department proposes to continue to allow employers or agricultural associations engaged in the covered occupations to file applications and job orders covering work locations in multiple areas of intended employment and within one or more contiguous States.[101] This approach is warranted by the unique nature of work in these occupations, particularly the itinerant nature of work crews. In addition, the Department proposes to continue to allow an agricultural association to file a master application as a joint employer covering work locations in multiple areas of intended employment within two or more contiguous States.

The Department proposes to apply the geographic limitation in § 655.303(b)(1) and (2) to applications for job opportunities involving commercial beekeeping, with the exception that those applications may include one noncontiguous State at the beginning and end of the period of employment for retrieving bee colonies from and returning them to the overwintering location. For beekeepers, winter months provide an opportunity to engage in colony health and maintenance activities, such as splitting and building colonies, while the bees are not engaged in the pollination, pollen collection, and honey production activities of the rest of the year. Typically, migratory beekeeping operations overwinter their hives in warm-winter states, such as Texas. As warmer weather returns to the rest of the country and plants begin to flower, beekeepers may move their hives from these overwintering locations to the places where their pollination and honey-production activities will take place for the rest of the year, such as cultivated fields and orchards in California and uncultivated fields in North Dakota and South Dakota where clover and wildflowers grow. Apart from accommodating the initial care and gathering of the hives at overwintering locations for transport and the hives' return to the overwintering locations, the Department proposes to maintain the same geographic scope criteria for all applications covered under the provisions at §§ 655.300 through 655.304. Once the hives are moved from the overwintering location to their non-winter destinations, a beekeeping *Application for Temporary Employment Certification* and job order would be limited to multiple areas of intended employment in one or more contiguous States. Where a beekeeping operation involves pollination or honey production activities in non-contiguous States, the employer would be required to submit separate applications. For example, a beekeeping employer could not file an application including an itinerary that begins and ends at a place of employment in Texas and, in between, list places of employment in California, North Dakota, and South Dakota. Instead, the employer could submit two separate applications, one with an itinerary including Texas and California and the other with an itinerary including Texas, North Dakota, and South Dakota.

Under the proposed rule, an employer would need to file one H–2A application for each crew of itinerant workers. This requirement is consistent with current practice for all covered occupations except reforestation, where employers have been permitted to submit one H–2A application covering multiple itineraries. The Department believes permitting multiple crews and itineraries on a single application undermines the integrity and efficacy of U.S. worker recruitment. Therefore, to promote the integrity of the application process in these occupations, and provide consistency across applications in the H–2A program, the proposed rule would require the employer to file one application for each itinerant crew, within the parameters of §§ 655.300 through 655.304.

Aside from these filing variances, the usual H–2A filing requirements would apply to job opportunities involving animal shearing, custom combining,

[101] This would continue the current practice that permits a variance from the geographic scope limitations of 20 CFR 655.132(a) for H–2ALCs engaged in these occupations, and from 20 CFR 655.131(b) for master applications that include worksites in more than two contiguous States.

commercial beekeeping, and reforestation. For example, all H–2ALCs filing under the provisions of §§ 655.300 through 655.304 would be required to comply with § 655.132(d). Thus, employers in those occupations would have to provide fully-executed contracts for each anticipated work location on the itinerary. *See* 20 CFR 655.132(d). Such contracts would demonstrate to the Department the work to be performed along the itinerary with sufficient specificity to allow the Department to ensure compliance with program requirements.

5. Section 655.304, Standards for Mobile Housing

Under the Department's current and proposed regulation at § 655.122(d), an employer must provide housing at no cost to H–2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Additionally, employer-provided housing must meet applicable safety and health standards.[102] Due to the unique nature of animal shearing and custom combining occupations, however, the Department has historically permitted the use of mobile housing for workers engaged in these occupations,[103] the standards for which are found in the TEGLs. The proposed rule continues this longstanding practice, and includes proposed standards for mobile housing for workers engaged in these occupations.

The proposed standards largely incorporate the housing standards in the TEGLs, with two key exceptions. First, the TEGL for workers engaged in animal shearing occupations expressly provides that an animal shearing contractor may lease a mobile unit owned by a crew member or other person or make some other type of ''allowance'' to the owner. Under the proposed rule, such an arrangement is not permitted. Upon further consideration of this practice, the Department concludes that this type of arrangement is inconsistent with the employer's obligation to provide housing at no cost to all H–2A workers and those non-H–2A workers in corresponding employment who are not reasonably able to return to their residences within the same day. *See* section 218(c)(4) of the INA, 8 U.S.C. 1188(c)(4); 20 CFR 655.122(d)(1). Allowing an employer to compensate a worker for housing the worker owns or secures inappropriately shifts at least part of this obligation from the employer to the worker. By requiring animal shearing employers to independently secure sufficient housing in advance of the start date, as required of all other H–2A employers, this change ensures that all housing (including mobile units) has been inspected and certified as meeting housing standards before a temporary labor certification is issued. This change further ensures that all prospective applicants have access to the job opportunity without preference for applicants who possess their own units. Second, the proposed standards align less closely than the TEGLs with the standards for range housing found at § 655.235. Although, historically, the animal shearing and custom combining TEGLs set out the same or similar mobile housing standards as the standards applicable to range housing, there are important differences in these occupations that necessitate different standards for range housing (for workers engaged in herding or the range production of livestock) and mobile housing (for itinerant workers engaged in animal shearing and custom combining occupations). Specifically, the standards for range housing anticipate that workers generally will be on call 24 hours per day, 7 days a week in uniquely remote, isolated areas. Animal shearing and custom combining workers, on the other hand, though itinerant, typically work in less isolated areas with greater access to facilities, and generally there is no expectation that these workers continuously be on call.

The Department recognizes that itinerant workers engaged in the animal shearing and custom combining occupations may work in locations that meet the definition of range in § 655.201 and, therefore, requires use of housing that meets only the standards for range housing in § 655.235 for some portion of the period of employment. In these situations, the Department proposes that mobile housing must be inspected to ensure that it meets the standards for range housing, and that it needs to meet the standards for range housing in § 655.235 only during the period in which the housing is located on the range to enable work to be performed on the range. The applicability of the standards for range housing or mobile housing depends on the sites where mobile housing units are parked. This provision intends to address the fact that itinerant workers in the animal shearing and custom combining occupations may, on occasion, be working in areas so remote that it is not feasible for the employer to provide certain amenities, such as hot and cold water under pressure. However, once the mobile housing unit is moved to a location off of the range, the mobile housing standards in § 655.304 are once again applicable. Therefore, a mobile housing unit that the employer anticipates using both on and off the range is subject to both the procedure for securing and submitting a range housing inspection approval in § 655.230(b) and (c) and the procedure for securing and submitting an inspection approval of the mobile housing unit as proposed in § 655.122(d)(6).

The Department recognizes that the mobile housing units Canadian employers use to perform custom combining operations in the United States are typically located in Canada when not in use, making it unfeasible for these employers to secure pre-occupancy housing inspection and approval from a SWA. Therefore, the Department proposes to continue the longstanding practice reflected in the TEGL of permitting these employers to secure approval of each mobile unit from an authorized representative of the Federal or provincial government of Canada, in accordance with inspection procedures and applicable standards for such housing under Canadian law or regulation.

The proposed standards for mobile housing are for use *only* for itinerant workers engaged in the animal shearing and custom combining occupations. Although the commercial beekeeping [104] and reforestation [105] occupations are also frequently itinerant, the TEGLs for these occupations historically have not allowed for mobile housing, and employers in these occupations tend to house their workers in fixed-site housing, hotels, and motels. The Department invites comment from employers engaged in commercial beekeeping and reforestation regarding

[102] Specifically, employer-provided housing must meet the OSHA standards at 29 CFR 1910.142, or the ETA standards at §§ 654.404 through 654.417 of this chapter, whichever standards are applicable under § 654.401 of this chapter.

[103] *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 17–06, Change 1, Attachment B (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf;* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 16–06, Change 1, Attachment A (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf.*

[104] *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 33–10 (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL33-10.pdf.*

[105] *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 27–06 (June 12, 2007), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL27-06.pdf.*

the current practices and their specific housing needs.

a. Paragraph (b)

As proposed, the standards for mobile housing combine certain provisions from the standards for range housing at § 655.235 and the ETA housing standards at §§ 654.404 through 654.417, as did the TEGLs. The proposed standards are intended to protect the health and safety of workers engaged in animal shearing and custom combining occupations, while also being sufficiently flexible to apply to a variety of mobile housing units. In its enforcement experience, the Department has seen a variety of mobile housing units used by workers engaged in these occupations, including RVs, trailers, and custom bunk-houses built in the back of tractor-trailers. Some mobile housing units are complete with functioning bathrooms, showers, generators, and washer/dryers, while others are smaller and simpler. Consequently, the Department proposes to allow mobile housing units without certain facilities (*e.g.,* showers and laundry facilities) as long as the employer otherwise supplements these facilities. For example, if the mobile housing unit does not contain bathing facilities, facilities with hot and cold water under pressure must be provided at least once per day. This standard contemplates that some mobile housing units may not include showers, but the mobile housing sites, such as farms, ranches, campgrounds, RV parks, or cities and towns, should have bathing facilities, and workers must be afforded access to these facilities. The Department requests comments on the feasibility of these standards in the animal shearing and custom combining occupations, as well as if any additional standards for mobile housing should be incorporated.

b. Paragraph (c), Housing Site

The proposed rule incorporates the standards for the housing site from the range housing standards and the TEGLs. Specifically, the Department proposes that mobile housing sites must be well drained and free from depressions where water may stagnate.[106] In addition, the Department proposes that mobile housing sites shall be located where the disposal of sewage is provided in a manner that neither creates, nor is likely to create a nuisance or a hazard to health; and shall not be in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards. Mobile housing sites shall also be free from debris, noxious plants (*e.g.,* poison ivy, etc.), and uncontrolled weeds or brush.[107] The Department has determined that employers will not find it overly burdensome to place mobile housing units at sites that comply with these provisions.

c. Paragraph (d), Drinking Water Supply

Similar to the TEGLs for these occupations, the Department proposes that an adequate and convenient supply of potable water that meets the standards of the local or state health authority must be provided, as well as individual drinking cups.[108] The Department also proposes to require employers to provide a cold water tap within a reasonable distance from each individual living unit when water is not provided in the unit. Itinerant workers engaged in animal shearing and custom combining occupations may stay in mobile housing units with water tanks or water hookups that provide water in the unit. If no water is available in the unit, workers may park the mobile housing unit within a reasonable distance of a cold water tap.[109] Additionally, adequate drainage facilities for overflow and spillage must be provided.

d. Paragraph (e), Excreta and Liquid Waste Disposal

The Department proposes to require that toilet facilities, such as portable toilets, RV or trailer toilets, privies, or flush toilets, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the applicable local, state, or federal health authority, whichever is most stringent. Many mobile housing units are equipped with toilet facilities that would comply with these standards. Where mobile housing units are not equipped with toilet facilities, the employer must provide access to toilet facilities.

Where mobile housing units contain toilet facilities, the employer must provide access to sewage hookups whenever feasible. Some campgrounds or RV parks have sewage hookups; the employer must place workers at these locations if feasible. If wastewater tanks are used because such access to sewage hookups is unavailable or the mobile housing units have toilet facilities but are not designed to connect to sewage hookups, the employer must make provision to regularly empty the wastewater tanks. Consistent with the TEGLs, if pits are used for disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled in completely after each use.[110] The maintenance of disposal pits must be in accordance with local and state health and sanitation requirements.

The proposed mobile housing standards for excreta and liquid waste disposal deviate from the standards for range housing in § 655.235 and the TEGLs for these occupations, which do not require toilet facilities. Itinerant workers in the animal shearing and custom combining occupations frequently work in relatively more populated areas that provide easy access to running water, indoor plumbing, sewage hookups, vault toilets, and/or portable toilets. The Department, therefore, concludes that it is reasonable and necessary to require employers to provide toilet facilities. The Department invites comment on whether any additional standards (*i.e.,* specific toilet facilities, a specific number of toilet facilities, etc.) should be included.

e. Paragraph (f), Housing Structure

Consistent with the TEGLs, the Department proposes to require that housing be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants. Similarly, the housing must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering, and each housing unit must have at least one window or a skylight that can be opened directly to the outdoors.[111] Acknowledging the variety of possible mobile housing units, the Department has not proposed specific measurements for windows, but invites comment on whether specific measurements should be required.

[106] This provision is similar to standards for range housing found at § 655.235(a)(1) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[107] These provisions are similar to the ETA housing standards found at § 654.404, but exclude the provision that requires that the housing site must provide a space for recreation reasonably related to the size of the facility and the type of occupancy. *See* 20 CFR 654.404(d).

[108] These proposed standards are similar to the standards for range housing found at § 655.235(b); however, these standards exclude the provision for delivery of water. These provisions are also similar to the standards found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[109] Unlike the ETA housing standards, which requires that a cold water tap be provided within 100 feet of each living unit, the Department's proposal does not require the water tap to be located within a certain number of feet of the mobile housing unit because some campgrounds may not comply with these specific standards. *See* 20 CFR 654.405(b).

[110] TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[111] These standards are also identical to those included in the standards for range housing in § 655.235(d).

Housing standards for fire, safety, and first aid discuss a second means of escape, which may be a window if the window is sufficiently large to allow for escape.

f. Paragraph (g), Heating

The Department proposes to fully incorporate the heating standards from § 655.235(e). These standards are also substantially the same as those contained in the TEGLs for these occupations.[112]

g. Paragraph (h), Electricity and Lighting

The Department proposes that, barring unusual circumstances that prevent access, electrical service or generators must be provided. This may include an electrical hookup, solar panel, battery generator, or other type of device that provides electrical service. This provision differs from the standards for range housing promulgated in § 655.235(f) and existing standards for mobile housing contained in the TEGLs, which require only that lanterns be provided if it is not feasible to provide electrical service to mobile housing. The Department has determined that, in the majority of circumstances, workers in animal shearing and custom combining occupations will be in areas with access to electrical service; therefore, it is necessary and reasonable to require that it be accessible to workers in mobile housing units. Many mobile housing units, such as some RVs, will comply with this requirement. In the rare circumstances in which it is not feasible to provide electrical service, lanterns must be provided to each unit, one per occupant of each unit.[113]

h. Paragraph (i), Bathing, Laundry, and Hand Washing

The Department proposes that bathing facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per day. Some mobile housing units may contain functioning showers with hot and cold water under pressure; in which case, the employer has complied with this provision as long as all workers have access to the bathing facilities. If the mobile housing units do not have bathing facilities, workers should have access to facilities no less frequently than once per day. There are no restrictions on how the employer may provide access to these facilities (*e.g.,* at a campground, RV park, ranch bunkhouse, temporary labor camp, motel, etc.).

Similarly, the Department proposes that the employer must provide access to laundry facilities, supplied with hot and cold water under pressure, at no cost to all occupants no less frequently than once per week. The Department anticipates that most mobile housing units will not include laundry facilities; therefore, the employer must supplement its mobile housing units with laundry facilities.

The Department also proposes that alternative bathing and laundry facilities, such as washtubs, must be available to all occupants at all times when water under pressure is unavailable. For example, if a worker needs to bathe or launder clothes, but is hours away from being provided access to a shower or days away from being provided access to a laundry facility, a washtub must be available so that the worker is able to bathe or launder clothes without water under pressure.

Finally, the Department proposes that hand washing facilities must be available to all occupants at all times, even when water under pressure is not available.

These proposed standards differ from the standards for range housing promulgated in § 655.235(g) and the existing standards for mobile housing in the TEGLs, which require that mobile bathing, laundry, and handwashing facilities must be provided when it is not feasible to provide hot and cold water under pressure. However, itinerant workers in the animal shearing and custom combining occupations frequently work in relatively more populated areas that provide easy access to running water with hot and cold water under pressure, and the Department therefore concludes that it is necessary and reasonable to provide periodic, if not constant, access to these amenities.

i. Paragraph (j), Food Storage

The Department proposes that provisions for mechanical refrigeration of food at a temperature of not more than 45 degrees Fahrenheit must be provided.[114] When mechanical refrigeration of food is not feasible, the employer must provide another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator.[115]

j. Paragraph (k), Cooking and Eating Facilities

The proposed standards for cooking and eating facilities are nearly identical to those in the TEGLs. The Department proposes that, when workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation, and stoves or hotplates. The Department also proposes that wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.[116]

k. Paragraph (l), Garbage and Other Refuse

The proposed standards for garbage and refuse are substantially the same as those in the TEGLs. The Department proposes that durable, fly-tight, clean containers must be provided to each housing unit for storing garbage and other refuse. Provision must be made for collecting refuse, which includes garbage, at least twice a week or more often if necessary for proper disposal.[117] The Department also proposes that the disposal of refuse, which includes garbage, shall be in accordance with applicable local, state, and federal law, whichever is most stringent.[118]

l. Paragraph (m), Insect and Rodent Control

With minor revisions, the proposed standards for insect and rodent control are the same as those in the TEGLs. The Department proposes that appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents, and other vermin.[119]

m. Paragraph (n), Sleeping Facilities

The Department proposes that a separate comfortable and clean bed, cot,

[112] TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[113] This proposed standard is similar to the standards for range housing found at § 655.235(f)(2) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[114] This proposed standard is similar to the ETA housing standards found at § 654.413(a)(3).

[115] This proposed standard is similar to the standards for range housing found at § 655.235(h) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B, but excludes references to dehydrating or salting foods.

[116] These proposed provisions are similar to the standards for range housing found at § 655.235(i) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[117] These proposed provisions are similar to the standards for range housing found at § 655.235(j) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[118] This proposed provision is similar to ETA housing standards found at § 654.414.

[119] This proposed provision is similar to the standards for range housing found at § 655.235(k) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

or bunk, with a clean mattress, must be provided for each person, except in a family arrangement.[120] This proposed provision is similar to the standards for range housing found in § 655.235(l) and in the current TEGLs for animal shearing and custom combining occupations, excluding the variance that allows for workers to share beds in certain circumstances. The range housing standards allow workers to share a bed for a short period of time, so long as separate bedding is provided, while transitioning from one herder tending the livestock on the range to another herder. However, the Department concludes that such a variance is not necessary, and therefore not appropriate, for mobile housing units for workers engaged in custom combining and animal shearing not located on the range. Clean and sanitary bedding must be provided to for each person. The Department also proposes that no more than double deck bunks are permissible.[121]

n. Paragraph (o), Fire, Safety, and First Aid

This standard is also substantially the same as the ones in the TEGLs. The Department proposes that all units in which people sleep or eat must be constructed and maintained according to applicable local or state fire and safety law; no flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use; mobile housing units must have a second means of escape through which the worker can exit the unit without difficulty; and adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the mobile housing.[122]

o. Paragraph (p), Maximum Occupancy

The Department proposes that the number of occupants housed in each mobile housing unit must not surpass the occupancy limitations set forth in the manufacturer specifications for the unit. The Department recognizes that implementing space standards in mobile housing is difficult because mobile housing is, by its nature, compact. Many RVs and trailers incorporate beds in unexpected places. However, workers should be able to live comfortably in the space provided, and the employer must not house more workers than that for which such space is designed. For example, an RV intended for 5 people must not be used to house more than 5 workers. Similarly, if the mobile housing unit in which the employer houses 20 workers has 1 shower facility, not all workers may have access to the shower facility. The Department welcomes comment on whether specific space standards should be incorporated.

K. Terminology and Technical Changes

The Department proposes to revise various terms and phrases used throughout the regulation. These modifications would improve the regulation's internal consistency, or correct or update the relevant terms or titles. These modifications are explained below.

- The Department proposes to use the term ''*Application for Temporary Employment Certification*'' throughout the regulation when referring to Form ETA–9142A for clarity and to improve the regulation's internal consistency.
- The Department proposes to use the term ''agricultural association'' in place of ''association'' to ensure consistency with the terms defined in § 655.103(b).
- The Department proposes to change the term ''worksite'' to ''place of employment'' throughout the regulation to ensure consistency with the terms defined in § 655.103(b).
- The Department proposes to add the word ''calendar'' before the word ''days'' in a number of provisions, to clarify that the timeframe or deadline in question is based on calendar days, not business days.
- The Department proposes to change the term ''temporary labor certification'' to ''temporary agricultural labor certification'' to ensure consistency throughout the regulation and with the definition of ''temporary agricultural labor certification'' in § 655.103(b).
- The name of the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices, has been changed to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, to reflect its current name.
- The Department proposes additional changes throughout the text to correct typographical errors and improve clarity and readability. Such changes are nonsubstantive and do not change the meaning of the current text. Substantive changes to the current regulatory text are discussed in the corresponding section of the preamble.

III. Discussion of Proposed Revisions to 29 CFR Part 501

The Department proposes revisions to the regulations at 29 CFR part 501, which set forth the responsibilities of WHD to enforce the legal, contractual, and regulatory obligations of employers under the H–2A program. WHD has a statutory mandate to protect U.S. workers and H–2A workers. The Department proposes these amendments concurrent with and in order to complement the changes ETA proposes to its certification procedures.

A. Conforming Changes

Where discussed and noted above in the Section-by-Section Analysis of 20 CFR part 655, the Department proposes various revisions to 29 CFR part 501, which will conform to revisions the Department is proposing to 20 CFR part 655. These proposed conforming revisions include, among others, to add or revise (including technical revisions) the following definitions of terms in § 501.3, to conform to proposed changes to 20 CFR 655.103(b): Act, Administrator, adverse effect wage rate, agent, agricultural association, agricultural labor, applicant, Application for Temporary Employment Certification, area of intended employment, attorney, Certifying Officer, Chief Administrative Law Judge, corresponding employment, Department of Homeland Security, employer, Employment and Training Administration, first date of need, H–2A petition, job order, joint employment, logging employment, maximum period of employment, metropolitan statistical area, National Processing Center, Office of Foreign Labor Certification, OFLC Administrator, period of employment, piece rate, pine straw activities, place of employment, reforestation activities, Secretary of Labor, successor in interest, temporary agricultural labor certification, United States, U.S. Citizenship and Immigration Services, U.S. worker, wages, Wage and Hour Division, WHD Administrator, and work contract.

B. Section 501.9, Surety Bond

The Department proposes revisions to WHD's surety bond provision at 29 CFR 501.9 as described fully in the discussion of proposed 20 CFR 655.132 above.

C. Section 501.20, Debarment and Revocation

The Department proposes revisions to WHD's debarment provisions at 29 CFR

[120] This proposed provision is similar to the standards for range housing found in § 655.235(l), excluding the variance that allows for workers sharing beds in certain circumstances. The proposed provision is also similar to the standards for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[121] This proposal is similar to the ETA standards at § 654.416(c).

[122] These proposed provisions are also similar to those found in the standards for range housing at § 655.235(m).

501.20 to maintain consistency with the proposed changes to 20 CFR 655.182(a). The Department has long had concerns about the role of agents in the program, and has questioned whether the participation of agents in the H–2A labor certification process is undermining compliance with program requirements. Under the current debarment provision, however, the Department can debar agents and attorneys only for their participation in the employer's substantial violations. Thus, to increase program integrity and promote compliance with program requirements, the Department proposes to permit the debarment of agents and attorneys for their own misconduct, rather than solely for participating in the employer's violations. Proposed 29 CFR 501.20 would permit WHD to debar an agent or employer for substantially violating a term or condition of the temporary agricultural labor certification. The Department is otherwise retaining 29 CFR 501.20 as in the current regulation.

D. Terminology and Technical Changes

In addition to proposed revisions to conform to the terminology and technical changes proposed to 20 CFR part 655, subpart B, the Department proposes minor changes throughout part 501 to correct typographical errors and improve clarity and readability. Such changes are nonsubstantive and do not change the meaning of the current text. For example, the Department proposes throughout part 501 to replace the phrase ''the regulations in this part'' with the phrase ''this part.''

IV. Administrative Information

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. Id. This proposed rule is an economically significant regulatory action under this section and was reviewed by OIRA.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

E.O. 13771 directs agencies to reduce regulation and control regulatory costs by eliminating at least two existing regulations for each new regulation, and by controlling the cost of planned regulations through the budgeting process. *See* 82 FR 9339. In relevant part, OMB defines an ''E.O. 13771 regulatory action'' as ''a significant regulatory action as defined in section 3(f) of E.O. 12866 that has been finalized and that imposes total costs greater than zero.'' [123] By contrast, an ''E.O. 13771 deregulatory action'' is defined as ''an action that has been finalized and has total costs less than zero.'' [124] For the purpose of E.O. 13771, this proposed rule, if finalized as proposed, is expected to be an E.O. 13771 deregulatory action because while the quantifiable rule familiarization, surety bond, and recordkeeping costs associated with the rule are larger than the quantifiable cost savings, the Department expects the total annualized cost savings of this proposed rule would outweigh the total annualized costs. However, the final designation of this rule's E.O. 13711 status will be determined in any final rule. In the interim, the Department requests public comments regarding this determination. The cost savings associated with the rule will result from the proposed electronic processing of applications, digitized application signatures, the ability to stagger entry of workers under a single *Application for Temporary Employment Certification,* and the electronic sharing of job orders submitted to the NPC with the SWAs (655.150).

Outline of the Analysis

Section V.A.1 describes the need for the proposed rule, and section V.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section V.A.3 explains how the provisions of the proposed rule will result in quantifiable costs, cost savings, and transfer payments, and presents the calculations the Department used to estimate them. In addition, section V.A.3 describes the qualitative costs, cost-savings, transfer payments, and benefits of the proposed rule. Section V.A.4 summarizes the estimated first-year and 10-year total and annualized costs, cost savings, net costs, perpetuated net costs, and transfer payments of the proposed rule. Finally, section V.A.5 describes the regulatory alternatives that were considered during the development of the proposed rule.

Summary of the Analysis

The Department estimates that the proposed rule will result in costs, cost savings, and transfer payments. As shown in Exhibit 1, the proposed rule is expected to have an average annual quantifiable cost of $4.01 million and a total 10-year quantifiable cost of $28.18 million at a discount rate of 7 percent. The proposed rule is estimated to have annual quantifiable cost savings of $1.32 million and total 10-year quantifiable cost savings of $10.39 million at a discount rate of 7 percent. Also, the proposed rule is estimated to result in annual transfer payments of $95.28 million and total 10-year transfer payments of $673.07 million at a discount rate of 7 percent. The Department estimates that the proposed rule would result in total annualized net quantifiable costs of $2.62 million at a discount rate of 3 percent and $2.53 million at a discount rate of 7 percent, both expressed in 2017 dollars. The Department was unable to quantify cost savings resulting from fewer incomplete or incorrect applications due to lack of data. The Department invites comments

[123] Office of Information and Regulatory Affairs, Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs'' (Apr. 5, 2017), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.*

[124] *Id.*

regarding how this impact may be estimated.

EXHIBIT 1—ESTIMATED MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE

[2017 $millions]

	Costs	Cost savings	Net costs *	Transfer payments
Undiscounted 10-Year Total	$40.11	$13.21	$26.89	$952.83
10-Year Total with a Discount Rate of 3%	34.21	11.85	22.36	803.57
10-Year Total with a Discount Rate of 7%	28.18	10.39	17.79	673.07
10-Year Average	4.01	1.32	2.69	95.28
Annualized at a Discount Rate of 3%	4.01	1.39	2.62	94.20
Annualized with at a Discount Rate of 7%	4.01	1.48	2.53	114.41
Perpetuated Net Costs * with a Discount Rate of 7%			3.24	

* Net Costs = [Total Costs] − [Total Cost Savings].

The total cost of the proposed rule is associated with rule familiarization and recordkeeping requirements for all H–2A employers,[125] as well as increases in the amount of surety bonds required for H–2ALCs. The two largest contributors to the cost savings of the proposed rule are the electronic submission of applications and application signatures, including the use of electronic surety bonds, and the electronic sharing of job orders submitted to the NPC with the SWAs. Transfer payments are the results of changes to the AEWR and changes to the requirement that employers provide or pay for transportation and subsistence for certain workers for the trips between the worker's place of recruitment and the place of employment. See the costs, cost savings, and transfer payments subsections of section V.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some cost, cost-savings, transfer payments, and the benefits of the proposed rule. The Department describes them qualitatively in section V.A.3 (Subject-by-Subject Analysis). The Department invites comments regarding the assumptions, data sources, and methodologies used to estimate the costs, cost savings, and transfer payments from this proposed rule.

1. Need for Regulation

The Department has determined that new rulemaking is necessary for the H–2A program and furthers the goals of E.O. 13788, Buy American and Hire American. *See* 82 FR 18837. The ''Hire American'' directive of the E.O. articulates the executive branch policy to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests. *Id.* sec. 2(b). It directs federal agencies, including the Department, to propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers. *Id.* sec. 5.

It is the policy of the Department to increase protections of U.S. workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of ETA, WHD, and the Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of working conditions in the United States.[126]

Consistent with the E.O.'s mandate, the Department's policy, and the goal of modernizing the H–2A program, the Department proposes to update its regulations to ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while maintaining the program's strong protections for the U.S. workforce. The changes proposed in this NPRM would streamline the Department's review of H–2A applications and enhance WHD's enforcement capabilities, thereby removing workforce instability that hinders the growth and productivity of our nation's farms, while allowing aggressive enforcement against program fraud and abuse that undermine the interests of U.S. workers. Among other proposals to achieve these goals, the Department proposes to: (1) Require mandatory e-filing and accept electronic signatures; (2) revise the current wage methodology so that the AEWR better protects against adverse effect on an occupation-specific basis and to modernize the prevailing wage methodology to provide accurate and reliable prevailing wage rates consistent with modern budget realities; (3) update surety bond and clarify recordkeeping requirements; (4) expand the definition of ''agricultural labor or services'' such that ''reforestation activities'' and ''pine straw activities'' are included in the H–2A program; (5) authorize SWAs (or other appropriate authorities) to inspect and certify employer-provided housing for up to 24 months; (6) permit the staggering of H–2A workers; (7) replace the current 50 percent rule, which requires employers of H–2A workers to hire any qualified, eligible U.S. worker who applies to the employer during the first 50 percent of the work contract period, with a requirement to hire such workers through 30 days of the contract period, unless the employer chooses to stagger the entry of H–2A workers, in which case a longer hiring obligation applies; and (8) revise the debarment provisions to allow the Department to debar agents and attorneys, and their successors in interest, based on their own substantial violations.

2. Analysis Considerations

The Department estimated the costs, cost savings, and transfer payments of the proposed rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B).

[125] The Department does not consider the cost of H–2A employers learning how to e-file. Based on H–2A Certification data from FY 2019, 94.1 percent of applications are submitted electronically. Almost of all the remaining 5.9% of H–2A applicants have access to email, so very few applicants will need to learn how to e-file.

[126] *See* News Release, U.S. Secretary of Labor Protects Americans, Directs Agencies to Aggressively Confront Visa Program Fraud and Abuse (June 6, 2017), *https://www.dol.gov/newsroom/releases/opa/opa20170606.*

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the proposed rule (*i.e.,* costs, cost savings, and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2020 through 2029) to ensure it captures major costs, cost savings, and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2017 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

Exhibit 2 presents the number of affected entities that are expected to be affected by the proposed rule. The number of affected entities is calculated using data from the OFLC certification data from 2016 and 2017. The Department provides these estimates and uses them throughout this analysis to estimate the costs, cost savings, and transfer payments of the proposed rule.

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE

[FY 2016–2017 average]

Entity type	Number
H–2A Applications Processed ..	9,391
Unique H–2A Applicants	[127] 7,282
Certified H–2A Employers	[128] 7,023
Certified H–2A Workers	[129] 187,740

Growth Rate

The Department estimates a 14 percent annual growth rate in the number of certified applications and in applications processed based on historical H–2A program data on labor certifications for FY 2012–2018. The Department also estimates a 19 percent geometric growth rate in certified H–2A workers, a 4 percent growth rate in H–2A certified employers, and a 16 percent growth rate in H–2A certified labor contractors. The average annual growth rates were applied to the estimated costs, cost savings, and transfer payments of the proposed rule to forcast participation in the H–2A program. Employment projections from BLS forecast that cumulative employment in the agriculture sector will not change through FY 2026.[130] As such, the growth rates presented in this rule are the upmost upper bounds of certified H–2A workers in the 10-year analysis time-frame.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of workers and the change in hours required to comply with the proposed rule per worker for each activity in section V.A.3 (Subject-by-Subject Analysis). For some activities, such as rule familiarization and application submission, all applicants will experience a change. For other activities, the proposed will only affect certified H–2A employers. These numbers are derived from OFLC certification data for the years 2016 and 2017 and represent an average of the two FYs.[131] To calculate these estimates, the Department estimated the average amount of time (in hours) needed for each activity to meet the new requirements relative to the baseline.

Compensation Rates

In section V.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the proposed rule. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the proposed rule. The Department used the mean hourly wage rate for private sector human resources specialists [132] and the wage rate for federal employees at the NPC (Grade 12, Step 5).[133] To account for fringe benefits and overhead costs, the mean hourly wage rate has been doubled.[134] The Department adjusted these base wage rates using a loaded wage factor to reflect total compensation, which includes non-wage factors such as health and retirement benefits. First, the Department calculated a loaded wage rate of 1.44 for private industry workers by calculating the ratio of average total compensation [135] to average wages and salaries in 2017 for the private sector.[136] In addition, the Department added 56 percent to account for overhead costs. For the Federal Government, the Department multiplied the loaded wage rate for private workers (1.44) by the ratio of the loaded wage factors for Federal workers to private workers (1.13) using data from a Congressional Budget Office report [137] to estimate the 2017 loaded wage rate for Federal workers of 1.63. The Department then multiplied the loaded wage factor by the corresponding occupational category's wage rate to calculate an hourly compensation rate. In addition, the Department added 37 percent to account for overhead costs.

The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

[127] This average includes 103 unique H–2B applicants that will now be considered H–2A.

[128] This average includes 55 certified H–2B employers that will now be considered H–2A. 3,990 workers were estimated from FY 2016–2017 program data.

[129] This average includes 3,990 certified H–2B workers that will now be considered H–2A.

[130] The projected growth rate for the agricultural sector was obtained from BLS's Industrial Employment Projections and Output, which may be accessed at *https://www.bls.gov/emp/data/industry-out-and-emp.htm.*

[131] The total unique H–2A applicants in 2016 and 2017 were 7,560 and 7,004, respectively. The total certified H–2A employers in 2016 and 2017 were 6,780 and 7,265, respectively. This includes H–2B applicants and employers that will now be considered H–2A.

[132] Bureau of Labor Statistics. (2018). May 2017 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist. Retrieved from: *https://www.bls.gov/oes/current/oes131071.htm.*

[133] Office of Personnel Management, Salary Table 2018—CHI Incorporating the 1.4% General Schedule Increase and a Locality Payment of 27.47% for the Locality Pay Area of Chicago-Naperville, IL–IN–WI (Jan. 2018), *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/CHI_h.pdf.*

[134] Source: U.S. Department of Health and Human Services, *Guidelines for Regulatory Impact Analysis* (2016), *https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf.* In its guidelines, HHS states, ''as an interim default, while HHS conducts more research, analysts should assume overhead costs (including benefits) are equal to 100 percent of pre-tax wages.'' HHS explains that 100 percent is roughly the midpoint between 46 and 150 percent, with 46 percent based on ECEC data that suggest benefits average 46 percent of wages and salaries, and 150 percent based on the private sector ''rule of thumb'' that fringe benefits plus overhead equal 150 percent of wages. To isolate the overhead costs from HHS's 100 percent assumption.

[135] Bureau of Labor Statistics, *2017 Employer Costs for Employee Compensation, https://www.bls.gov/ncs/ect/data.htm.* Total compensation for all workers. Average Series ID CMU2010000000000D, CMU2010000000000P. To calculate the average total compensation in 2017, the Department averaged the total compensation for all workers for quarters 1–4.

[136] Bureau of Labor Statistics, *2017 Employer Costs for Employee Compensation, https://www.bls.gov/ncs/ect/data.htm.* Wages and salaries for all workers. Average Series ID CMU2020000000000D, CMU2020000000000P. To calculate the average wage and salary in 2017, the Department averaged the wages and salaries for all workers for quarters 1–4.

[137] Congressional Budget Office. (2012). *Comparing the compensation of federal and private-sector employees.* Tables 2 and 4. Retrieved from *https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/01-30-FedPay_0.pdf.* The Department calculated the loaded wage rate for Federal workers of all education levels of 1.64 by dividing total compensation by wages (1.63 = $52.50/$32.30). The Department then calculated the loaded wage rate for private sector workers of all educations levels of 1.44 by dividing total compensation by wages (1.44 = $45.40/$31.60). Finally, the Department calculated the ratio of the loaded wage factors for Federal to private sector works of 1.13 (1.13 = 1.63/1.44).

EXHIBIT 3—COMPENSATION RATES

[2017 dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Private Sector Employees					
HR Specialist	N/A	$31.84	$14.01 ($31.84 × 0.44)	$17.83 ($31.84 × 0.56)	$63.68
Federal Government Employees					
National Processing Center Staff	12	$44.02	$27.73 ($44.02 × 0.63)	$16.29 ($44.02 × 0.37)	$88.04

3. Subject-by-Subject Analysis

The Department's analysis below covers the estimated costs, cost savings, and transfer payments of the proposed rule. In accordance with Circular A–4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society.

The Department emphasizes that many of the provisions in the proposed rule are existing requirements in the statute, regulations, or regulatory guidance. The proposed rule codifies these practices under one set of rules; therefore, they are not considered ''new'' burdens resulting from the proposed rule. Accordingly, the regulatory analysis focuses on the costs, cost savings, and transfer payments that can be attributed exclusively to the new requirements in the proposed rule.

Costs

The following sections describe the costs of the proposed rule.

Quantifiable Costs

a. Rule Familiarization

When the proposed rule takes effect, H–2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year.

To estimate the first-year cost of rule familiarization, the Department applied the geometric average growth rate of H–2A applications (14 percent) to the number of unique H–2A applications (7,282) to determine the annual number H–2A applications impacted in the first year. The number of H–2A applications (8,268) was multiplied by the estimated amount of time required to review the rule (2 hours).[138] This number was then multiplied by the hourly compensation rate of Human Resources Specialists ($63.68 per hour). This calculation results in a one-time undiscounted cost of $1,053,057 in the first year after the proposed rule takes effect. This one-time cost yields a total average annual undiscounted cost of $105,306. The annualized cost over the 10-year period is $123,450 and $149,932 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

b. Surety Bond Amounts

An H–2ALC is required to submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations under the H–2A program in the form of a surety bond.[139] Based on the Department's experience implementing the bonding requirement and its enforcement experience with H–2ALCs, the Department proposes updates to the regulations. These updates are intended to clarify and streamline the existing requirement and to strengthen the Department's ability to collect on such bonds. Further, the Department proposes adjustments to the required bond amounts to reflect annual increases in the AEWR and to address the increasing number of certifications that cover a significant number of workers under a single application and surety bond.

Currently, the required bond amounts range from $5,000 to $75,000, depending on the number of H–2A workers employed by the H–2ALC under the labor certification. For less than 25 workers, the required bond amount is currently $5,000. These amounts increase to $10,000, $20,000, $50,000, and $75,000 for 25 to 49 workers, 50 and 74 workers, 75 to 100 workers, and more than 100 workers, respectively. The Department proposes to adjust the existing required bond amounts proportionally, on an annual basis, to the degree that a national average AEWR exceeds $9.25. The Department will calculate and publish an average AEWR annually when it calculates and publishes AEWRs in accordance with § 655.120(b). The average AEWR will be calculated as a simple average of these AEWRs. To calculate the updated bond amounts, the Department will use the current bond amounts as a base, multiply the base by the average AEWR, and divide that number by $9.25. Until the Department publishes an average AEWR, the updated amount will be based on a simple average of the 2018 AEWRs, which the Department calculates to be $12.20. For instance, for a certification covering 100 workers, the required bond amount would be calculated by the Department using the following formula:

$75,000 (base amount) × $12.20 ÷ $9.25 = $98,918.92 (updated bond amount).

In subsequent years, the 2018 average AEWR of $12.20 would be replaced in this calculation by the average AEWR calculated and published in that year.

The Department also proposes to increase the required bond amounts for certifications covering 150 or more workers. For such certifications, the bond amount applicable to certifications covering 100 or more workers is used as a starting point and is increased for each additional 50 workers. The interval by which the bond amount increases will be updated annually to reflect increases in the AEWR. This value will be based on the amount of wages earned by 50 workers over a 2-week period and, in its

[138] This estimate reflects the nature of the proposal. As a proposal to amend to parts of an existing regulation, rather than to create a new rule, the 2-hour estimate assumes a high number of readers familiar with the existing regulation. Further, portions of this proposal (*e.g.,* portions of §§ 655.200 through 655.235) reprint existing regulatory provisions for ease of reference only. In addition, a major component of the Department's H–2A regulations—employer-conducted recruitment—is excluded from this proposal; they are the subject of a separate rulemaking. *See Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.* 83 FR 55985 (Nov. 9, 2018).

[139] *See* 20 CFR 655.132(b)(3); 29 CFR 501.9.

initial implementation, would be calculated using the 2018 average AEWR as demonstrated:

$12.20 (2018 Average AEWR) × 80 hours × 50 workers = $48,800 in additional bond for each additional 50 workers over 100.

For example, a certification covering a crew of 150 workers would require additional surety in the amount of $48,800 (150 − 100 = 50; 1 additional set of 50 workers). For a crew of 275 workers, additional surety of $146,400 would be required (275 − 100 = 175; 175 ÷ 50 = 3.5; this is 3 additional sets of 50 workers). As explained above, this additional surety is added to the bond amount required for certifications of 100 or more workers.

While this may represent a significant increase in the face value of the required bond, the Department understands that employer premiums for farm labor contractor surety bonds generally range from 1 to 4 percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better).[140]

For this analysis, the Department assumes that the bond premium faced by H–2ALCs will be 4 percent. To calculate the costs of the proposed increase in the required bond amounts, the Department first calculated the average number of H–2ALCs (including those labor contractors in the H–2B program that are becoming H–2A) in FYs 2016 and 2017 and the current required bond amounts. Also, the Department calculated the average number of additional sets of 50 workers in FYs 2016 and 2017. Next, the Department calculated the proposed required bond amounts for each category of number of workers using the 2018 national average AEWR of $12.20, as well as the proposed bond amount for each set of additional 50 workers per H–2ALC. Exhibit 4 presents these calculations.

EXHIBIT 4—COST INCREASES DUE TO CHANGES IN REQUIRED BOND AMOUNTS

Number of workers	Existing required bond amount	Average number of H–2ALCs in FYs 16 and 17	Proposed required bond amount	Change in required bond amount	Cost increase
Fewer than 25	$5,000	295	$6,594.59	$1,594.59	$63.78
25–49	10,000	88	13,189.19	3,189.19	127.57
50–74	20,000	54.5	26,378.38	6,378.38	255.14
75–100	50,000	38	65,945.95	15,945.95	637.84
More than 100	75,000	147	98,918.92	23,918.92	956.76
Each Additional Set of 50 Workers Greater than 100	N/A	[a] 667.5	48,800.00	48,800.00	1,952.00

[a] This value represents the total number of additional sets of 50 for H–2ALCs with more than 100 workers.

The Department calculated the first-year cost for H–2ALCs with fewer than 25 workers by multiplying the average number of H–2ALCs in FYs 2016 and 2017 with fewer than 25 workers (295 H–2ALCs) by the change in the required bond amount ($1,594.59) and the assumed bond premium (4 percent). The Department calculated this for each category of number of workers. Additionally, the Department calculated the total cost due to the proposed required bond amounts for additional sets of 50 workers by multiplying the average additional sets of 50 workers (667.5 H–2ALCs) in the FYs 2016 and 2017 by the required bond amount ($48,800.00) and the assumed bond premium (4 percent). The geometric growth rate of H–2A labor contractors (16 percent) was applied to account for anticipated increased H–2A applicants. These costs were then summed to obtain the total annual costs resulting from the increase in bond premiums. This calculation yields an average annual undiscounted cost of $3.74 million.

The total cost from the proposed required bond amounts over the 10-year period is estimated at $37.36 million undiscounted, or $31.69 million and $25.89 million at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $3.72 million and $3.69 million at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

c. Recordkeeping

i. Earnings Records

The Department is considering whether to require an employer to maintain a worker's email address and phone number(s) in the worker's home country when available. This information would greatly assist the Department in contacting an H–2A worker in the worker's home country, should the Department need to do so to conduct employee interviews as part of an investigation, to secure employee testimony during litigation, or to distribute back wages.

To calculate the estimated recordkeeping costs associated with collecting and maintaining this information, the Department first multiplied the number of certified H–2A employers (7,023 employers) by the 4-percent annual growth rate of ceritifed H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the estimated time required to collect and maintain this information (2 minutes) to obtain the total amount of recordkeeping time required. The Department then multiplied this estimate by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This yields an annual cost ranging from $15,557 in 2020 to $22,839 in 2029. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

ii. Housing

The Department proposes to authorize the SWAs (or other appropriate authorities) to inspect and issue an employer-provided housing certification valid for up to 24 months. Under the proposal, an employer must self-certify that the employer-provided housing remains in compliance for a subsequent *Application for Temporary Employment Certification* filed during the validity

[140] The Department reviewed premium rates provided on the websites of companies that offer farm labor contractor bonds and, as noted in the discussion of sections 655.132 and 29 CFR 501.9, above, found that employer premiums generally range from 1 to 4 percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better). The Department assumed contractors would have fair/average credit and so used a premium of 4 percent to approximate the rate on the high side for premiums on the standard bond market. The Department seeks comments on the impact of the proposed updates to the required bond amounts.

period of the official housing certification.

To calculate the estimated recordkeeping costs associated with maintaining records of these certifications, the Department first multiplied the number of certified H–2A employers (7,023 employers) by the 4 percent annual growth rate of ceritifed H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the assumed percentage of employers per year that will self-certify each year (100 percent). This amount was then multiplied by the estimated time required to maintain this information (2 minutes) to calculate the total amount of recordkeeping time required. This total time was then multiplied by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This yields an annual cost ranging from $15,557 in 2020 to $22,839 in 2029. This assumes that the SWAs will exercise their right to certify housing for more than 1 year. Some SWAs do not issue housing certifications valid for more than 1 year as a rule; others do not on a case-by-case basis. It would be accurate to say that employers would be assumed to self-certify 100 percent whenever the SWA's certification permitted it. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

iii. Abandonment of Employment or Termination for Cause

The Department proposes to revise § 655.122(n) to require an employer to maintain records of notification detailed in the same section for not less than 3 years from the date of the certification. An employer is relieved from the requirements relating to return transportation and subsistence costs and three-fourth guarantee when the employer notifies the NPC (and the DHS in case of an H–2A worker), in a timely manner, if a worker voluntarily abandons employment before the end of the contract period or is terminated for cause. Additionally, the employer is not required to contact its former U.S. workers, who abandoned employment or were terminated for cause, to solicit their return to the job.

To estimate the recordkeeping costs associated with maintaining records of these notifications, the Department first multiplied the number of certified H–2A employers (7,023) by the 4 percent annual growth rate of ceritifed H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the assumed percentage of employers per year that will have 1 or more workers abandon employment or be terminated for cause (70 percent). This amount was then multiplied by the estimated time required to maintain these records (2 minutes) to estimate the total amount of recordkeeping time required. This total time was then multiplied by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This yields an annual cost ranging from $10,890 in 2020 to 15,988 in 2029. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

iv. Total Recordkeeping Costs

The total cost from the proposed recordkeeping requirements over the 10-year period is estimated at $0.51 million undiscounted, or $0.45 million and $0.38 million at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $0.052 million and $0.054 million at discount rates of 3 and 7 percent, respectively.

d. Reforestation Applications

The proposed rule mandates all forestry employers reclassified as H–2A employers must now submit an application per each crew, rather than one application for multiple crews. The Department estimates that this will increase the number of applications required from each forestry employer by two. The change impacts the average of 75.5 forestry employers.[141] The Department applied the growth rate of H–2A certified employers (4 percent) to determine the annual number of forestry employers impacted. The annual number of forestry employers was then multiplied by the increase in applications (2) to determine the annual number of increased applications. To estimate the costs to forestry employers, the Department multiplied the annual number of applications by the cost per application ($460).[142] The Department also multiplied the annual number of applications by the number of hours it takes for a Human Resources Specialist to file the application (1), the Human Resources Specialist's compensation rate ($31.84 per hour), and the sum of the loaded wage factor and overhead cost for the private sector (2.00). To determine the cost to DOL staff to review increased applications, the annual number of applications was mutlipled by the amount of time spent reviewing an application (1 hour), the hourly wage for DOL staff ($44.02), and the sum of the loaded wage factor and overhead cost for the federal government (2.00). Costs to employers and DOL were then summed. This calculation yields an average annual undiscounted cost of $117,676.

The total cost from the proposed increase in forestry applications over the 10-year period is estimated at $1.18 million undiscounted, or $1,023,229 and $863,624 at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $119,954 and $122,961 at discount rates of 3 and 7 percent, respectively.

Non-Quantifiable Costs and Transfers

a. Definition of Agriculture

If finalized as proposed, the proposed rule would expand the regulatory definition of agriculture labor or services pursuant to 8 U.S.C. 1011(a)(15)(H)(ii)(1) to include reforestation and pine straw activities. Consequently, nonimmigrant workers engaged in reforestation and pine straw activities, who historically have been and are currently admitted under the H–2B visa program, will be included in the H–2A program.

As described earlier, the Department believes that such transfer would not impose significant burdens for the employers. Protections that currently apply to H–2A workers are generally comparable to the protections afforded to H–2B workers engaged in reforestation and pine straw activities.[143] Additionally, work in both the reforestation and pine straw industries, as defined in the proposed rule, often meets the definition of agricultural employment under the MSPA.[144] In the Department's experience in the administration and enforcement of the H–2B visa program, the pine straw industry is not an active user of the H–2B program, as workers engaged in pine straw activities are frequently local seasonal agricultural workers. Consequently, the proposed rule would not have significant effects in that industry. Based on OFLC performance data from FY 2016 and FY 2017, 3,990 represents the average amount of reforestation and pinestraw workers that receive H–2B visas per year. The growth rates were applied to

[141] Average annual number of unique certified forestry employers for FY16–17 from H–2B dataset.

[142] Cost per USDA, see *https://www.farmers.gov/manage/h2a.*

[143] *See* 80 FR 24041.

[144] *See Morante-Navarro* v. *T & Y Pine Straw, Inc.,* 350 F.3d 1163, 1170–72 (11th Cir. 2003); *Bresgal* v. *Brock,* 843 F.2d 1163, 1171–72 (9th Cir. 1987); *Davis Forestry Corp.* v. *Smith,* 707 F.2d 1325, 1328 n.3 (11th Cir. 1983).

project their numbers over the course of the 10-year analysis timeframe.

The Department believes that there are three potential transfer payments from employers to workers—transfers that result from potential expenses workers would no longer need to bear—under the proposed expanded definition of agricultural labor or services. First, under the H–2A program, an employer must provide housing at no cost to all H–2A workers. The employer must also provide housing at no cost to those non-H–2A workers in corresponding employment who are not reasonably able to return to their residence within the same day.[145] Additionally, H–2A employer-provided housing must be inspected and certified, and rental and/or public accommodations must meet certain local, state, or federal standards.[146] Under the H–2B program, however, an employer is not generally required to pay for housing unless the housing is primarily for the benefit or convenience of the employer. For example, an H–2B employer is required to provide housing to itinerant workers engaged in reforestation activities at no cost to the workers due to the transient nature of the occupation.[147] In the Department's experience in the administration and enforcement of the H–2B program, itinerant workers engaged in reforestation activities are more likely to be provided with public accommodations.

The Department believes workers engaged in pine straw activities for H–2B employers tend to be local workers, and typically need not be provided with housing because they stay in their own homes. But, under the MSPA, if an employer provides housing to workers, the employer may charge the cost for housing to the workers, if properly disclosed.[148] Consequently, the Department believes that the H–2A requirement at § 655.122(d)(1) would result in transfer payments from employers to nonimmigrant workers engaged in the pine straw activities, due to a shift in the cost of such housing.

Second, the Department's H–2A regulation at § 655.122(h)(3) requires an employer to provide transportation for workers between employer-provided housing and the employer's worksite at no cost to the workers. Additionally, the employer is required to provide transportation between the employer's worksites, if there is more than one worksite, at no cost to the workers. Providing such transportation is generally not a requirement under the H–2B program. However, H–2B employers of itinerant workers, many of whom work in the reforestation industry, must provide such transportation because of the transient nature of these itinerant workers.[149] Consequently, the Department believes that the H–2A requirement at § 655.122(h)(3) would impact only employers in the pine straw industry that are currently charging their workers for the cost of transportation, since employers would pay for such transportation under this rule.[150]

Finally, the Department's H–2A regulation at § 655.122(g) requires an employer to provide each worker with three meals a day or furnish free and convenient cooking and kitchen facilities so that the workers can prepare their own meals. Where an employer provides the meals, the job offer must state the charge, if any, to the worker for such meals; the employer may deduct any disclosed allowable meal charges from the worker's pay.[151] In contrast, the employer may not pass on to the worker any additional costs that the employer incurs for the provision of meals that exceed the allowable meal charge, unless a petition for higher meal charge was submitted and granted.[152] There is no similar meal requirement under the H–2B program. Consequently, the Department believes that the H–2A requirement at § 655.122(g) would lead to transfer payments from employers to nonimmigrant workers engaged in the reforestation and pine straw activities under circumstances in which the employer spends more than the maximum allowable meal charge to provide three meals a day.

The Department is unable to quantify the estimated transfers described in this section due to a lack of data regarding the amount, if any, charged to nonimmigrant workers by employers for housing, transportation, and meals, and wide variations nationally in the costs associated with providing housing, transportation, and meals. The Department also proposes to codify existing mobile housing standards for workers engaged in animal shearing and custom combining occupations, with some modifications. The proposed modifications include removing the authority for an animal sheering contractor to lease a mobile unit owned by a crew member or other person or make some other type of ''allowance'' to the owner. The proposed standards would also limit the circumstances under which an employer's mobile housing unit can comply with range housing standards, rather than the mobile housing or standard housing regulations, to those periods when the work is performed on the range. The proposed standards would provide flexibility for employers to use existing mobile housing units that may not fully comply with the modified standards at all times by allowing the employer to supplement mobile units with required facilities (*e.g.,* access to showers at a fixed-site such as an RV park) in order to comply fully with all proposed requirements. The Department is unable to quantify the costs of these modifications because it lacks data on the number of animal shearing employers that currently lease a mobile unit or make some other ''allowance'' under the current TEGLs, the number of employers who will supplement existing mobile units with additional facilities and to what extent, as well as on the amount of time that workers engaged in these occupations spend on the range. Consequently, the Department invites comment on this analysis, including any relevant data or information that might allow for a quantitative analysis of possible transfer effects described in this section.

b. Housing

If adopted without change, the proposed rule includes potential costs to H–2A employers that elect to secure rental and/or public accommodations for workers to meet their H–2A housing obligations. Specifically, the proposal requires that, in the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the OSHA temporary labor camp standards at 29 CFR 1910.142(b)(2) (''each room used for sleeping purposes shall contain at least 50 square feet for each occupant''), § 1910.142(b)(3) (''beds . . . shall be provided in every room used for sleeping purposes''); § 1910.142(b)(9) (''In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.''); § 1910.142(b)(11) (heating, cooking, and water heating equipment installed properly); § 1910.142(c) (water supply);

[145] *See* 8 U.S.C. 1188(c)(4); 20 CFR 655.122(d)(1).

[146] *Id.*

[147] *See* 80 FR at 24063.

[148] 29 CFR 500.75–500.76 require an employer to disclose to each worker in writing any benefits, including transportation and housing, and any costs to be charged for each of them. Additionally, 29 CFR 500.130 requires that a facility or real property used as housing for any migrant agricultural worker must comply with state and federal safety and health standards applicable to such housing.

[149] *See* 80 FR 24041 at 24063.

[150] 29 CFR 500.75–500.76 require an employer to disclose to each worker in writing any benefits, including transportation and housing, and any costs to be charged for each of them.

[151] *See* 20 CFR 655.173(a).

[152] *See* 20 CFR 655.173(b).

§ 1910.142(f) (laundry, handwashing, and bathing facilities); and § 1910.142(j) (insect and rodent control), the relevant state standards will apply; in the absence of applicable state standards addressing such concerns, the relevant OSHA temporary labor camp standards will apply. Employers that currently provide rental and/or public accommodations that do not meet such standards will be required to provide different or additional accommodations. For example, employers that currently require workers to share beds will be required to provide each worker with a separate bed. To comply with the proposal, such employers may be required to book additional rooms or provide different housing.

The Department is unable to quantify an estimated cost due to a lack of data as to the number of employers that would be required to change current practices under this proposal. Consequently, the Department invites comment on this analysis, including any relevant data or information that might allow for a quantitative analysis of possible costs in the final rule.

c. Requirement To File Electronically

Currently, about six percent of employers choose not to file electronically. Under the proposed rule, these employers would have two options—to file electronically or to file a request for accommodation because they are unable or limited in their ability to use or access electronic forms as result of a disability or lack of access to e-filing. The Department has not estimated costs for employers' time and travel to file electronically when they otherwise would not have. The Department believes these costs will be small.

The Department also has not estimated any costs for accommodation requests. The Department expects to receive very few mailed-in accommodation requests. In its H–1B program, which has mandatory e-filing—albeit from a very different set of industry—the Department has not received any requests for accommodation due to a disability. Of the handful of internet access requests received annually, none were approved, as the requestors had public access nearby. For those requesting an accommodation in H–2A, the Department estimates that the cost to apply would be *de minimis,* consisting of the time and cost of a letter and printing out forms.

Cost Savings

The following sections describe the cost savings of the proposed rule.

Quantifiable Cost Savings

a. Electronic Processing and Process Streamlining

The Department proposes to modernize and clarify the procedures by which an employer files a job order and an *Application for Temporary Employment Certification* for H–2A workers under §§ 655.121 and 655.130 through 655.132. The NPC will electronically share job orders with SWAs, which will result in both a material cost and a time cost savings for employers.

To ensure the most efficient processing of all applications, the Department must receive a complete application for review. Based on the Department's experience administering the H–2A program under the current rule, a common reason for issuing a NOD on an employer's application includes failure to complete all required fields on a form, failure to submit one or more supporting documents required by the regulation at the time of filing, or both. These incomplete applications create unnecessary processing delays for both the NPC and employers. In order to address this concern, the Department proposes to require an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator, unless the employer cannot file electronically due to disability or lack of internet access. The technology system used by the OFLC will not permit an employer to submit an application until the employer completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all required documentation, including a copy of the job order submitted in accordance with § 655.121. The Department estimates that 80 percent of applications are currently filed electronically and that this proposed rule would significantly increase the number of employers who submit electronic applications. This would result in material and time cost savings for employers. Electronic processing would also result in a time cost savings for the NPC. The Department also proposes that employers may file only one *Application for Temporary Employment Certification* for place(s) of employment contained within a single area of intended employment covering the same occupation or comparable work by an employer for each period of employment, which will reduce the number of overall applications submitted. Finally, the Department proposes to the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney or agent.

To estimate the material cost savings to employers due to electronic processing, the Department assumed that the proposed rule would result in 6 percent of H–2A employers switching to electronic processing of applications. Initially the Department reduced the number of H–2A applications processed (9,391) by the number of applications made unnecessary by the staggering rule (8,444) to determine an impacted population of H–2A applications (947). The growth rate of H–2A applications (14 percent) was then applied to determine the annual impacted number of applications. The Department then multiplied the percentage estimated to switch to electronic processing of applications (6 percent) by the annual number of impacted H–2A applications to obtain the number of employers who would no longer be submitting by mail. For each application, a material cost was calculated by summing the price of a stamp ($0.50), the price of an envelope ($0.04), and the total cost of paper. The total cost of paper was calculated by multiplying the cost of a sheet of paper ($0.02) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of $304.62.

The total material cost savings from electronic processing over the 10-year period is estimated at $43,046 undiscounted, or $24,596 and $20,135 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $304.36 and $303.91 at discount rates of 3 and 7 percent, respectively.

To estimate the time cost savings to employers due to electronic processing, the Department again estimated the number of affected applications by multiplying the assumed percentage of employers that would switch to electronic applications (6 percent) by the total number of annually impacted H–2A applications. The Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes (0.083 hours) by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This time cost savings was then multiplied by the estimated number of applications expected to switch to electronic

submission. This yields average annual undiscounted cost savings of $633.87.

The total time cost savings from electronic processing over the 10-year period is estimated at $6,339 undiscounted, or $5,403 and $4,442 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $633.34 and $632.39 at discount rates of 3 and 7 percent, respectively.

To estimate the material cost savings to employers due to the NPC sharing job orders with the SWAs electronically, the Department assumed that 100 percent of unique H–2A applicants would be affected. For each annually impacted H–2A application, a material cost was calculated by summing the price of a stamp ($0.50), the price of an envelope ($0.04), and the total cost of paper. The total cost of paper was calculated by multiplying the cost of a sheet of paper ($0.02) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of $5,163.

The total material cost savings over the 10-year period is estimated at $51,630 undiscounted, or $44,004 and $36,178 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $5,159 and $5,151 at discount rates of 3 and 7 percent, respectively.

To estimate the time cost savings to employers resulting from the NPC electronically sharing job orders with the SWAs, the Department again assumed that 100 percent of unique H–2A applicants would be affected. For each annually impacted H–2A application, the Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes in hours (0.083 hours) by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This cost savings was then multiplied by the estimated number of applications switching to electronic submission. This yields average annual undiscounted cost savings of $10,744.

The total time cost savings over the 10-year period is estimated at $107,436 undiscounted, or $91,568 and $75,283 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $10,735 and $10,719 at discount rates of 3 and 7 percent, respectively.

The Department assumes that the DOL staff will save approximately 1 hour for each application that is now submitted electronically. To calculate the time cost savings to the Federal Government due to electronic processing, the Department first calculated the number of employers that would now submit electronically by multiplying the assumed percentage (6percent) by the total number of annually impacted H–2A applications. This cost savings was then multiplied by the per-application time cost savings, calculated by multiplying the time savings (1 hour) by the hourly compensation rate for DOL staff ($88.04 per hour). This yields average annual undiscounted cost savings of $10,558.

The total time cost savings over the 10-year period is estimated at $105,585 undiscounted, or $89,990 and $73,985 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $10,550 and $10,554 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the cost savings resulting from this provision.

b. Staggering Worker Entry

The Department proposes to permit the staggered entry of H–2A workers into the United States. This proposal permits an employer that receives a temporary agricultural labor certification and an approved H–2A Petition to bring nonimmigrant workers into the United States at any time during the 120-day period after the first date of need identified on the certified *Application for Temporary Employment Certification* without filing another H–2A Petition. An employer that chooses to stagger the entry of its workers must notify the NPC electronically, or by mail if permitted to do so, of its intent to stagger and identify the period of time, up to 120 days, during which the staggering will take place. An agricultural association filing as a joint employer with its members need only make a single request on behalf of its members duly named on the application and provide the NPC with the maximum staggered entry timeframe.

Employers that wish to stagger the entry of their workers must continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified *Application for Temporary Employment Certification,* whichever is longer. Employers must also comply with the requirement to update their recruitment reports.

The Department expects the above proposal will result in cost savings to the employer. This is because currently, an employer that needs agricultural workers at different points of a season must file separate *Applications for Temporary Employment Certification* containing a new start date for each group of job opportunities. In addition, an agricultural association filing as a joint employer with a number of its employer-members must currently coordinate the amount and timing of labor needed across numerous employer-members growing a wide array of different crops under the same start date of work. The same agricultural association must then file numerous master applications, often one every calendar month, covering substantially the same employer-members that need workers to perform work in the same occupational classification based on a different start date of work. Because the proposal will reduce the number of *Applications for Temporary Employment Certification* an employer that wishes to stagger must file and decrease the time and expense of coordinating master applications for agricultural associations, the Department expects this proposed change to produce cost savings for the employer. Some of these cost savings may be offset by the time and expense it will take for the employer to notify the NPC of its intent to stagger, but the Department expects this cost to be minimal and the overall impact of its proposal to be one of cost savings.

To estimate employer time cost savings associated with the staggered entry of workers into the United States, the Department first calculated the total number of employers eligible for staggering (4,926) and applied the annual growth rate of H–2A applications certified (14 percent) and the total number of certifications for the same SOC, state, and employer (13,370) and applied the H–2A certified employer growth rate (4 percent). The Department subtracts the number of eligible employers from the total number of duplicate certifications to estimate the total number of repeat applications annually that would no longer be necessary under the proposed rule (8,444). This number was then multiplied by the assumed net time savings (1.77 hours) and the total loaded wage rate for employers ($63.68). This yields average annual undiscounted cost savings of $726,493.

The total time cost savings to employers due over the 10-year period is estimated at $7.26 million undiscounted, or $6.52 million and $5.73 million at discount rates of 3 and

7 percent, respectively. The annualized cost savings over the 10-year period is $764,689 and $815,570 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the cost savings resulting from this provision.

To estimate time cost savings to the Federal government associated with the staggered entry of workers into the United States, the Department multiplied the total number of annual repeat applications that would no longer by necessary (8,444) by the assumed time to review each repeat application (1 hour) and the loaded wage rate for Federal employees ($88.04). This yields average annual undiscounted cost savings of $567,460.

The total time cost savings to the Federal government over the 10-year period is estimated at $5.67 million undiscounted, or $5.10 million and $4.47 million at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $597,295 and $637,038 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the cost savings resulting from this provision.

Non-Quantifiable Cost Savings

a. Cost Savings From Modernizing the H–2A Program To Provide Employers With Timely Access to Legal Agricultural Labors

The Department proposes to institute changes to modernize the H–2A program and eliminate inefficiencies, which will help ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while maintaining the program's strong protections for the U.S. workforce. Among other proposals to achieve these goals, the Department proposes to (1) allow employers to start work within a 14 calendar day period after the anticipated start date of work and stagger the entry of H–2A workers to account for factors such as travel delays and changing climatic conditions that impact farm operations and costs; (2) facilitate employers—especially small growers who are unable to individually offer full-time work—jointly employing workers to perform the same services or labor during the same period of employment; (3) streamline application processing by providing employers who file compliant job orders with the option to begin positive recruitment of U.S. workers prior to filing the H–2A application; (4) increase the stability of any given employer's workforce by replacing the current 50 percent rule with a requirement to hire workers through 30 days of the contract period; and (5) expand the H–2A program to employers performing ''reforestation activities'' and ''pine straw activities'' to reflect how their workers share many of the same characteristics as traditional agricultural crews.

Through such changes, the rule would reduce costly workforce instability that hinders the growth and productivity of our nation's farms. The Department believes such changes will result in cost savings from a more viable and productive workforce alternative. At the same time, an H–2A program that is more functional and reliable as a whole would also reduce costs associated with available but displaced U.S. workers, or adverse effects to their wages and working conditions.

b. Cost Savings From Efficiencies Associated With Receiving More Complete and Accurate Applications

The Department proposes to modernize the process by which H–2A employers submit job orders to the SWAs and applications to the Department through e-filing and requiring the designation of a valid email address for sending and receiving official correspondence during application processing, except where the employer is unable or limited in its ability to use or access electronic forms as result of a disability, or lacks access to e-filing.

The Department believes that transitioning to electronic submissions would result in cost savings to employers and to the NPC. Currently, submissions that are incomplete or obviously inaccurate upon their receipt result in a NOD on the employer's application. As a result, employers who submit incomplete applications must start the submission process from the beginning. This can lead to costly delays for employers, as well as costly processing time for the NPC.

The requirement for electronic submissions would reduce the number of instances where incomplete applications are submitted because employers have not fully completed the form prior to submitting it. E-filing permits automatic notification that an application is incomplete or obviously inaccurate and provides employers with an immediate opportunity to correct the errors or upload missing documentation. Additionally, the adoption of electronic submissions should reduce the amount of time it takes to correct errors because entries can simply be deleted, rather than requiring the production of new copies of the form after an error is detected.

For the NPC, electronic filing and communications will improve the quality of information collected from employers, reduce unnecessary costs of communicating with employers to resolve obvious errors or receive complete information, and reduce the frequency of delays related to application processing.

c. Cost Savings From Efficiencies Created by Acceptance of Electronic Signatures

The Department also proposes to enable employers, agents, and attorneys to use electronic methods to sign or certify any document required under this subpart using a valid electronic signature method. The current practice of accepting electronic (scanned) copies of original signatures on documents has generated efficiencies in the application process, and the Department believes leveraging modern technologies to accept electronic signature methods can achieve even greater efficiencies and result in cost savings to employers and the NPC.

Accepting electronic signature methods as a means of complying with original signature requirements for the H–2A program will reduce the costs for employers associated with printing, mailing, or delivering original signed paper documents or scanned copies of original signatures on documents to the NPC. Additionally, electronic signature methods provide employers and their authorized attorneys or agents with greater flexibility to conduct business with the Department—at any time and at any location with an internet connection—rather than needing to be located in a physical office. This frees valuable time for conducting other business tasks.

The NPC anticipates additional cost savings from use of electronic signature methods. The acceptance of documents containing electronic signatures will facilitate the NPC's use of a more centralized document storage capability to more efficiently access documents during application processing, saving time and expense.

d. Cost Savings From Efficiencies Created by the Use of Electronic Surety Bonds

The Department also proposes to develop a process for accepting electronic surety bonds through the iCERT system and to require the use of a standardized bond form. The Department believes that these proposed changes will result in a cost savings to H–2ALCs and the NPC. Currently all H–

2ALCs, even the majority that submit other components of their applications electronically, have to submit original paper surety bonds before the labor certifications can be issued. Accepting original electronic surety bonds will reduce the costs associated with mailing or delivering the original surety bonds to the NPC and the costs for NPC to transfer these bonds to WHD for enforcement purposes. Additionally, using a standardized bond form will reduce the likelihood of errors and the amount of time required for the NPC to review the bonds for compliance.

The Department seeks comments from the public regarding any additional non-quantifiable cost savings that are not included in this analysis.

Transfer Payments

Quantifiable Transfer Payments

This section discusses the quantifiable transfer payments related to transportation and subsistence costs and the revisions to the wage structure.

a. Transportation and Subsistence Costs

The Department proposes to revise the beginning and end points from and to which an employer must provide or pay for transportation and subsistence costs for certain H–2A workers. An employer must pay a worker for the reasonable transportation and subsistence costs incurred when traveling to the employer's place of employment, provided that the worker completes at least 50 percent of the work contract period and the employer has not previously advanced or otherwise provided such transportation and subsistence. Specifically, an employer must provide or pay for transportation and daily subsistence from ''the place from which the worker has come to work for the employer.'' Under the proposed rule, for an H–2A worker that requires a visa departing to work for the employer from a location outside of the United States, ''the place from which the worker departed'' will mean the appropriate U.S. Consulate or Embassy. This change will result in transfer payments from workers to employers. The Department first calculated the transfer payment for transportation and then calculated such transfer payment for subsistence cost.

Transportation-related transfer payments were calculated by multiplying the total number of certified H–2A workers (187,740 workers) by the growth rate of H–2A certified workers (19 percent) to determine the annual number of certified workers. The annual number of certified H–2A workers was then multiplied by the number of one-way trips per worker (2 trips). This was then multiplied by the cost of a one-way bus ticket ($59.00) between Oaxaca, Mexico and Monterrey, Mexico. In the Department's enforcement experience, H–2A workers are predominantly from Mexico. Additionally, in the Department's experience, the majority of H–2A workers from Mexico arrive in Monterrey, Mexico for visa processing prior to arriving at the appropriate port of entry to seek admission to the United States. This yields average annual undiscounted transfers of $65.38 million. The total transfer over the 10-year period is estimated at $653.76 million undiscounted, or $551.35 million and $446.92 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $64.63 million and $78.50 million at discount rates of 3 and 7 percent, respectively.

Subsistence-related transfer payments were also calculated by multiplying the total annual number of certified H–2A workers (187,740 workers) by the number of one-way trips per worker (2 trips). This amount was then multiplied by the minimum daily subsistence amount for workers traveling ($12.26),[153] resulting in average annual undiscounted transfers of $13.58 million. The total transfer over the 10-year period is estimated at $135.85 million undiscounted, or $114.57 million and $92.87 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $13.43 million and $16.31 million at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the transfers resulting from this provision.

b. Revisions to Wage Structure

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H–2A worker is admissible only if the Secretary of Labor determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement by requiring the employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. The Department proposes to maintain this general wage-setting structure with only minor revisions, but, as discussed below, proposes to modify the methodology by which it establishes the AEWRs and prevailing wages.

Specifically, the Department proposes to modify the AEWR methodology so that it is based on data more specific to the agricultural occupation of workers in the United States similarly employed. The Department currently sets the AEWR at the annual average hourly gross wage for field and livestock workers (combined) for the State or region from the FLS conducted by the USDA's NASS, which results in a single AEWR for all agricultural workers in a State or region. As discussed in depth in the preamble, the Department is concerned that the current AEWR methodology may have an adverse effect on the wages of workers in higher paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of field and livestock workers (combined), an occupational category from the FLS that does not include those workers. In addition, the use of generalized data for other agricultural occupations could produce a wage rate that is not sufficiently tailored to the occupation, as necessary to protect against adverse effect for those occupations.

The Department proposes to set the AEWR at the annual average hourly gross wage for the State or region and particular SOC applicable to the work performed from the USDA's FLS. The Department proposes to use the FLS to establish the AEWR for the SOC, where such a wage is available, rather than an alternative wage source, because the FLS is the only comprehensive wage survey of wages paid by farmers and ranchers. When FLS State or regional data is not available for the SOC, however, the Department proposes to set the AEWR based on BLS's OES average wage for the SOC and the State because the OES is a comprehensive and valid source of wage data that can be useful when USDA cannot produce valid FLS wage data for the agricultural occupation and geographic area. Next, if OES State data is not available, the Department would be set the AEWR based on FLS national data for the SOC. Lastly, if all prior data sources do not

[153] Department of Labor, Employment and Training Administration, Allowable Meal Charges and Reimbursements for Daily Subsistence (Mar. 21, 2018), *https://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm.*

have an hourly wage available, then the AEWR would be determined by OES National data.

The Department calculated the impact on wages that would occur from the implementation of the proposed AEWR methodology. For each H–2A Certification in 2016 and 2017, the Department used the difference between the projected AEWR under the proposed rule and estimated wages under the current AEWR baseline to establish the wage impact of the proposed AEWR methodology.

For an illustrative example in Exhibit 5, to calculate projected AEWRs under the proposed rule, the Department multiplied the number of certified workers by the number of hours worked each week, the number of weeks in a given year that the employees worked, and the annual average hourly gross wage for the State or region and particular SOC applicable to the work performed from the USDA FLS (FLS regional SOC wage).[154] This example sets forth how the Department calculated the proposed wage impact for an individual case.

EXHIBIT 5—AEWR WAGE UNDER THE PROPOSED RULE

[Example case]

Number of certified workers	Basic number of hours	Number of days worked in 2016	Number of days worked in 2017	FLS regional SOC wage 2016	FLS regional SOC wage 2017	Total AEWR wages 2016	Total AEWR wages 2017
(a)	(b)	(c)	(d)	(e)	(f)	(a * b * (c/7) * e)	(a * b * (d/7) * f)
14	35	306	1	$10.43	$10.44	$223,410.60	$730.80

After the total AEWR for the proposed rule was determined, the wage calculation under the current AEWR was calculated. The methodology is similar to that used to estimate the projected AEWR under the proposed rule: The number of workers certified is multiplied by the number of hours worked each week, the number of weeks in a given year that the employees worked, and the AEWR baseline for the year(s) in which the work occurred (Exhibit 6 provides an example of the calculation of the AEWR baseline for the same case as in Exhibit 5).

EXHIBIT 6—CURRENT AEWR

(Example Case)

Number of certified workers	Basic number of hours	Number of days worked in 2016	Number of days worked in 2017	AEWR (baseline) 2016	AEWR (baseline) 2017	AEWR wages 2016	AEWR wages 2017
(a)	(b)	(c)	(d)	(e)	(f)	(a * b * (c/7) * e)	(a * b * (d/7) * f)
14	35	306	1	$10.69	$10.38	$228,979.80	$726.60

Once the wage for the AEWR baseline was obtained, the Department estimated the wage impact of the new proposed AEWR by subtracting the baseline AEWR wage for 2016 from the proposed wage for 2016 to determine the AEWR wage impact ($223,410.60 − $228,979,80 = −$5,569.20). This was repeated for 2017 ($730.80 − $726.60 = $4.20). The Department also applied the growth rate of certified H–2A workers (19 percent) to determine the annual transfer.

Forestry and conservation workers (45–4011) previously classified as H–2B workers were segregated in the analysis from all other H–2A workers. For these workers, a proposed AEWR was determined using the BLS' OES average wage by SOC and State, where available, or OES national Data if a State wage was not available for the SOC because there is no FLS State or regional data available for SOC 45–4011. Unfortunately, no baseline data was available to compare the proposed wages to for these forestry workers. Because of this, the Department was unable to determine wage impacts of the proposed rule for forestry workers, and they are not included in the total impact for FY 2016 or 2017.[155]

The Department determined the total impact of the proposed AEWR for each year, excluding forest and conservation workers, by summing the AEWR impacts for all certifications in each year and these totals were then averaged to produce an annual estimate of the proposed AEWR impacts.

The changes in AEWR rates constitute a transfer payment from employers to employees. The Department estimates average annual undiscounted transfers of $16.32 million. The total transfer over the 10-year period is estimated at $163.22 million undiscounted, or $137.65 million and $111.58 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $16.14 million and $19.60 million at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the transfers resulting from this provision.

In addition to the proposed changes to the AEWR methodology discussed above, the Department also proposes to modernize the methodology currently set in sub-regulatory guidance for state-conducted prevailing wage surveys. This proposal would likely result in a transfer from employers to workers. The Department expects the proposal to allow SWAs and other state agencies to conduct prevailing wage surveys using standards that are realistic in a modern budget environment would allow the

[154] When the USDA survey did not produce an FLS regional SOC wage, the Department utilized a wage determination hierarchy of OES State data followed by FLS national SOC data, then OES national SOC data in the event that the previously mentioned wage sources were not available.

[155] In FY 2016 and FY 2017 there were 12,638 forestry workers, compared to 375,480 H–2A workers overall. While the Department expects their wages to go up, the Department does not expect a significant impact relative to the total overall impacts of the proposed rule.

Department to establish a greater number of reliable and accurate prevailing wage rates for workers and employers. However, under the proposal, the Department would require an employer to pay a prevailing wage rate only if a prevailing wage rate published by the OFLC Administrator is the highest applicable wage. Because the Department cannot estimate the extent of the increase in the number of prevailing wage determinations that would be issued as the highest applicable wage under the proposed methodology, the Department is not able to quantify these transfer payments. The Department invites comments on the economic impacts of these proposals.

Unquantifiable Transfer Payments

a. Revisions to Wage Structure

The increase (or decrease) in the wage rates for H–2A workers represents an important transfer from agricultural employers to corresponding U.S. workers, not just H–2A workers. The higher (or lower) wages for H–2A workers associated with the proposed rule's methodology for determining the monthly AEWR will also result in wage changes to corresponding U.S. workers. However, the Department does not have sufficient information about the number of corresponding U.S. workers affected and their wage structure to reasonably measure the wage transfer to corresponding U.S workers. The Department invites comments regarding how this impact can be calculated.

Qualitative Benefits Discussion

a. Housing

In association with the [benefits/savings] outlined above, the proposed rule has unquantifiable benefits as well. First, if finalized as proposed, the proposed rule would authorize the SWAs (or other appropriate authorities) to inspect and certify employer-provided housing for a period of up to 24 months.[156] The SWAs and other appropriate authorities would thus be required to conduct fewer inspections of H–2A employer-provided housing annually, permitting these authorities to more efficiently allocate and prioritize resources. Moreover, the proposal would result in more timely certifications of employer-provided housing, reducing delays in the H–2A labor certification process. The Federal Government, employers, and workers alike would benefit from such reduction in delays.

The Department is unable to quantify these estimated benefits, given the discretion afforded the SWAs (or other appropriate authorities) under the proposed rule to determine the exact length of a housing inspection certification. Consequently, the Department invites comments on this analysis, including any relevant data or information that might allow for a quantitative analysis of possible benefits in the final rule resulting from the housing inspection proposals.

b. Thirty-Day Rule

The Department's analysis of recruitment report data indicate that many U.S. workers hired pursuant to the 50 percent rule voluntarily resigned or abandoned the job shortly after beginning work; therefore, employers who choose to displace an H–2A worker when hiring a U.S. worker may find themselves without enough workers to fulfill their staffing needs. However, employers who choose to retain both the H–2A worker and the U.S. worker to prevent potential disruption to work flow must incur the expense of doing so.

The changes proposed in this NPRM would improve the process of submitting and reviewing H–2A applications, which would directly enhance WHD's enforcement capabilities. This would result in the reduction of workforce instability that hinders the growth and productivity of our nation's farms while allowing aggressive enforcement against program fraud and abuse that undermine the interests of U.S. workers.

c. Surety Bonds

The proposed changes to the surety bond requirement, including the use of electronic surety bonds and a standardized bond form, will also result in unquantifiable benefits to the H–2ALCs in the form of a more streamlined application process with fewer delays. Accepting electronic surety bonds will mean that the NPC receives the required original bond with the rest of the application and it will no longer be necessary to wait for the bond to arrival via mail or other delivery before issuing the certification.

Further, these changes and the changes to the required bond amounts will enhance WHD's enforcement capabilities by making it more certain that there will be a sufficient, compliant bond available to redress potential violations. This will advance the Department's goal of aggressively enforcing against program fraud and abuse that undermine the interests of U.S. workers.

4. Summary of the Analysis

Exhibit 4 summarizes the estimated total costs, cost savings, and transfer payments of the proposed rule over the 10-year analysis period. The transportation and daily subsistence has the largest effect as a transfer cost.

EXHIBIT 4—ESTIMATED 10-YEAR MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE BY PROVISION

[2017 $millions]

Provision	Total cost	Total cost savings	Total transfer
Transportation and Daily Subsistence	.....	.....	$789.61
Proposed Wage Option	.....	.....	163.22
Surety Bond	$37.36	.....	.....
Record Keeping	0.51	.....	.....
Rule Familiarization	1.05	.....	.....
Reforestation Applications	1.18	.....	.....
Electronic Processing and Process Streamlining Cost Savings	.....	$0.27	.....
Staggered Entry	.....	12.94	.....
Undiscounted 10-Year Total	40.11	13.21	952.83
10-Year Total with a Discount Rate of 3%	34.21	11.85	803.57

[156] As described above, 24-month certification would be subject to appropriate criteria and prior notice to the Department by the certifying authority.

EXHIBIT 4—ESTIMATED 10-YEAR MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE BY PROVISION—Continued

[2017 $millions]

Provision	Total cost	Total cost savings	Total transfer
10-Year Total with a Discount Rate of 7%	28.18	10.39	673.07

Exhibit 5 summarizes the estimated total costs, cost savings, and transfer payments of the proposed rule over the 10-year analysis period.

The Department estimates the annualized costs of the proposed rule at $4.01 million, the annualized cost savings at $1.48 million, and the annualized transfer payments (from H–2A employers to workers) at $114.41 million, at a discount rate of 7 percent. For the purpose of E.O. 13771, even though the annualized net quantifiable cost, when perpetuated, is $3.24 million at a discount rate of 7 percent, the Department expects that the total annualized cost-savings of this proposed rule would outweigh the total annualized costs, resulting in a net cost savings due to large non-quantifiable cost savings. The Department seeks comment on this expectation.

The Department estimates the total net cost of the proposed rule at $17.79 million at a discount rate of 7 percent.

EXHIBIT 5—ESTIMATED MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE

[2017 $millions]

	Costs	Cost savings	Net costs*	Transfer payments
2020	$2.94	$1.69	$1.25	$38.44
2021	2.18	1.66	0.51	45.77
2022	2.51	1.62	0.89	54.50
2023	2.89	1.56	1.33	64.88
2024	3.34	1.48	1.86	77.25
2025	3.85	1.37	2.48	91.98
2026	4.45	1.24	3.21	109.51
2027	5.14	1.08	4.06	130.39
2028	5.94	0.87	5.06	155.25
2029	6.87	0.63	6.24	184.84
Undiscounted 10-Year Total	40.11	13.21	26.89	952.83
10-Year Total with a Discount Rate of 3%	34.21	11.85	22.36	803.57
10-Year Total with a Discount Rate of 7%	28.18	10.39	17.79	673.07
10-Year Average	4.01	1.32	2.69	95.28
Annualized with a Discount Rate of 3%	4.01	1.39	2.62	94.20
Annualized with a Discount Rate of 7%	4.01	1.48	2.53	114.41
Perpetuated Net Costs with a Discount Rate of 7%			$3.24	

5. Regulatory Alternatives

The Department considered two alternatives to the proposal to establish the AEWR at the annual average hourly gross wage for the State or region and SOC from the FLS where USDA reports such a wage. First, the Department considered using the current FLS occupational classifications of field and livestock workers for each State or region to set a separate AEWR for field workers and another AEWR for livestock workers at the annual average hourly gross wage from the FLS for workers covered by those classifications. Under this alternative, the Department would use the OES average hourly wage for the SOC and State if either: (1) The occupation covered by the job order is not included in the current FLS occupational classifications of field or livestock workers; [157] or (2) workers within the occupations classifications of field or livestock workers but in a region or State where USDA cannot produce a wage for that classification, which is expected to occur only in Alaska. Finally, under this alternative where both OES State data is not available, and the work performed is not covered by the field or livestock worker categories of the FLS, the Department would use the OES national average hourly wage for the SOC.

The total impact of the first regulatory alternative was calculated in the same manner as the proposed wage. The Department estimated average annual undiscounted transfers of $23.88 million. The total transfer over the 10-year period was estimated at $238.76 million undiscounted, or $201.36 million and $163.23 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $23.61 million and $28.67 million at discount rates of 3 and 7 percent, respectively.

Under the second regulatory alternative considered by the Department, the Department would set the AEWR using the OES average hourly wage for the SOC and State. When OES State data is not available, the Department would set the AEWR at the OES national average hourly wage for the SOC under this alternative. The Department again used the same method to calculate the total impact of the proposed regulatory alternative. The

[157] Among the workers excluded from the field and livestock worker categories of the FLS are workers in the following SOCs: Farmers, Ranchers and Other Agricultural Managers (SOC 11–9013) and First Line Supervisors of Farm Workers (SOC 45–1011), Forest and Conservation Workers (SOC 45–4011), Logging Workers (SOC 45–4020), and Construction Laborers (SOC 47–2061).

Department estimated average annual undiscounted transfers of $106.20 million. The total transfer over the 10-year period was estimated at $1.06 billion undiscounted, or $895.61 million and $725.98 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $104.99 million and $127.51 million at discount rates of 3 and 7 percent, respectively.

Exhibit 6 summarizes the estimated transfer payments associated with the three considered revised wage structrues over the 10-year analysis period. The Department prefers the proposed methodology, under which the Department would establish the AEWR at the annual average hourly gross wage for the State or region and SOC from the FLS where the FLS produces such a wage, to the two regulatory alternatives for the reasons discussed more fully in the preamble. Among those reasons, the Department prefers the proposal to the first regulatory alternative because the proposal provides data that is more specific to the agricultural occupation and does not combine workers performing dissimilar duties, as might be the case if the Department used the more general categories of field and livestock workers from the FLS to establish the AEWR. The Department prefers the proposal to the second regulatory alternative because the Department generally finds the FLS to be a superior wage source to the OES for establishing the AEWR where both surveys produce an occupation-specific wage because only the FLS directly surveys farmers and ranchers and the FLS is recognized by the BLS as the authoritative source for data on agricultural wages.

EXHIBIT 6—ESTIMATED MONETIZED WAGE STRUCTURE TRANSFER PAYMENTS AND COSTS OF THE PROPOSED RULE, UNDISCOUNTED

[2017 $millions]

	Proposed rule	Regulatory alternative 1	Regulatory alternative 2
Total 10-Year Transfer	$163.22	$238,76	$1,061.96
Total with 3% Discount	137.65	201.36	895.61
Total with 7% Discount	111.58	163.23	725.98
Annualized Undiscounted Transfer	16.32	23.88	106.20
Annualized Transfer with 3% Discount	16.14	26.61	105.00
Annualized Transfer with 7% Discount	19.60	28.67	127.51
Costs for Regulatory Alternative 3			
Total 10-Year Cost	$587.72		
Total with 3% Discount	498.51		
Total with 7% Discount	407.22		
Annualized Undiscounted Cost	58.77		
Annualized Cost with 3% Discount	58.44		
Annualized Cost with 7% Discount	57.98		

The Department also considered a third regulatory alternative regarding required surety bond amounts that relied on the proposed revisions to the wage structure. Under this regulatory alternative, the revisions to the wage structure would be the same as the proposed rule and would be used in the formula to calculate bond amounts. This formula is the most specific to factors that affect the likely amount of back wages owed, including crew size and duration of certification and therefore produces the most variability in bond amounts. It was calculated based on information already required on the job offer: The number of H–2A workers (''Workers''), the applicable AEWR from the proposed wage structure, the number of hours to be worked per week (''Hours''), and the duration of the certification (''Weeks''). Each of these variables were multiplied to get the bond amount required for certification. The total cost to the employer was calculated by multiplying the required bond amount by the assumed bond premium (0.04). This formula is the simplest for the employer because the values are readily accessible. Because the current bond amounts increase based on crew size in a non-linear fashion, switching to this formula will mean the certifications for certain crew sizes will be affected differently, with certifications for 25 to 74 workers having the biggest increases.

The Department used the OFLC certification data to calculate required bond amounts under this alternative for all certified H–2A employers for FYs 2016 and 2017. These amounts were then multiplied by the assumed bond premium (0.04) and the growth rate of H–2A certified labor contractors (16 percent), summed by year, and averaged to generate an estimated undiscounted annual cost due to bond amount increases of $58.77 million. The total cost from the alternative required bond amounts over the 10-year period is estimated at $587.72 million undiscounted, or $498.51 million and $407.22 million at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $58.44 million and $57.98 million at discount rates of 3 and 7 percent, respectively.

The Department prefers the proposed methodology for surety bonds because the proposal is easier to understand and administer and is likely to result in less variability in the bond amounts than the regulatory alternatives.

A. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small

governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. Despite this, it is the Department's view that due to stakeholder interest in this proposed rule an initial regulatory flexibility analysis should be published to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. The Department invites interested persons to submit comments on the following estimates, including the number of small entities affected by the proposed rule, the compliance cost estimates, and whether alternatives exist that will reduce the burden on small entities while still remaining consistent with the objectives of the proposed rule.

1. Why the Department Is Considering Action

The Department has concluded that efforts to protect workers and enforce laws governing the administration of nonimmigrant visa programs requires additional notice and comment rulemaking regarding the certification of temporary employment of nonimmigrant workers through the H–2A program, and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. The Department also seeks to further the goals of E.O. 13788, Buy American and Hire American, by rigorously enforcing applicable laws in order to create higher wages and employment rates for workers in the U.S. and protect their economic interests. As a result, the Department publishes this NPRM developing standards related to mandatory electronic filing and electronic signatures, revising the adverse effect wage rate and prevailing wage methodologies, incorporating certain training and employment guidance letters into the H–2A regulatory structure, and expanding the definition of agriculture under the H–2A program, and seeks public input on all aspects of the proposals presented here.

2. Objectives of and Legal Basis for the Proposed Rule

The Department is proposing to amend current regulations related to the H–2A program in a manner that modernizes and eliminates inefficiencies in the process by which employers obtain a temporary agricultural labor certification for use in petitioning DHS to employ a nonimmigrant worker in H–2A status. Sections 101(a)(15)(H)(ii)(a) and 218(a)(1) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a) and 1188(a)(1), establish the H–2A nonimmigrant worker visa program which enables U.S. agricultural employers to employ foreign workers to perform temporary or seasonal agricultural labor or services where the Secretary of DOL certifies (1) 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 (2) the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. The standard and procedures for the certification and employment of workers under the H–2A program are found in 20 CFR part 655 and 29 CFR part 501.

The Secretary has delegated his authority to issue temporary agricultural labor certifications to the Assistant Secretary, ETA, who in turn has delegated that authority to ETA's OFLC. Secretary's Order 06–2010 (Oct. 20, 2010). In addition, the Secretary has delegated to WHD the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to assure employer compliance with the terms and conditions of employment under the H–2A program. Secretary's Order 01–2014 (Dec. 19, 2014).

3. Estimating the Number of Small Businesses Affected by the Rulemaking

The Department collected employment and annual revenue data from the business information provider InfoUSA and merged those data into the H–2A disclosure data for FYs 2015, 2016, and 2017. Disclosure data for 2015 was included for cases that have certified workers in both 2015 and 2016. This process allowed the Department to identify the number and type of small entities in the H–2A disclosure data as well as their annual revenues. The Department was able to obtain data matches for 5,329 H–2A cases with work in 2016 and 2017, including employers of reforestation workers that would be classified as H–2A employers under the proposed rule.[158] Next, the Department used the SBA size standards to classify 4,320 of these employers (or 81.1 percent) as small.[159] Labor contractors determined to be small entities were removed from the RFA analysis because their revenue is not related to the number of temporary H–2A workers certified. This resulted in 3,600 small, certified cases. Because a single employer can apply for temporary H–2A workers multiple times, unique employers had to be identified. Additionally, duplicate cases that appeared multiple times within the dataset were removed (*i.e.,* the same employer applying for the same number of workers in the same occupation, in the same state, during the same work period). Based on employer name, city, and state, the Department determined that there were 2,514 unique employers with work in 2016 and 2017. These unique small employers had an average of 12 employees and average annual revenue of approximately $3.54 million. Of these unique employers, 2,465 of them had revenue data available from InfoUSA. The Department's analysis of the impact of this proposed rule on small businesses is based on the number of small unique employers (2,465 with revenue data).

To provide clarity on the agricultural industries impacted by this regulation, exhibit 7 shows the number of unique H–2A small entity employers[160] with certifications in 2016 and 2017 within each NAICS code at the 6-digit and 4-digit level.

[158] Of the 2,514 small H–2A unique employers in 2016 and 2017, 20 entities are employers of reforestation and pinestraw workers that are currently under the H–2B program and would be reclassified under the H–2A program in this proposal.

[159] Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* (Oct. 2017), *https://www.naics.com/wp-content/uploads/2017/10/SBA_Size_Standards_Table.pdf.*

[160] This table is not inclusive of H–2B employers reclassificed as H–2A employers. There are 18 unique small entity H–2B employers in 2017.

EXHIBIT 7—NUMBER OF H–2A SMALL EMPLOYERS BY NAICS CODE

2016				2017			
6-Digit NAICS	Description	Number of employers	Percent	6-Digit NAICS	Description	Number of employers	Percent
111421	Nursery and Tree Production	134	12	111421	Nursery and Tree Production	136	11
111998	All Other Miscellaneous Crop Farming ..	103	9	111998	All Other Miscellaneous Crop Farming ..	102	8
111219	Other Vegetable (except Potato) and Melon Farming.	68	6	115113	Crop Harvesting, Primarily by Machine	72	6
111331	Crop Harvesting, Primarily by Machine	59	5	111331	Apple Orchards	65	5
115113	Apple Orchards	58	5	111219	Other Vegetable (except Potato) and Melon Farming.	65	5
112111	Beef Cattle Ranching and Farming	42	4	112111	Beef Cattle Ranching and Farming	41	3
111191	Oilseed and Grain Combination Farming	27	2	111191	Oilseed and Grain Combination Farming	32	3
813910	Business Associations	25	2	111339	Other Noncitrus Fruit Farming	26	2
111339	Other Noncitrus Fruit Farming	23	2	115112	Soil Preparation, Planting, and Cultivating.	23	2
115112	Soil Preparation, Planting, and Cultivating.	18	2	111211	Potato Farming	19	2
Other NAICS codes		573	51	Other NAICS codes		603	49
No NAICS code available		4	0.4	No NAICS code available		51	4
4-Digit NAICS	Description	Number of employers	Percent	4-Digit NAICS	Description	Number of employers	Percent
1119	Other Crop Farming	385	34	1119	Other Crop Farming	408	33
1114	Greenhouse, Nursery, and Floriculture Production.	152	13	1114	Greenhouse, Nursery, and Floriculture Production.	156	13
1113	Vegetable and Melon Farming	121	11	1113	Fruit and Tree Nut Farming	149	12
1112	Fruit and Tree Nut Farming	121	11	1112	Vegetable and Melon Farming	127	10
1151	Support Activities for Crop Production ...	99	9	1151	Support Activities for Crop Production ...	110	9
1111	Oilseed and Grain Farming	68	6	1111	Oilseed and Grain Farming	67	5
1121	Cattle Ranching and Farming	61	5	1121	Cattle Ranching and Farming	55	4
1129	Other Animal Production	33	3	1129	Other Animal Production	34	3
1125	Aquaculture	29	3	1125	Aquaculture	24	2
8139	Business, Professional, Labor, Political, and Similar Organizations.	25	2	3331	Agriculture, Construction, and Mining Machinery Manufacturing.	14	1
Other NAICS codes		36	3	Other NAICS codes		40	3
No NAICS code available		4	0	No NAICS code available		51	4

Exhibit 8 shows the number of H–2B small entity employers that would be classified as H–2A employers under the proposed rule. These employers are classified as support activities for forestry under the 4-digit NAICS code 1153.

EXHIBIT 8—NUMBER OF H–2B SMALL EMPLOYERS BY NAICS CODE

NAICS code	NAICS description	2016 number of employers	2017 number of employers	Percent
115310	Support Activities for Forestry	2	18	100
1153	Support Activities for Forestry	2	18	100

4. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

The Department has estimated the incremental costs for small businesses from the baseline (*i.e.,* the 2010 Final Rule: T*emporary Agricultural Employment of H–2A Aliens in the United States;* TEGL 17–06, Change 1; TEGL 33–10, and TEGL 16–06, Change 1) to this proposed rule. We estimated the costs of (a) new surety bond amounts required for H–2A labor contractors based on the number of H–2A employees as well as the proportional adjustment of surety bond rates on an annual basis; (b) recordkeeping costs associated with maintaining records of employee's home address in their respective home countries; (c) recordkeeping costs incurred by the abandonment or dismissal with cause of employees; (d) time to read and review the proposed rule; (e) reforestation applications; and (f) wage costs (or cost-savings). The cost estimates included in this analysis for the provisions of the proposed rule are consistent with those presented in the E.O. 12866 section.

The Department identified the following provisions of the proposed rule to have an impact on industry but was not able to quantify the impacts due to data limitations: An expansion of the regulatory definition of agriculture as to include reforestation and pine straw workers; and housing requirements (securing rentals or public accommodations for H–2A employees).

5. Calculating the Impact of the Proposed Rule on Small Business Firms

The Department estimates that small businesses not classified as H–2ALCs, 2,514 unique employers,[161] would incur a one-time cost of $127.36 to familiarize themselves with the rule and an annual cost of $5.67 associated with

[161] The 2,514 unique small employers includes employers of reforestation and pine straw workers that would be classified as H–2A employers under the proposed rule, and excludes all labor contractors.

recordkeeping requirements.[162] While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department ignores those cost savings for purposes of the RFA analysis. In total, the Department estimates that small businesses not classified as labor contractors will incur a total first-year cost of $133.03 (= $127.36 + $5.67). The Department uses the first-year cost estimate because it is the highest cost incurred by businesses over the analysis timeframe. Additionally, employers of reforestation and pine straw workers (currently under the H–2B program) that would be classified as H–2A employers under the proposed rule will incur H–2A labor certification filing fee costs, not applicable under the H–2B program. The Department estimates this cost to be $551.70 per employer, and is incurred annually. Therefore, for reforestation and pine straw employers, the total first-year cost is $684.73, and total second-year cost is $551.70.

The proposed rule includes the provision pertaining to surety bonds that applies to only H–2ALCs, so the Department estimates the impact on those entities separately. *See* 20 CFR 655.132(c). To estimate the impact of the proposed rule on these entities, the Department used the SBA size standards to classify an average of 81 H–2ALCs as small employers. These small entities had an average of 54 employees and average annual revenues of approximately $12.09 million in FYs 2016 and 2017.

The Department estimates that the average small H–2A labor contractor would incur a one-time cost of $127.36 to familiarize themselves with the rule, annual costs of $5.67 associated with recordkeeping requirements, and $255.14 associated with an increase in the required surety bond amounts.[163] While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department ignores those cost savings for purposes of the RFA analysis. In total, the Department estimates that small businesses classified as H–2ALCs will incur a total first-year cost of $388.17 (= $127.36 + $5.67 + $255.14).

In addition to the total first- and second-year costs above, each small entity will have an increase (or decrease) in the wage costs (or cost-savings) due to the revisions to the wage structure. For each small business, the estimated wage cost (or cost-savings) was calculated as the sum of the proposed total wage minus the total baseline wage for each small business identified from the H–2A disclosure data in FYs 2016 and 2017. This change in the wage costs was added to the total first-year costs to measure the total impact of the proposed rule on the small business.

The Department determined the proportion of each small entities' total revenue that would be impacted by the costs of the proposed rule to determine if the proposed rule would have a significant and substantial impact on small business. The cost impacts included estimated first year costs and the wage burden cost introduced by the proposed rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small businesses incurring a significant impact as the threshold for a substantial impact on small business.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact. See, *e.g.,* 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex). This threshold is also consistent with that sometimes used by other agencies. See, *e.g.,* 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant). The Department also believes that its use of a 20 percent of affected small business entities substantiality criterion is appropriate. The Department has used a threshold of 15 percent of small entities in prior rulemakings for the definition of substantial number of small entities. *See, e.g.,* 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors).

Of the 2,514 unique small employers with work occurring in 2016 and 2017 and revenue data,[164] 94.4 percent of employers had less than 3 percent of their total revenue impacted. Exhibit 9 provides a breakdown of small employers by the proportion of revenue affected by the costs of the proposed rule.

EXHIBIT 9—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	2016 Employers	2016 Percentage	2017 Employers	2017 Percentage
<1%	2,182	89	2,182	89
1%–2%	101	4	101	4
2%–3%	43	2	42	2
3%–4%	27	1	31	1
4%–5%	14	1	27	1
>5%	98	4	82	3

[162] $127.36 = 2 hrs × $63.68, where $63.68 = $31.84 + ($31.84 × 44%) + ($31.84 × 56%). These recordkeeping requirements include the following: $2.12 to collect and maintain records of workers' email address and phone number(s) home, $2.12 to maintain records for the self-certification of housing, and $2.12 to maintain records of notification to the NPC (and DHS) of employment abandonment or termination for cause.

[163] $255.14 is the annual incremental cost per H–2ALC with additional 50 to 75 workers.

[164] The 2,514 unique small employers includes employers of reforestation workers that would be classified as H–2A employers under the proposed rule, and excludes all labor contractors.

6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Proposed Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

7. Alternative to the Proposed Rule

The RFA directs agencies to assess the impacts that various regulatory alternatives would have on small entities and to consider ways to minimize those impacts. Accordingly, the Department considered two regulatory alternatives related to the third cost component: Employers' recordkeeping for abandonment of employment or termination for cause. *See* proposed 20 CFR 655.122(n) and 655.167(c)(7). Under the first alternative, small businesses would not need to provide notice to the NPC within two working days of each occurrence of abandonment of employment or termination for cause during the certification period in order to be relieved of certain H–2A obligations (*i.e.,* return transportation and subsistence costs for the worker; three-fourths guarantee to the worker; and, for U.S. workers, contact in subsequent seasons to solicit the worker's return to the job). Rather, these small businesses could wait until the end of the certification period to provide this notice; the employer could amass all such notifications into one package to submit to the NPC at the end of the certification period. This alternative differs from the Department's proposal related to § 655.122(n) by providing flexibility in the timing of the notice to the NPC. This first alternative would slightly decrease the burden of small businesses having to potentially prepare and submit multiple notifications to NPC throughout the certification period.

The Department decided not to pursue this alternative for two reasons. First, DHS regulations require employers to notify DHS within two work days if an H–2A worker: Fails to report to work within 5 workdays of the employment start date; absconds from the worksite (*i.e.,* fails to report for work for a period of 5 consecutive workdays without the consent of the employer; [165]) or is terminated prior to the completion of agricultural labor or services for which he or she was hired. Under this first regulatory alternative, small businesses would need to submit the same notification to two different agencies at two different reporting cycles, rather than on the same reporting cycle. The employer would have to submit potentially multiple notifications to DHS regarding H–2A workers, each within two work days of a triggering event, while separately amassing all notifications regarding both H–2A workers and U.S. workers in corresponding employment for a single submission to ETA's NPC at a later date.

This bifurcation of the reporting cycle would not relieve employers of a contemporaneous notification requirement for H–2A workers to one agency (*i.e.,* DHS) and could create confusion, which could negatively impact employers' compliance with DHS notification requirements, thereby undermining DHS' ability to identify of H–2A workers who had been, but may no longer be in the United States legally, as discussed above in the section-by-section analysis of this notification requirement. Second, in its experience of administering and enforcing the H–2A program, the Department has found that employers are better able to prepare such notification contemporaneous to the triggering event. Notification that does not occur contemporaneously is more likely to be less detailed, possibly inaccurate and incomplete, as employers' recollections and memories of specific circumstances for abandonment of employment or termination for cause may diminish over a period of time, even as short as a few weeks or months. The quality of such notifications is important to the employer, not only the Department. The notifications both support program integrity and serve to relieve the employer of financial burdens, if they provide adequate information. While potentially reducing burden for compliance with DOL regulations, this first regulatory alternative would not be less burdensome for small businesses because they still have to meet DHS requirements for timely notification regarding abandonment of employment or termination for cause for H–2A workers and could increase confusion and overall burden by imposing disparate reporting cycles.

Under the second regulatory alternative related to the third cost component, employers' recordkeeping for abandonment of employment or termination for cause, the Department would not require employers to submit to the NPC the notice described in § 655.122(n) with regard to U.S. workers who abandoned employment or were terminated for cause within two working days of the triggering event. Rather, the employers would only need to prepare and maintain records of these notices for not less than 3 years from the date of the certification, as proposed in § 655.167(c)(7).

This alternative would reduce small businesses' cost and burden of preparing and submitting this documentation to the NPC. The Department decided not to pursue this alternative because the reduction of cost and burden to small businesses is negligible, as it would not affect such notifications for H–2A workers and would relieve the employer only of notice submission to the Department, not preparation, for U.S. workers in corresponding employment. As with the alternative discussed above, bifurcating notice requirements into separate categories (*i.e.,* notification prepared and submitted within two working days for H–2A workers, but prepared and retained for U.S. workers in corresponding employment) is ripe for confusion and allowing delayed notification preparation may result in less detailed, accurate, and complete notification documentation, to the employer's detriment. Further, the negligible reduction of cost and burden is outweighed by the value of affirmative, contemporaneous notification to maintaining program integrity. Absent timely notification, the Department would only be made aware of U.S. worker abandonment under limited circumstances (*e.g.,* an audit), not in all cases. This would limit the Department's ability to identify patterns of U.S. worker abandonment, which could suggest involuntary abandonment, as discussed in the section-by-section analysis of proposed changes. The Department's ability to assure program integrity would be greatly diminished in exchange for a relatively minor reduction reporting requirements.

The Department invites public comment on these alternatives and whether other alternatives exist that would reduce the burden on small entities while still remaining consistent with the objectives of the proposed rule.

B. Paperwork Reduction Act

In order to meet its statutory responsibilities under the INA, the Department collects information necessary to render determinations on requests for temporary agricultural labor certification, which allow employers to bring foreign labor to the United States on a seasonal or other temporary basis under the H–2A program. The Department uses the collected information to determine if employers are meeting their statutory and regulatory obligations. This information collection is subject to the PRA, 44 U.S.C. 3501 *et seq.* A Federal agency

[165] 8 CFR 214.2(h)(5)(vi)(E).

generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a), 1320.6. The Department obtained OMB approval for this information collection under Control Number 1205–0466.

This information collection request (ICR), concerning OMB Control No. 1205–0466, includes the collection of information related to the Department's temporary agricultural labor certification determination process in the H–2A program. The PRA helps ensure that requested data is provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

On October 25, 2018, the Department published a 60-day notice announcing its proposed revisions to the collection of information under OMB Control Number 1205–0466 in the **Federal Register** as part of its ongoing effort to streamline information collection, clarify statutory and regulatory requirements, and provide greater oversight in the H–2A program. *See* 83 FR 53911. In accordance with the PRA, the Department provided the public with a notice and the opportunity to comment on proposed revisions to the application (Form ETA–9142A, *H–2A Application for Temporary Employment Certification;* Form ETA–9142A, *Appendix A;* and the general instructions to those forms); to the method of issuing temporary agricultural labor certifications, from paper-based issuance to a new one-page electronically-issued Form ETA–9142A, *H–2A Approval Final Determination: Temporary Labor Certification Approval;* and to the agricultural clearance order.[166] The Department instructed the public to submit written comments on those proposed revisions following the instructions provided in that **Federal Register** notice on or before December 24, 2018.

The Department now proposes additional revisions to this information collection, covered under OMB Control No. 1205–0466, to further revise the information collection tools, based on regulatory changes proposed in this NPRM. The additional proposed revisions to Forms ETA–9142A and appendices and Form ETA–790/790A and addenda will align information collection requirements with the Department's proposed regulatory framework and continue the ongoing efforts to provide greater clarity to employers on regulatory requirements, standardize and streamline information collection to reduce employer time and burden preparing applications, and promote greater efficiency and transparency in the review and issuance of labor certification decisions under the H–2A visa program. For example, the Department proposes a new Form ETA–9142A, Appendix B, *H–2A Labor Contractor Surety Bond,* to facilitate satisfaction of this filing requirement for H–2A Labor Contractor employers and a field for an employer to indicate it conducted pre-filing recruitment under proposed § 655.123. The Department also proposes to implement a revised ETA–232, *Domestic Agricultural In-Season Wage Report,* and eliminate the current ETA–232A, *Wage Survey Interview Record,* for SWA use to modernize the survey process and to reflect the prevailing wage survey methodology proposed in this proposed rule at § 655.120(c).[167]

Overview of Information Collection Proposed by This NPRM

Title: H–2A Temporary Agricultural Employment Certification Program.

Type of Review: Revision of a Currently Approved Information Collection.

OMB Number: 1205–0466.

Affected Public: Individuals or Households, Private Sector—businesses or other for-profits, Government, State, Local and Tribal Governments.

Form(s): ETA–9142A, *H–2A Application for Temporary Employment Certification;* ETA–9142A—*Appendix A;* ETA–9142A—*Appendix B, H–2A Labor Contractor Surety Bond;* ETA–9142A—*H–2A Approval Final Determination: Temporary Agricultural Labor Certification;* ETA–790/790A, *H–2A Agricultural Clearance Order;* ETA–790/790A—*Addendum A;* ETA–790/790A—*Addendum B;* ETA–790/790A—*Addendum C;* ETA–232, *Domestic Agricultural In-Season Wage Report.*

Total Annual Respondents: 8,982.

Annual Frequency: On Occasion.

Total Annual Responses: 290,824.45.

Estimated Time per Response (averages):

—Forms ETA 9142A, Appendix A, Appendix B—3.68 hours per response.

—Forms ETA 790/790A/790B—.75 hours per response.

—Form ETA–232—3.30 hours per response.

—Administrative Appeals—18.48 hours per response.

Estimated Total Annual Burden Hours: 56,862.86.

Total Annual Burden Cost for Respondents: $0.

The Department invites comments on all aspects of the PRA analysis. Comments that are related to a specific form or a specific form's instructions should identify the form or form's instructions using the form number, *e.g.,* ETA–9142A or Form ETA–790/790A, and should identify the particular area of the form for comment. A copy of the proposed revised information collection tools can be obtained by contacting the office listed below in the addresses section of this notice. Written comments must be submitted on or before September 24, 2019.

The Department is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, and the agency's estimates associated with the annual burden cost incurred by respondents and the government cost associated with this collection of information;

[166] The proposed Form ETA–790/790A, *H–2A Agricultural Clearance Order,* and addenda, provide language to employers to disclose necessary information regarding the material terms and conditions of the job opportunity. A copy of Form ETA–790/790A will be integrated with the Form ETA–9142A for purposes of the Department's temporary agricultural labor certification determination; the CO will review the Form ETA–790/790A in combination with Form ETA–9142A, when the employer submits Form ETA–9142A to the NPC. This proposal will consolidate information collected through the agricultural clearance order Form ETA–790, which is currently authorized under OMB Control Number 1205–0134, into the agency's primary H–2A information collection requirements under OMB Control Number 1205–0466. This consolidation and revision will align all data collection for the H–2A program under a single OMB-approved ICR.

[167] This is a collection of information from SWAs, not employers, that is separately authorized under OMB Control Number 1205–0017. The Department proposes to revise and consolidate the collection under OMB Control Number 1205–0466. The SWAs will use the new Form ETA–232, *Domestic Agricultural In-Season Wage Report,* to report to OFLC the results of wage surveys in compliance with the revised prevailing wage determination methodology in the proposed rule, which OFLC will use to establish prevailing wage rates for the H–2A program.

• enhance the quality, utility, and clarity of the information to be collected; and

• minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Comments submitted in response to this notice will be considered, summarized and/or included in the ICR the Department will submit to OMB for approval; they will also become a matter of public record. Commenters are encouraged not to submit sensitive information (*e.g.,* confidential business information or personally identifiable information such as a social security number).

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in $100 million or more expenditure (adjusted annually for inflation) in any 1 year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of $100 million in 1995 adjusted for inflation to 2017 levels by the Consumer Price Index for All Urban Consumer (CPI–U) is $161 million.

This NPRM, if finalized as proposed, does not exceed the $100 million expenditure in any 1 year when adjusted for inflation ($161 million in 2017 dollars), and this rulemaking does not contain such a mandate. The requirements of Title II of the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

D. Executive Order 13132: Federalism

This NPRM, if finalized as proposed, does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132 requires no further agency action or analysis.

E. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This NPRM, if finalized as proposed, does not have ''tribal implications'' because it 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. Accordingly, E.O. 13175 requires no further agency action or analysis.

Appendix A

TABLE 1—HOURLY AEWRS BY REGION OR STATE UNDER CURRENT REGULATION

Region or state	2016	2017	2018
Appalachian I	$10.72	$11.27	$11.46
Appalachian II	10.85	10.92	11.19
California	11.89	12.57	13.18
Cornbelt I	12.07	13.01	12.93
Cornbelt II	12.17	13.12	13.42
Delta	10.69	10.38	10.73
Florida	10.70	11.12	11.29
Hawaii	12.64	13.14	14.37
Lake	12.02	12.75	13.06
Mountain I	11.75	11.66	11.63
Mountain II	11.27	11.00	10.69
Mountain III	11.20	10.95	10.46
Northeast I	11.74	12.38	12.83
Northeast II	11.66	12.19	12.05
Northern Plains	13.80	13.79	13.64
Pacific	12.69	13.38	14.12
Southeast	10.59	10.62	10.95
Southern Plains	11.15	11.59	11.87

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Appalachian I	NC	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	$27.93	OES State	$31.43	OES State	$45.08	OES State.
Appalachian I	NC	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.73	OES State	28.10	OES State	30.90	OES State.
Appalachian I	NC	45–2041	Graders and Sorters, Agricultural Products.	10.55	FLS Regional	13.29	FLS Regional	11.07	FLS Regional.
Appalachian I	NC	45–2091	Agricultural Equipment Operators	11.30	OES State	12.42	OES State	12.34	FLS Regional.
Appalachian I	NC	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.46	FLS Regional	10.96	FLS Regional	11.48	FLS Regional.
Appalachian I	NC	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.46	OES State	12.94	OES State	13.22	OES State.
Appalachian I	NC	45–2099	Agricultural Workers, All Other	13.13	OES State	12.42	OES State	12.53	OES State.
Appalachian I	NC	53–7064	Packers and Packagers, Hand	9.67	FLS Regional	11.00	FLS Regional	10.29	FLS Regional.
Appalachian I	VA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	35.16	OES State	40.07	OES State.
Appalachian I	VA	35–2012	Cooks, Institution and Cafeteria	12.80	OES State	13.49	OES State	13.67	OES State.
Appalachian I	VA	35–2015	Cooks, Short Order	10.66	OES State	10.88	OES State	10.72	OES State.
Appalachian I	VA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	27.13	OES State	26.03	OES State	25.93	OES State.
Appalachian I	VA	45–2041	Graders and Sorters, Agricultural Products.	10.55	FLS Regional	13.29	FLS Regional	11.07	FLS Regional.
Appalachian I	VA	45–2091	Agricultural Equipment Operators	12.20	OES State	12.89	OES State	12.34	FLS Regional.
Appalachian I	VA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.46	FLS Regional	10.96	FLS Regional	11.48	FLS Regional.
Appalachian I	VA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.41	OES State	12.25	OES State	12.90	OES State.
Appalachian I	VA	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Appalachian I	VA	53–7064	Packers and Packagers, Hand	9.67	FLS Regional	11.00	FLS Regional	10.29	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Appalachian II	KY	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.32	OES State	37.75	OES State	41.50	OES State.
Appalachian II	KY	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.87	OES State	23.97	OES State	22.83	OES State.
Appalachian II	KY	45–2021	Animal Breeders	17.97	OES State	24.45	OES State	20.89	OES National.
Appalachian II	KY	45–2041	Graders and Sorters, Agricultural Products.	11.42	OES State	11.64	OES State	10.02	FLS Regional.
Appalachian II	KY	45–2091	Agricultural Equipment Operators	10.78	OES State	10.85	OES State	12.10	FLS Regional.
Appalachian II	KY	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.43	OES State	10.44	FLS Regional	10.77	FLS Regional.
Appalachian II	KY	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.03	OES State	12.75	OES State	11.10	FLS Regional.
Appalachian II	KY	45–2099	Agricultural Workers, All Other	14.73	OES State	15.06	OES State	15.36	OES State.
Appalachian II	KY	53–7064	Packers and Packagers, Hand ...	10.53	FLS Regional	10.50	FLS Regional	12.13	OES State.
Appalachian II	TN	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	22.14	OES State	25.57	OES State	29.28	OES State.
Appalachian II	TN	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.93	OES State	20.61	OES State	20.14	OES State.
Appalachian II	TN	45–2041	Graders and Sorters, Agricultural Products.	12.27	OES State	11.65	FLS National	10.02	FLS Regional.
Appalachian II	TN	45–2091	Agricultural Equipment Operators	12.12	OES State	13.26	OES State	12.10	FLS Regional.
Appalachian II	TN	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.14	OES State	10.44	FLS Regional	10.77	FLS Regional.
Appalachian II	TN	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.56	OES State	10.90	OES State	11.10	FLS Regional.
Appalachian II	TN	45–2099	Agricultural Workers, All Other	15.31	OES National	18.57	OES State	14.54	OES State.
Appalachian II	TN	53–7064	Packers and Packagers, Hand ...	10.53	FLS Regional	10.50	FLS Regional	11.46	OES State.
Appalachian II	WV	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Appalachian II	WV	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.09	OES State	23.39	OES State	24.66	OES State.
Appalachian II	WV	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	10.02	FLS Regional.
Appalachian II	WV	45–2091	Agricultural Equipment Operators	12.38	FLS National	12.85	FLS National	12.10	FLS Regional.
Appalachian II	WV	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.10	OES State	10.44	FLS Regional	10.77	FLS Regional.
Appalachian II	WV	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.06	OES State	14.17	OES State	11.10	FLS Regional.
Appalachian II	WV	45–2099	Agricultural Workers, All Other	11.73	OES State	13.22	OES State	13.36	FLS National.
Appalachian II	WV	53–7064	Packers and Packagers, Hand ...	10.53	FLS Regional	10.50	FLS Regional	11.51	OES State.
California	CA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	26.01	FLS Regional	27.05	FLS Regional	30.18	FLS Regional.
California	CA	19–4011	Agricultural and Food Science Technicians.	20.07	OES State	20.40	OES State	20.80	OES State.
California	CA	35–2012	Cooks, Institution and Cafeteria ..	14.99	OES State	15.75	OES State	16.61	OES State.
California	CA	35–2021	Food Preparation Workers	11.17	OES State	12.19	OES State	12.82	OES State.
California	CA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	19.48	FLS Regional	20.38	FLS Regional	22.11	FLS Regional.
California	CA	45–2041	Graders and Sorters, Agricultural Products.	12.34	FLS Regional	12.37	FLS Regional	13.53	FLS Regional.
California	CA	45–2091	Agricultural Equipment Operators	12.27	FLS Regional	12.95	FLS Regional	13.53	FLS Regional.
California	CA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.49	FLS Regional	12.33	FLS Regional	12.92	FLS Regional.
California	CA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.74	FLS Regional	13.15	FLS Regional	13.96	FLS Regional.
California	CA	45–2099	Agricultural Workers, All Other	12.08	FLS Regional	12.93	FLS Regional	14.40	FLS Regional.
California	CA	53–7064	Packers and Packagers, Hand ...	11.72	FLS Regional	11.79	FLS Regional	12.85	FLS Regional.
Cornbelt I	IL	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.92	OES State	33.27	OES State	32.66	OES State.
Cornbelt I	IL	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.01	OES State	20.29	OES State	20.45	OES State.
Cornbelt I	IL	45–2021	Animal Breeders	21.47	OES National	20.35	OES National	20.89	OES National.
Cornbelt I	IL	45–2041	Graders and Sorters, Agricultural Products.	13.08	FLS Regional	13.55	FLS Regional	10.43	FLS Regional.
Cornbelt I	IL	45–2091	Agricultural Equipment Operators	15.83	OES State	16.60	OES State	14.76	FLS Regional.
Cornbelt I	IL	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.93	FLS Regional	12.80	FLS Regional	11.53	FLS Regional.
Cornbelt I	IL	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.85	OES State	12.27	OES State	13.80	OES State.
Cornbelt I	IL	45–2099	Agricultural Workers, All Other	14.51	OES State	14.14	OES State	14.19	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Cornbelt I	IL	47–2061	Construction Laborers	25.07	OES State	27.01	OES State	27.55	OES State.
Cornbelt I	IL	53–7064	Packers and Packagers, Hand	12.31	OES State	11.91	OES State	12.31	OES State.
Cornbelt I	IN	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.54	OES State	21.98	FLS National	30.10	OES State.
Cornbelt I	IN	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.98	OES State	22.70	OES State	22.46	OES State.
Cornbelt I	IN	45–2041	Graders and Sorters, Agricultural Products.	13.08	FLS Regional	13.55	FLS Regional	10.43	FLS Regional.
Cornbelt I	IN	45–2091	Agricultural Equipment Operators	17.41	OES State	17.42	OES State	14.76	FLS Regional.
Cornbelt I	IN	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.93	FLS Regional	12.80	FLS Regional	11.53	FLS Regional.
Cornbelt I	IN	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.90	OES State	12.31	OES State	12.29	OES State.
Cornbelt I	IN	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	10.12	OES State.
Cornbelt I	IN	53–7064	Packers and Packagers, Hand	11.36	OES State	11.31	OES State	11.96	OES State.
Cornbelt I	OH	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	32.14	OES State	40.03	OES State	39.74	OES State.
Cornbelt I	OH	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.27	OES State	25.33	OES State	23.15	OES State.
Cornbelt I	OH	45–2041	Graders and Sorters, Agricultural Products.	13.08	FLS Regional	13.55	FLS Regional	10.43	FLS Regional.
Cornbelt I	OH	45–2091	Agricultural Equipment Operators	16.22	OES State	16.76	OES State	14.76	FLS Regional.
Cornbelt I	OH	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.93	FLS Regional	12.80	FLS Regional	11.53	FLS Regional.
Cornbelt I	OH	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.84	OES State	13.68	OES State	13.92	OES State.
Cornbelt I	OH	45–2099	Agricultural Workers, All Other	13.65	OES State	16.88	OES National	13.36	FLS National.
Cornbelt I	OH	47–2061	Construction Laborers	18.93	OES State	19.20	OES State	20.27	OES State.
Cornbelt I	OH	53–7064	Packers and Packagers, Hand	11.46	OES State	11.66	OES State	11.99	OES State.
Cornbelt II	IA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	37.05	OES State	37.28	OES State	34.50	OES State.
Cornbelt II	IA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.09	OES State	27.52	OES State	27.02	OES State.
Cornbelt II	IA	45–2021	Animal Breeders	15.74	OES State	15.52	OES State	14.86	OES State.
Cornbelt II	IA	45–2041	Graders and Sorters, Agricultural Products.	13.73	OES State	13.56	OES State	14.24	OES State.
Cornbelt II	IA	45–2091	Agricultural Equipment Operators	17.08	OES State	17.07	OES State	16.93	OES State.
Cornbelt II	IA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.73	OES State	13.12	OES State	11.82	FLS Regional.
Cornbelt II	IA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.55	FLS Regional	13.24	FLS Regional	13.57	FLS Regional.
Cornbelt II	IA	45–2099	Agricultural Workers, All Other	13.37	OES State	14.70	OES State	15.56	OES State.
Cornbelt II	IA	53–7064	Packers and Packagers, Hand	11.14	OES State	11.72	OES State	12.38	FLS Regional.
Cornbelt II	MO	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	27.68	OES State	30.33	OES State	28.72	OES State.
Cornbelt II	MO	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.63	OES State	22.34	OES State	23.37	OES State.
Cornbelt II	MO	45–2041	Graders and Sorters, Agricultural Products.	11.25	OES State	12.63	OES State	13.35	OES State.
Cornbelt II	MO	45–2091	Agricultural Equipment Operators	13.51	OES State	14.10	OES State	15.46	OES State.
Cornbelt II	MO	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.59	OES State	11.80	OES State	11.82	FLS Regional.
Cornbelt II	MO	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.55	FLS Regional	13.24	FLS Regional	13.57	FLS Regional.
Cornbelt II	MO	45–2099	Agricultural Workers, All Other	13.09	OES State	14.64	OES State	14.44	OES State.
Cornbelt II	MO	47–2061	Construction Laborers	19.86	OES State	20.51	OES State	21.90	OES State.
Cornbelt II	MO	53–7064	Packers and Packagers, Hand	11.42	OES State	11.36	OES State	12.38	FLS Regional.
Delta	AR	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	42.35	OES State	41.44	OES State	17.95	FLS Regional.
Delta	AR	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.05	OES State	21.37	OES State	16.25	FLS Regional.
Delta	AR	45–2041	Graders and Sorters, Agricultural Products.	10.61	FLS Regional	9.19	FLS Regional	11.57	OES State.
Delta	AR	45–2091	Agricultural Equipment Operators	10.61	FLS Regional	10.27	FLS Regional	10.77	FLS Regional.
Delta	AR	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.43	FLS Regional	10.44	FLS Regional	10.40	FLS Regional.
Delta	AR	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.27	FLS Regional	10.33	FLS Regional	11.41	FLS Regional.
Delta	AR	45–2099	Agricultural Workers, All Other	12.37	OES State	15.29	OES State	15.38	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Delta	AR	49–3041	Farm Equipment Mechanics and Service Technicians.	16.42	OES State	16.33	OES State	17.20	OES State.
Delta	AR	53–7064	Packers and Packagers, Hand	10.19	FLS Regional	10.21	FLS Regional	10.61	FLS Regional.
Delta	LA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	30.80	OES State	30.70	OES State	17.95	FLS Regional.
Delta	LA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.52	OES State	27.24	OES State	16.25	FLS Regional.
Delta	LA	45–2041	Graders and Sorters, Agricultural Products.	10.61	FLS Regional	9.19	FLS Regional	16.15	OES State.
Delta	LA	45–2091	Agricultural Equipment Operators	10.61	FLS Regional	10.27	FLS Regional	10.77	FLS Regional.
Delta	LA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.43	FLS Regional	10.44	FLS Regional	10.40	FLS Regional.
Delta	LA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.27	FLS Regional	10.33	FLS Regional	11.41	FLS Regional.
Delta	LA	45–2099	Agricultural Workers, All Other	20.04	OES State	26.79	OES State	24.13	OES State.
Delta	LA	53–7064	Packers and Packagers, Hand	10.19	FLS Regional	10.21	FLS Regional	10.61	FLS Regional.
Delta	MS	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	23.51	OES State	21.98	FLS National	17.95	FLS Regional.
Delta	MS	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.15	OES State	20.71	OES State	16.25	FLS Regional.
Delta	MS	45–2041	Graders and Sorters, Agricultural Products.	10.61	FLS Regional	9.19	FLS Regional	11.41	OES State.
Delta	MS	45–2091	Agricultural Equipment Operators	10.61	FLS Regional	10.27	FLS Regional	10.77	FLS Regional.
Delta	MS	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.43	FLS Regional	10.44	FLS Regional	10.40	FLS Regional.
Delta	MS	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.27	FLS Regional	10.33	FLS Regional	11.41	FLS Regional.
Delta	MS	45–2099	Agricultural Workers, All Other	11.38	OES State	14.54	OES State	13.36	FLS National.
Delta	MS	53–7064	Packers and Packagers, Hand	10.19	FLS Regional	10.21	FLS Regional	10.61	FLS Regional.
Florida	FL	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	46.15	OES State	50.97	OES State	41.57	OES State.
Florida	FL	13–1074	Farm Labor Contractors	20.26	OES State	22.74	OES National	11.51	OES State.
Florida	FL	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.67	OES State	22.56	OES State	22.95	OES State.
Florida	FL	45–2041	Graders and Sorters, Agricultural Products.	10.75	FLS Regional	10.91	FLS Regional	9.29	OES State.
Florida	FL	45–2091	Agricultural Equipment Operators	13.09	OES State	14.50	OES State	11.75	FLS Regional.
Florida	FL	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.66	FLS Regional	10.95	FLS Regional	11.21	FLS Regional.
Florida	FL	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.71	FLS Regional	12.80	FLS Regional	11.98	FLS Regional.
Florida	FL	45–2099	Agricultural Workers, All Other	15.31	OES National	16.48	OES State	10.40	FLS Regional.
Florida	FL	49–3041	Farm Equipment Mechanics and Service Technicians.	17.42	OES State	18.27	OES State	19.28	OES State.
Florida	FL	53–3032	Heavy and Tractor-Trailer Truck Drivers.	18.19	OES State	18.91	OES State	19.78	OES State.
Florida	FL	53–7064	Packers and Packagers, Hand	9.59	FLS Regional	9.92	FLS Regional	10.87	OES State.
Hawaii	HI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Hawaii	HI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.71	OES State	24.83	OES State	24.60	OES State.
Hawaii	HI	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	12.43	FLS National.
Hawaii	HI	45–2091	Agricultural Equipment Operators	14.94	FLS Regional	15.92	FLS Regional	12.86	FLS National.
Hawaii	HI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.37	FLS Regional	12.44	FLS Regional	15.13	OES State.
Hawaii	HI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.99	FLS Regional	16.54	FLS Regional	16.16	OES State.
Hawaii	HI	45–2099	Agricultural Workers, All Other	18.56	OES State	18.17	OES State	19.17	OES State.
Hawaii	HI	53–7064	Packers and Packagers, Hand	11.90	OES State	12.00	OES State	12.31	OES State.
Lake	MI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	28.73	OES State	31.75	OES State	31.02	OES State.
Lake	MI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.34	OES State	20.83	OES State	21.27	OES State.
Lake	MI	45–2041	Graders and Sorters, Agricultural Products.	11.34	OES State	10.85	OES State	11.34	OES State.
Lake	MI	45–2091	Agricultural Equipment Operators	12.94	FLS Regional	16.33	FLS Regional	15.37	FLS Regional.
Lake	MI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.55	FLS Regional	11.43	FLS Regional	12.47	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Lake	MI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.80	FLS Regional	12.23	FLS Regional	12.56	FLS Regional.
Lake	MI	45–2099	Agricultural Workers, All Other	11.53	FLS Regional	13.18	FLS Regional	14.87	OES State.
Lake	MI	47–2061	Construction Laborers	18.15	OES State	18.31	OES State	18.56	OES State.
Lake	MI	53–7064	Packers and Packagers, Hand ...	11.86	OES State	12.27	OES State	11.30	FLS Regional.
Lake	MN	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	35.92	OES State	38.70	OES State	38.56	OES State.
Lake	MN	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.51	OES State	25.19	OES State	29.18	OES State.
Lake	MN	45–2041	Graders and Sorters, Agricultural Products.	14.84	OES State	15.44	OES State	16.26	OES State.
Lake	MN	45–2091	Agricultural Equipment Operators	12.94	FLS Regional	16.33	FLS Regional	15.37	FLS Regional.
Lake	MN	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.55	FLS Regional	11.43	FLS Regional	12.47	FLS Regional.
Lake	MN	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.80	FLS Regional	12.23	FLS Regional	12.56	FLS Regional.
Lake	MN	45–2099	Agricultural Workers, All Other	11.53	FLS Regional	13.18	FLS Regional	23.52	OES State.
Lake	MN	53–7064	Packers and Packagers, Hand ...	11.91	OES State	12.58	OES State	11.30	FLS Regional.
Lake	WI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.18	OES State	31.01	OES State	35.25	OES State.
Lake	WI	35–1011	Chefs and Head Cooks	18.95	OES State	22.71	OES State	22.85	OES State.
Lake	WI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.99	OES State	24.88	OES State	25.20	OES State.
Lake	WI	45–2041	Graders and Sorters, Agricultural Products.	13.41	OES State	13.77	OES State	14.54	OES State.
Lake	WI	45–2091	Agricultural Equipment Operators	12.94	FLS Regional	16.33	FLS Regional	15.37	FLS Regional.
Lake	WI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.55	FLS Regional	11.43	FLS Regional	12.47	FLS Regional.
Lake	WI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.80	FLS Regional	12.23	FLS Regional	12.56	FLS Regional.
Lake	WI	45–2099	Agricultural Workers, All Other	11.53	FLS Regional	13.18	FLS Regional	13.36	FLS National.
Lake	WI	53–7064	Packers and Packagers, Hand ...	12.43	OES State	12.99	OES State	11.30	FLS Regional.
Mountain I	ID	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	37.97	OES State	35.39	OES State	35.37	OES State.
Mountain I	ID	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	19.60	OES State	20.49	OES State	21.61	OES State.
Mountain I	ID	45–2021	Animal Breeders	21.47	OES National	20.35	OES National	20.89	OES National.
Mountain I	ID	45–2041	Graders and Sorters, Agricultural Products.	9.77	OES State	10.45	OES State	11.21	FLS Regional.
Mountain I	ID	45–2091	Agricultural Equipment Operators	12.41	FLS Regional	12.60	FLS Regional	15.38	OES State.
Mountain I	ID	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.51	FLS Regional	12.05	FLS Regional	10.82	FLS Regional.
Mountain I	ID	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.99	OES State	13.39	OES State	11.92	FLS Regional.
Mountain I	ID	45–2099	Agricultural Workers, All Other	11.27	FLS Regional	11.84	FLS Regional	14.77	OES State.
Mountain I	ID	49–9071	Maintenance and Repair Workers, General.	16.81	OES State	17.15	OES State	17.17	OES State.
Mountain I	ID	53–7064	Packers and Packagers, Hand ...	11.39	OES State	11.80	OES State	12.40	OES State.
Mountain I	MT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Mountain I	MT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	17.78	OES State	17.33	OES State	18.69	OES State.
Mountain I	MT	45–2041	Graders and Sorters, Agricultural Products.	12.22	OES State	13.10	OES State	11.21	FLS Regional.
Mountain I	MT	45–2091	Agricultural Equipment Operators	12.41	FLS Regional	12.60	FLS Regional	12.86	FLS National.
Mountain I	MT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.51	FLS Regional	12.05	FLS Regional	10.82	FLS Regional.
Mountain I	MT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.54	OES State	13.08	OES State	11.92	FLS Regional.
Mountain I	MT	45–2099	Agricultural Workers, All Other	11.27	FLS Regional	11.84	FLS Regional	17.77	OES State.
Mountain I	MT	53–7064	Packers and Packagers, Hand ...	10.47	OES State	11.48	OES State	11.68	OES State.
Mountain I	WY	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Mountain I	WY	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.49	FLS National	19.55	FLS National	20.10	FLS National.
Mountain I	WY	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	11.21	FLS Regional.
Mountain I	WY	45–2091	Agricultural Equipment Operators	12.41	FLS Regional	12.60	FLS Regional	12.86	FLS National.
Mountain I	WY	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.51	FLS Regional	12.05	FLS Regional	10.82	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Mountain I	WY	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.10	OES State	14.13	OES State	11.92	FLS Regional.
Mountain I	WY	45–2099	Agricultural Workers, All Other	11.27	FLS Regional	11.84	FLS Regional	13.36	FLS National.
Mountain I	WY	53–7064	Packers and Packagers, Hand	13.68	OES State	13.48	OES State	10.94	OES State.
Mountain II	CO	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	21.24	OES State	27.99	OES State	16.62	FLS Regional.
Mountain II	CO	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.95	OES State	24.63	OES State	25.47	OES State.
Mountain II	CO	45–2041	Graders and Sorters, Agricultural Products.	9.48	OES State	9.56	OES State	10.60	FLS Regional.
Mountain II	CO	45–2091	Agricultural Equipment Operators	12.06	FLS Regional	11.40	FLS Regional	10.85	FLS Regional.
Mountain II	CO	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	FLS Regional	11.14	FLS Regional	10.02	FLS Regional.
Mountain II	CO	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	9.84	FLS Regional	10.71	FLS Regional	15.14	OES State.
Mountain II	CO	45–2099	Agricultural Workers, All Other	11.94	FLS Regional	12.64	FLS Regional	18.77	OES State.
Mountain II	CO	53–7064	Packers and Packagers, Hand	11.26	OES State	11.56	OES State	12.29	OES State.
Mountain II	NV	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	44.22	OES State	16.62	FLS Regional.
Mountain II	NV	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.28	OES State	23.46	OES State	23.93	OES State.
Mountain II	NV	45–2041	Graders and Sorters, Agricultural Products.	12.66	OES State	11.65	FLS National	12.43	FLS National.
Mountain II	NV	45–2091	Agricultural Equipment Operators	12.06	FLS Regional	11.40	FLS Regional	10.85	FLS Regional.
Mountain II	NV	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	FLS Regional	11.14	FLS Regional	10.02	FLS Regional.
Mountain II	NV	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	9.84	FLS Regional	10.71	FLS Regional	15.09	OES State.
Mountain II	NV	45–2099	Agricultural Workers, All Other	11.94	FLS Regional	12.64	FLS Regional	19.27	OES State.
Mountain II	NV	53–7064	Packers and Packagers, Hand	11.08	OES State	10.68	OES State	10.81	OES State.
Mountain II	UT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	16.62	FLS Regional.
Mountain II	UT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.76	OES State	22.51	OES State	22.98	OES State.
Mountain II	UT	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	12.43	FLS National.
Mountain II	UT	45–2091	Agricultural Equipment Operators	12.06	FLS Regional	11.40	FLS Regional	10.85	FLS Regional.
Mountain II	UT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	FLS Regional	11.14	FLS Regional	10.02	FLS Regional.
Mountain II	UT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	9.84	FLS Regional	10.71	FLS Regional	13.22	OES State.
Mountain II	UT	45–2099	Agricultural Workers, All Other	11.94	FLS Regional	12.64	FLS Regional	13.36	FLS National.
Mountain II	UT	53–7064	Packers and Packagers, Hand	10.77	OES State	11.17	OES State	11.74	OES State.
Mountain III	AZ	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.37	OES State	39.04	OES State	17.17	FLS Regional.
Mountain III	AZ	35–2021	Food Preparation Workers	10.33	OES State	10.63	OES State	11.42	OES State.
Mountain III	AZ	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.32	OES State	23.48	OES State	24.14	OES State.
Mountain III	AZ	45–2041	Graders and Sorters, Agricultural Products.	11.33	OES State	11.99	OES State	11.29	OES State.
Mountain III	AZ	45–2091	Agricultural Equipment Operators	11.10	FLS Regional	11.06	FLS Regional	10.65	FLS Regional.
Mountain III	AZ	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	9.17	OES State	9.97	OES State	10.23	FLS Regional.
Mountain III	AZ	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.57	FLS Regional	11.10	FLS Regional	15.83	OES State.
Mountain III	AZ	45–2099	Agricultural Workers, All Other	12.90	FLS Regional	12.02	FLS Regional	17.79	OES State.
Mountain III	AZ	53–7064	Packers and Packagers, Hand	10.99	OES State	11.35	OES State	10.02	FLS Regional.
Mountain III	NM	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	21.63	OES State	22.44	OES State	17.17	FLS Regional.
Mountain III	NM	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	19.54	OES State	17.69	OES State	20.71	OES State.
Mountain III	NM	45–2041	Graders and Sorters, Agricultural Products.	14.19	OES State	14.54	OES State	12.32	OES State.
Mountain III	NM	45–2091	Agricultural Equipment Operators	11.10	FLS Regional	11.06	FLS Regional	10.65	FLS Regional.
Mountain III	NM	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	9.64	OES State	10.41	OES State	10.23	FLS Regional.
Mountain III	NM	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.57	FLS Regional	11.10	FLS Regional	12.03	OES State.
Mountain III	NM	45–2099	Agricultural Workers, All Other	12.90	FLS Regional	12.02	FLS Regional	15.54	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Mountain III	NM	47–2073	Operating Engineers and Other Construction Equipment Operators.	20.93	OES State	21.05	OES State	20.77	OES State.
Mountain III	NM	53–7062	Laborers and Freight, Stock, and Material Movers, Hand.	12.76	OES State	13.08	OES State	13.39	OES State.
Mountain III	NM	53–7064	Packers and Packagers, Hand	9.86	OES State	10.21	OES State	10.02	FLS Regional.
North Plains	KS	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
North Plains	KS	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.30	OES State	24.91	OES State	25.13	OES State.
North Plains	KS	45–2041	Graders and Sorters, Agricultural Products.	15.04	OES State	15.70	OES State	16.25	OES State.
North Plains	KS	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	17.45	OES State.
North Plains	KS	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.89	OES State	12.58	OES State	12.83	OES State.
North Plains	KS	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	KS	45–2099	Agricultural Workers, All Other	15.31	OES National	15.15	OES State	16.31	OES State.
North Plains	KS	53–7064	Packers and Packagers, Hand	10.80	OES State	11.58	OES State	12.61	OES State.
North Plains	ND	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	36.04	OES State	21.98	FLS National	22.67	FLS National.
North Plains	ND	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.04	OES State	25.40	OES State	20.10	FLS National.
North Plains	ND	45–2041	Graders and Sorters, Agricultural Products.	14.50	OES State	17.07	OES State	19.15	OES State.
North Plains	ND	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	18.16	OES State.
North Plains	ND	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.82	OES State	12.89	OES State	14.11	OES State.
North Plains	ND	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	ND	45–2099	Agricultural Workers, All Other	15.36	OES State	18.91	OES State	13.36	FLS National.
North Plains	ND	53–7064	Packers and Packagers, Hand	11.46	OES State	12.18	OES State	12.80	OES State.
North Plains	NE	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	24.38	OES State.
North Plains	NE	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.23	OES State	24.85	OES State	26.68	OES State.
North Plains	NE	45–2041	Graders and Sorters, Agricultural Products.	14.47	OES State	14.52	OES State	15.15	OES State.
North Plains	NE	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	18.01	OES State.
North Plains	NE	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	15.67	OES State	16.01	OES State	17.59	OES State.
North Plains	NE	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	NE	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
North Plains	NE	53–7064	Packers and Packagers, Hand	11.30	OES State	11.65	OES State	12.41	OES State.
North Plains	SD	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
North Plains	SD	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.49	FLS National	19.55	FLS National	20.14	OES State.
North Plains	SD	45–2021	Animal Breeders	21.19	OES State	20.35	OES National	17.35	OES State.
North Plains	SD	45–2041	Graders and Sorters, Agricultural Products.	12.62	OES State	13.18	OES State	13.23	OES State.
North Plains	SD	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	15.62	OES State.
North Plains	SD	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	OES State	10.79	OES State	12.59	OES State.
North Plains	SD	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	SD	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
North Plains	SD	53–3032	Heavy and Tractor-Trailer Truck Drivers.	18.83	OES State	19.27	OES State	19.64	OES State.
North Plains	SD	53–7064	Packers and Packagers, Hand	11.11	OES State	11.41	OES State	11.76	OES State.
Northeast I	CT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	36.43	OES State.
Northeast I	CT	35–2012	Cooks, Institution and Cafeteria	16.41	OES State	16.73	OES State	17.57	OES State.
Northeast I	CT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.97	OES State	22.81	OES State	23.79	OES State.
Northeast I	CT	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	13.38	FLS Regional.
Northeast I	CT	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Northeast I	CT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.01	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	CT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	14.35	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	CT	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	CT	49–3041	Farm Equipment Mechanics and Service Technicians.	19.87	OES State	20.19	OES State	20.33	OES State.
Northeast I	CT	51–9012	Separating, Filtering, Clarifying, Precipitating, and Still Machine Setters, Operators, and Tenders.	12.92	OES State	15.12	OES State	15.88	OES State.
Northeast I	CT	53–3032	Heavy and Tractor-Trailer Truck Drivers.	22.37	OES State	22.80	OES State	23.33	OES State.
Northeast I	CT	53–7064	Packers and Packagers, Hand	13.72	OES State	14.53	OES State	15.43	OES State.
Northeast I	MA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	31.23	OES State.
Northeast I	MA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.91	OES State	26.35	OES State	25.45	OES State.
Northeast I	MA	45–2041	Graders and Sorters, Agricultural Products.	10.70	OES State	11.96	OES State	13.38	FLS Regional.
Northeast I	MA	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	MA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.82	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	MA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.56	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	MA	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	MA	53–7064	Packers and Packagers, Hand	11.89	OES State	12.52	OES State	13.15	OES State.
Northeast I	ME	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	ME	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.27	OES State	25.77	OES State	25.85	OES State.
Northeast I	ME	45–2041	Graders and Sorters, Agricultural Products.	11.69	OES State	13.56	OES State	13.38	FLS Regional.
Northeast I	ME	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	ME	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.72	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	ME	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.04	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	ME	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	ME	45–4022	Logging Equipment Operators	17.70	OES State	17.91	OES State	18.00	OES State.
Northeast I	ME	47–2073	Operating Engineers and Other Construction Equipment Operators.	17.70	OES State	18.53	OES State	19.13	OES State.
Northeast I	ME	49–3041	Farm Equipment Mechanics and Service Technicians.	15.34	OES State	18.26	OES State	19.60	OES State.
Northeast I	ME	49–3042	Mobile Heavy Equipment Mechanics, Except Engines.	21.26	OES State	21.31	OES State	20.98	OES State.
Northeast I	ME	51–7041	Sawing Machine Setters, Operators, and Tenders, Wood.	14.20	OES State	15.32	OES State	16.06	OES State.
Northeast I	ME	51–9021	Crushing, Grinding, and Polishing Machine Setters, Operators, and Tenders.	19.17	OES State	20.67	OES State	18.49	OES State.
Northeast I	ME	53–3032	Heavy and Tractor-Trailer Truck Drivers.	18.53	OES State	19.29	OES State	19.55	OES State.
Northeast I	ME	53–7041	Hoist and Winch Operators	24.37	OES National	24.05	OES National	26.40	OES National.
Northeast I	ME	53–7064	Packers and Packagers, Hand	10.99	OES State	11.43	OES State	12.36	OES State.
Northeast I	NH	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	NH	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.78	OES State	25.44	OES State	25.68	OES State.
Northeast I	NH	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	13.38	FLS Regional.
Northeast I	NH	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	NH	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.15	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	NH	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.80	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	NH	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	NH	53–7064	Packers and Packagers, Hand	11.58	OES State	11.26	OES State	11.82	OES State.
Northeast I	NY	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	32.90	OES State	36.23	OES State	41.46	OES State.
Northeast I	NY	35–2012	Cooks, Institution and Cafeteria	15.14	OES State	15.70	OES State	16.09	OES State.
Northeast I	NY	35–2019	Cooks, All Other	13.66	OES State	13.44	OES State	15.08	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Northeast I	NY	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	27.53	OES State	27.70	OES State	28.82	OES State.
Northeast I	NY	45–2041	Graders and Sorters, Agricultural Products.	10.74	OES State	11.35	OES State	13.38	FLS Regional.
Northeast I	NY	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	NY	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.56	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	NY	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	15.11	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	NY	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	NY	53–7064	Packers and Packagers, Hand	12.20	OES State	12.19	OES State	12.80	OES State.
Northeast I	RI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	RI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.49	FLS National	19.55	FLS National	20.10	FLS National.
Northeast I	RI	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	13.38	FLS Regional.
Northeast I	RI	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	RI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.91	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	RI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.81	FLS National	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	RI	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	RI	53–7064	Packers and Packagers, Hand	10.83	OES State	12.06	OES State	12.35	OES State.
Northeast I	VT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	VT	35–2012	Cooks, Institution and Cafeteria	14.00	OES State	14.57	OES State	14.65	OES State.
Northeast I	VT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.00	OES State	21.17	OES State	23.81	OES State.
Northeast I	VT	45–2041	Graders and Sorters, Agricultural Products.	11.70	OES State	12.66	OES State	13.38	FLS Regional.
Northeast I	VT	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	VT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.35	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	VT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	15.64	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	VT	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	VT	51–3022	Meat, Poultry, and Fish Cutters and Trimmers.	14.56	OES State	15.23	OES State	16.28	OES State.
Northeast I	VT	53–7064	Packers and Packagers, Hand	12.07	OES State	12.39	OES State	13.22	OES State.
Northeast II	DE	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast II	DE	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.75	OES State	25.70	OES State	27.07	OES State.
Northeast II	DE	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	DE	45–2091	Agricultural Equipment Operators	13.27	OES State	12.85	FLS National	12.86	FLS National.
Northeast II	DE	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	DE	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.82	OES State	13.28	OES State	11.36	FLS Regional.
Northeast II	DE	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast II	DE	53–7064	Packers and Packagers, Hand	12.55	OES State	11.47	OES State	11.68	OES State.
Northeast II	MD	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast II	MD	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.95	OES State	27.22	OES State	25.64	OES State.
Northeast II	MD	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	MD	45–2091	Agricultural Equipment Operators	18.40	OES State	20.31	OES State	20.30	OES State.
Northeast II	MD	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	MD	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	14.10	OES State	13.34	OES State	11.36	FLS Regional.
Northeast II	MD	45–2099	Agricultural Workers, All Other	17.44	OES State	17.92	OES State	13.36	FLS National.
Northeast II	MD	53–7064	Packers and Packagers, Hand	11.19	OES State	11.85	OES State	12.20	OES State.
Northeast II	NJ	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	40.26	OES State	39.45	OES State	39.49	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Northeast II	NJ	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.24	OES State	21.37	OES State	21.23	OES State.
Northeast II	NJ	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	NJ	45–2091	Agricultural Equipment Operators	16.33	OES State	12.85	FLS National	11.27	OES State.
Northeast II	NJ	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	NJ	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.43	OES State	13.53	OES State	11.36	FLS Regional.
Northeast II	NJ	45–2099	Agricultural Workers, All Other	13.09	OES State	13.11	OES State	11.88	OES State.
Northeast II	NJ	53–7064	Packers and Packagers, Hand	10.72	OES State	11.15	OES State	11.64	OES State.
Northeast II	PA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	42.44	OES State	41.83	OES State	43.16	OES State.
Northeast II	PA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.48	OES State	24.83	OES State	26.49	OES State.
Northeast II	PA	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	PA	45–2091	Agricultural Equipment Operators	13.60	OES State	15.43	OES State	18.81	OES State.
Northeast II	PA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	PA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.56	OES State	13.19	OES State	11.36	FLS Regional.
Northeast II	PA	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast II	PA	53–7064	Packers and Packagers, Hand	12.13	OES State	12.53	OES State	13.32	OES State.
Pacific	OR	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	28.68	OES State	26.10	OES State	29.89	OES State.
Pacific	OR	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.95	OES State	25.50	OES State	24.49	OES State.
Pacific	OR	45–2041	Graders and Sorters, Agricultural Products.	10.84	OES State	11.43	OES State	11.90	OES State.
Pacific	OR	45–2091	Agricultural Equipment Operators	15.12	FLS Regional	14.55	FLS Regional	14.38	FLS Regional.
Pacific	OR	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.08	FLS Regional	13.30	FLS Regional	14.32	FLS Regional.
Pacific	OR	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.08	FLS Regional	13.71	FLS Regional	14.47	FLS Regional.
Pacific	OR	45–2099	Agricultural Workers, All Other	15.38	OES State	16.40	OES State	18.08	OES State.
Pacific	OR	53–7064	Packers and Packagers, Hand	12.84	FLS Regional	11.26	FLS Regional	13.48	OES State.
Pacific	WA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	34.58	OES State	38.36	OES State	41.15	OES State.
Pacific	WA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.75	OES State	27.55	OES State	25.34	OES State.
Pacific	WA	45–2041	Graders and Sorters, Agricultural Products.	13.60	OES State	14.40	OES State	14.22	OES State.
Pacific	WA	45–2091	Agricultural Equipment Operators	15.12	FLS Regional	14.55	FLS Regional	14.38	FLS Regional.
Pacific	WA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.08	FLS Regional	13.30	FLS Regional	14.32	FLS Regional.
Pacific	WA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.08	FLS Regional	13.71	FLS Regional	14.47	FLS Regional.
Pacific	WA	45–2099	Agricultural Workers, All Other	16.06	OES State	17.36	OES State	15.78	OES State.
Pacific	WA	53–7064	Packers and Packagers, Hand	12.84	FLS Regional	11.26	FLS Regional	13.94	OES State.
Southeast	AL	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Southeast	AL	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.23	OES State	26.41	OES State	28.46	OES State.
Southeast	AL	45–2041	Graders and Sorters, Agricultural Products.	11.11	OES State	11.16	OES State	11.04	OES State.
Southeast	AL	45–2091	Agricultural Equipment Operators	12.80	OES State	15.80	OES State	11.05	OES State.
Southeast	AL	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.83	FLS Regional	10.93	FLS Regional	11.01	FLS Regional.
Southeast	AL	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.22	OES State	11.99	OES State	13.41	OES State.
Southeast	AL	45–2099	Agricultural Workers, All Other	12.01	FLS Regional	13.14	OES State	13.90	OES State.
Southeast	AL	53–3032	Heavy and Tractor-Trailer Truck Drivers.	19.28	OES State	18.77	OES State	19.27	OES State.
Southeast	AL	53–7064	Packers and Packagers, Hand	10.10	FLS Regional	10.31	FLS Regional	10.92	FLS Regional.
Southeast	GA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	31.51	OES State.
Southeast	GA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.79	OES State	23.42	OES State	23.14	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Southeast	GA	45–2041	Graders and Sorters, Agricultural Products.	10.40	OES State	10.53	OES State	10.44	OES State.
Southeast	GA	45–2091	Agricultural Equipment Operators	10.86	OES State	11.54	OES State	12.48	OES State.
Southeast	GA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.83	FLS Regional	10.93	FLS Regional	11.01	FLS Regional.
Southeast	GA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.52	OES State	12.77	OES State	13.27	OES State.
Southeast	GA	45–2099	Agricultural Workers, All Other	12.01	FLS Regional	19.49	OES State	18.29	OES State.
Southeast	GA	53–7064	Packers and Packagers, Hand	10.10	FLS Regional	10.31	FLS Regional	10.92	FLS Regional.
Southeast	SC	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	36.96	OES State	40.39	OES State	35.55	OES State.
Southeast	SC	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.84	OES State	27.24	OES State	27.08	OES State.
Southeast	SC	45–2041	Graders and Sorters, Agricultural Products.	11.23	OES State	10.50	OES State	10.92	OES State.
Southeast	SC	45–2091	Agricultural Equipment Operators	12.30	OES State	15.13	OES State	16.52	OES State.
Southeast	SC	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.83	FLS Regional	10.93	FLS Regional	11.01	FLS Regional.
Southeast	SC	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.97	OES State	12.94	OES State	13.71	OES State.
Southeast	SC	45–2099	Agricultural Workers, All Other	12.01	FLS Regional	17.92	OES State	13.36	FLS National.
Southeast	SC	53–7064	Packers and Packagers, Hand	10.10	FLS Regional	10.31	FLS Regional	10.92	FLS Regional.
Southeastern Plains.	OK	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	23.66	FLS Regional	24.74	OES State	27.39	OES State.
Southeastern Plains.	OK	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	17.28	FLS Regional	18.06	FLS Regional	25.85	OES State.
Southeastern Plains.	OK	45–2041	Graders and Sorters, Agricultural Products.	11.17	OES State	12.09	OES State	11.70	FLS Regional.
Southeastern Plains.	OK	45–2091	Agricultural Equipment Operators	11.59	FLS Regional	11.76	FLS Regional	11.28	FLS Regional.
Southeastern Plains.	OK	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.60	OES State	11.53	FLS Regional	11.53	FLS Regional.
Southeastern Plains.	OK	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.31	FLS Regional	11.66	FLS Regional	12.12	FLS Regional.
Southeastern Plains.	OK	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Southeastern Plains.	OK	53–3032	Heavy and Tractor-Trailer Truck Drivers.	20.27	OES State	20.21	OES State	20.74	OES State.
Southeastern Plains.	OK	53–7064	Packers and Packagers, Hand	11.17	OES State	11.39	OES State	12.09	FLS Regional.
Southeastern Plains.	TX	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	23.66	FLS Regional	41.28	OES State	37.67	OES State.
Southeastern Plains.	TX	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	17.28	FLS Regional	18.06	FLS Regional	27.00	OES State.
Southeastern Plains.	TX	45–2041	Graders and Sorters, Agricultural Products.	11.10	OES State	11.07	OES State	11.70	FLS Regional.
Southeastern Plains.	TX	45–2091	Agricultural Equipment Operators	11.59	FLS Regional	11.76	FLS Regional	11.28	FLS Regional.
Southeastern Plains.	TX	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	9.54	OES State	11.53	FLS Regional	11.53	FLS Regional.
Southeastern Plains.	TX	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.31	FLS Regional	11.66	FLS Regional	12.12	FLS Regional.
Southeastern Plains.	TX	45–2099	Agricultural Workers, All Other	13.04	OES State	13.77	OES State	16.65	OES State.
Southeastern Plains.	TX	47–2061	Construction Laborers	14.07	OES State	14.62	OES State	15.02	OES State.
Southeastern Plains.	TX	49–2093	Electrical and Electronics Installers and Repairers, Transportation Equipment.	27.34	OES State	29.88	OES State	28.40	OES State.
Southeastern Plains.	TX	53–7064	Packers and Packagers, Hand	10.80	OES State	11.05	OES State	12.09	FLS Regional.

List of Subjects

20 CFR Part 653

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping

requirements, Unemployment, Wages, Working conditions.

29 CFR Part 501

Administrative practice and procedure, Agricultural, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

For the reasons stated in the preamble, the Department of Labor proposes that 20 CFR parts 653 and 655 and 29 CFR part 501 be amended as follows:

Title 20—Employees' Benefits

PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM

■ 1. The authority citation for part 653 continues to read as follows:

Authority: Secs. 167, 189, 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

■ 2. Amend § 653.501 by revising the first sentence of paragraph (c)(2)(i) to read as follows:

§ 653.501 Requirements for processing clearance orders.

* * * * *

(c) * * *

(2) * * *

(i) The wages and working conditions offered are not less than the prevailing wages, as defined in § 655.103(b), and prevailing working conditions among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. * * *

* * * * *

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 3. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 4. Revise subpart B to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

Sec.

§ 655.100 Scope and purpose of this subpart.

(a) *Purpose.* (1) A temporary agricultural labor certification issued under this subpart reflects a determination by the Secretary of Labor (Secretary), pursuant to 8 U.S.C. 1188(a), that:

(i) There are not sufficient able, willing, and qualified United States (U.S.) workers available to perform the temporary agricultural labor or services for which an employer desires to hire foreign workers; and

(ii) The employment of the H–2A worker(s) will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) This subpart describes the process by which the Department of Labor (Department or DOL) makes such a determination and certifies its determination to the Department of Homeland Security (DHS).

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of foreign workers in the H–2A nonimmigrant classification, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(a). It also establishes standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H–2A employers must comply, as well as the rights and obligations of H–2A workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the temporary agricultural labor certification.

§ 655.101 Authority of the agencies, offices, and divisions in the Department of Labor.

(a) *Authority and role of the Office of Foreign Labor Certification.* The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, *e.g.,* a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 29 CFR part 501, and this subpart (''the H–2A program''), and to carry out other statutory responsibilities required by 8 U.S.C. 1188. The regulations governing WHD's investigatory and enforcement functions, including those related to the enforcement of temporary agricultural labor certifications issued under this subpart, are in 29 CFR part 501.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to § 655.182 and 29 CFR 501.20.

§ 655.102 Transition procedures.

(a) The NPC shall continue to process an *Application for Temporary Employment Certification* submitted prior to [effective date of the final rule] in accordance with 20 CFR part 655, subpart B, in effect as of [date 1 day before the effective date of the final rule].

(b) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after [effective date of the final rule], and that has a first date of need no later than [date 90 calendar days after the effective date of the final rule], in accordance with 20 CFR part 655, subpart B, in effect as of [date 1 day before the effective date of the final rule].

(c) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after [effective date of the final rule], and that has a first date of need later than [date 90 calendar days after the effective date of the final rule], in accordance with all job order and application filing requirements under this supbart.

§ 655.103 Overview of this subpart and definition of terms.

(a) *Overview.* In order to bring nonimmigrant workers to the United States to perform agricultural work, an employer must first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. This subpart describes a process by which the 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:

Act. The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

Administrative Law Judge. A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

Administrator. See definitions of OFLC Administrator and WHD Administrator below.

Adverse effect wage rate. The wage rate published by the OFLC Administrator in the **Federal Register** for the occupational classification and state based on either the U.S. Department of Agriculture's (USDA's) Farm Labor Survey (FLS) or the Bureau of Labor Statistics' (BLS') Occupational Employment Statistics (OES) survey, as set forth in § 655.120(b).

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this subpart with respect to a specific application; and

(iii) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101.

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable state law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Applicant. A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

Application for Temporary Employment Certification. The Office of Management and Budget (OMB)-approved Form ETA–9142A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

Area of intended employment. The geographic area within normal commuting distance of the place(s) of

employment for which temporary agricultural labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the place(s) of employment, or quality of the regional transportation network). If a place of employment is within a Metropolitan Statistical Area (MSA), including a multi-state MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (*e.g.,* near the border of) the MSA.

Attorney. Any person who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States, or the District of Columbia (DC). Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 8 CFR 1003.101, may represent an employer under this subpart.

Average adverse effect wage rate. The simple average of the first adverse effect wage rates (AEWRs) applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) that the OFLC Administrator publishes in a calendar year in accordance with § 655.120(b).

Board of Alien Labor Certification Appeals. The permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of Administrative Law Judges (ALJs) appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of Board of Alien Labor Certification Appeals (BALCA or Board).

Certifying Officer. The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H–2A program. The OFLC Administrator is the national CO. Other COs may be designated by the OFLC Administrator to also make the determinations required under this subpart.

Chief Administrative Law Judge. The chief official of the Department's Office of Administrative Law Judges or the Chief ALJ's designee.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.

Department of Homeland Security. The Federal department having jurisdiction over certain immigration-related functions, acting through its component agencies, including U.S. Citizenship and Immigration Services (USCIS).

Employee. A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer. A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(i) Has an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; or

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) A person on whose behalf an *Application for Temporary Employment Certification* is filed.

Employment and Training Administration. The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

First date of need. The first date the employer anticipates requiring the labor or services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation.

H–2A labor contractor. Any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this subpart, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

H–2A worker. Any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

H–2A Petition. The USCIS Form I–129, Petition for a Nonimmigrant Worker, with H Supplement or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2A nonimmigrant workers.

Job offer. The offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity. Full-time employment at a place in the United States to which U.S. workers can be referred.

Job order. The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA–790/ETA–790A and all appropriate addenda), as submitted to the NPC.

Joint employment. (i) Where two or more employers each have sufficient

definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker.

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H–2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H–2A workers sponsored under the *Application for Temporary Employment Certification.*

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under § 655.131(b) are, at all times, joint employers of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

Master application. An *Application for Temporary Employment Certification* filed by an association of agricultural producers as a joint employer with its employer-members. A master application must cover the same occupations or comparable agricultural employment; the first date of need for all employer-members listed on the *Application for Temporary Employment Certification* may be separated by no more than 14 calendar days; and may cover multiple areas of intended employment within a single state but no more than two contiguous states.

Metropolitan Statistical Area. A geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center. The offices within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification.*

Office of Foreign Labor Certification. OFLC means the organizational component of ETA that provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the United States to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

OFLC Administrator. The primary official of OFLC, or the OFLC Administrator's designee.

Period of employment. The time during which the employer requires the labor or services of H–2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification.*

Piece rate. A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

Place of employment. A worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment.

Positive recruitment. The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of OFLC, in recruiting and interviewing individuals in the area where the employer's job opportunity is located, and any other state designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing practice. A practice engaged in by employers, that:

(i) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(ii) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H–2A employers only for determinations concerning the provision of advance transportation and the utilization of labor contractors.

Prevailing wage. A wage rate established by the OFLC Administrator for a crop activity or agricultural activity and geographic area based on a survey conducted by a state that meets the requirements in § 655.120(c).

Secretary of Labor. The chief official of the Department, or the Secretary's designee.

Secretary of Homeland Security. The chief official of DHS or the Secretary of Homeland Security's designee.

State Workforce Agency. State government agency that receives funds pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 et seq., to administer the state's public labor exchange activities.

Strike. A concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest. (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 29 CFR part 501, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

(F) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(G) Similarity in machinery, equipment, and production methods;

(H) Similarity of products and services; and

(I) The ability of the predecessor to provide relief.

(ii) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

Temporary agricultural labor certification. Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification,* job order, and all supporting documentation, with respect to an employer seeking to file 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, and this subpart.

United States. The continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services. The Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2A workers to perform temporary or seasonal agricultural labor or services in the United States.

U.S. worker. A worker who is:

(i) A citizen or national of the United States;

(ii) An individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized by the INA or DHS to be employed in the United States; or

(iii) An individual who is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3), with respect to the employment in which the worker is engaging.

Wages. All forms of cash remuneration to a worker by an employer in payment for labor or services.

Wage and Hour Division. The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 29 CFR part 501, and this subpart.

WHD Administrator. The primary official of WHD, or the WHD Administrator's designee.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 29 CFR part 501, or this subpart. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 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. 1011(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in section 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; logging employment; reforestation activities; or pine straw activities. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (c)(1) thorough (6) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (c) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in 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)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (c)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied

in section 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in section 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780, is agricultural labor or services for purposes of paragraph (c) of this section.

(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, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites, is agricultural labor or services for purposes of paragraph (c) of this section.

(5) *Reforestation activities.* Reforestation activities are predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas, including, but not limited to, planting tree seedlings in specified patterns using manual tools; and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. Reforestation activities may include some forest fire prevention or suppression duties, such as constructing fire breaks or performing prescribed burning tasks, when such duties are in connection with and incidental to other reforestation activities. Reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way.

(6) *Pine straw activities.* Operations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations, is agricultural labor or services for purposes of paragraph (c) of this section.

(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) *Employer obligation.* Except for occupations covered by §§ 655.200 through 655.235, to comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of:

(1) The AEWR;

(2) A prevailing wage rate, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of paragraph (c) of this section;

(3) The agreed-upon collective bargaining wage;

(4) The Federal minimum wage; or

(5) The state minimum wage.

(b) *AEWR determinations.* (1) The OFLC Administrator will determine the AEWR for each state and occupational classification as follows:

(i) If an annual average hourly gross wage for the occupational classification in the State or region is reported by the USDA's FLS, that wage shall be the AEWR for the occupational classification and geographic area;

(ii) If an annual average hourly gross wage for the occupational classification in the state or region is not reported by the FLS, the AEWR for the occupational classification and state shall be the statewide annual average hourly wage for the standard occupational classification (SOC) if one is reported by the OES survey;

(iii) If only a national wage for the occupational classification is reported by both the FLS and OES survey for the geographic area, the AEWR for the geographic area shall be the national annual average hourly gross wage for the occupational classification from the FLS; and

(iv) If only a national wage for the SOC is reported by the OES survey for the geographic area and no wage is reported for the occupational classification by the FLS, the AEWR for the geographic area shall be the national average hourly wage for the SOC from the OES survey.

(2) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to each AEWR as a notice in the **Federal Register**.

(3) If an updated AEWR for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEWR is higher than the highest of the previous AEWR, a prevailing wage for the crop activity or agricultural activity and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage, or the state minimum wage, the employer must pay the updated AEWR not later than 14 calendar days after the updated AEWR is published in the **Federal Register**.

(4) If an updated AEWR for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEWR is lower than the rate guaranteed on the job order, the employer must continue to pay the rate guaranteed on the job order.

(5) If the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification, the CO will determine the applicable AEWR based on the highest AEWR for all applicable occupational classifications.

(c) *Prevailing wage determinations.* (1) The OFLC Administrator will issue a prevailing wage for a crop activity or agricultural activity if all of the following requirements are met:

(i) The SWA submits to the Department a wage survey for the crop activity or agricultural activity and a Form ETA–232 providing the methodology of the survey;

(ii) The survey was independently conducted by the state, including any state agency, state college, or state university;

(iii) The survey covers a distinct work task or tasks performed in a single crop activity or agricultural activity;

(iv) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers performing the work task(s) in the crop activity or agricultural activity and geographic area surveyed or conducted a randomized sampling of such employers;

(v) The survey reports the average wage of U.S. workers in the crop activity or agricultural activity and geographic area using the unit of pay used to compensate at least 50 percent of the workers whose wages are surveyed;

(vi) The survey covers an appropriate geographic area based on available resources to conduct the survey, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the state;

(vii) The survey includes the wages of at least 30 U.S. workers;

(viii) The survey includes wages of U.S. workers employed by at least 5 employers; and

(ix) The wages paid by a single employer represent no more than 25 percent of the sampled wages.

(2) A prevailing wage issued by the OFLC Administrator will remain valid for 1 year after the wage is posted on the OFLC website or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed on the job order expires during the work contract, the employer must continue to guarantee at least the expired prevailing wage rate.

(3) If a prevailing wage for the geographic area and crop activity or agricultural activity is adjusted during a work contract, and is higher than the highest of the AEWR, a previous prevailing wage for the geographic area and crop activity or agricultural activity, the agreed-upon collective bargaining wage, the Federal minimum wage, or the state minimum wage, the employer must pay that higher prevailing wage not later than 14 calendar days after the Department notifies the employer of the new prevailing wage.

(4) If a prevailing wage for the geographic area and crop activity or agricultural activity is adjusted during a work contract, and is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(d) *Appeals.* (1) If the employer does not include the appropriate offered wage rate on the *Application for Temporary Employment Certification,* the CO will issue a Notice of Deficiency (NOD) requiring the employer to correct the wage rate.

(2) If the employer disagrees with the wage rate required by the CO, the employer may appeal only after the *Application for Temporary Employment Certification* is denied, and the employer must follow the procedures in § 655.171.

§ 655.121 Job order filing requirements.

(a) *What to file.* (1) Prior to filing an *Application for Temporary Employment Certification,* the employer must submit a completed job order, Form ETA–790/790A, including all required addenda, to the NPC designated by the OFLC Administrator, and must identify it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H–2A workers. The employer must include in its submission to the NPC a valid Federal Employer Identification Number (FEIN) as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(2) Where the job order is being placed in connection with a future master application to be filed by an agricultural association as a joint employer with its employer-members, the agricultural association may submit a single job order to be placed in the name of the agricultural association on behalf of all employers named on the job order and the future *Application for Temporary Employment Certification.*

(3) Where the job order is being placed in connection with a future application to be jointly filed by two or more employers seeking to jointly employ a worker(s) (but is not a master application), any one of the employers may submit a single job order to be placed on behalf of all joint employers named on the job order and the future *Application for Temporary Employment Certification.*

(4) The job order must satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and the requirements set forth in § 655.122.

(b) *Timeliness.* The employer must submit a completed job order to the NPC no more than 75 calendar days and no fewer than 60 calendar days before the employer's first date of need.

(c) *Location and method of filing.* The employer must submit a completed job order to the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any job order submitted using a method other than the designated electronic method(s), unless the employer submits the job order by mail as set forth in § 655.130(c)(2) or requests a reasonable accommodation as set forth in § 655.130(c)(3).

(d) *Original signature.* The job order must contain an electronic (scanned) copy of the original signature of the employer or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized agent or attorney.

(e) *SWA review.* (1) Upon receipt of the job order, the NPC will transmit an electronic copy of the job order to the SWA serving the area of intended employment for intrastate clearance. If the job opportunity is located in more than one state within the same area of intended employment, the NPC will transmit the job order to any one of the SWAs having jurisdiction over the place(s) of employment.

(2) The SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F, and this subpart, and will work with the employer to address any noted deficiencies. The SWA must notify the employer in writing of any deficiencies in its job order not later than 7 calendar days from the date the SWA received the job order. The SWA notification will state the reason(s) the job order fails to meet the applicable requirements, state the modification(s) needed for the SWA to accept the job order, and offer the employer an opportunity to respond to the deficiencies within 5 calendar days from the date the notification was issued by the SWA. Upon receipt of a response, the SWA will review the response and notify the employer in writing of its acceptance or denial of the job order within 3 calendar days from the date the response was received by the SWA. If the employer's response is not received within 12 calendar days after the notification was issued, the SWA will notify the employer in writing that the job order is deemed abandoned, and the employer will be required to submit a new job order to the NPC meeting the requirements of this section. Any notice sent by the SWA to an employer that requires a response must be sent using methods to assure next day delivery, including email or other electronic methods, with a copy to the employer's representative, as applicable.

(3) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer may file an *Application for Temporary Employment Certification* pursuant to the emergency filing procedures contained in § 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted above. The CO will process the emergency *Application for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167.

(f) *Intrastate and interstate clearance.* Upon its acceptance of the job order, the SWA must promptly place the job order in intrastate clearance, commence recruitment of U.S. workers, and notify the NPC that the approved job order must be placed into interstate clearance. Upon receipt of the SWA notification, the NPC will promptly transmit an electronic copy of the approved job

order for interstate clearance to any other SWAs in a manner consistent with the procedures set forth in § 655.150.

(g) *Duration of job order posting.* The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(h) *Modifications to the job order.* (1) Prior to the issuance of a final determination on an *Application for Temporary Employment Certification,* the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. Such modifications must be made, or certification will be denied pursuant to § 655.164.

(2) The employer may request a modification of the job order, Form ETA–790/790A, prior to the submission of an *Application for Temporary Employment Certification.* However, the employer may not reject referrals against the job order based upon a failure on the part of the applicant to meet the amended criteria, if such referral was made prior to the amendment of the job order. The employer may not request a modification of the job order on or after the date of filing an *Application for Temporary Employment Certification.*

(3) The employer must provide all workers recruited in connection with the *Application for Temporary Employment Certification* with a copy of the modified job order or work contract which reflects the amended terms and conditions, on the first day of employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first.

§ 655.122 Contents of job offers.

(a) *Prohibition against preferential treatment of H–2A workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers. This does not relieve the employer from providing to H–2A workers at least the same level of minimum benefits, wages, and working conditions that must be offered to U.S. workers consistent with this section.

(b) *Job qualifications and requirements.* Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) *Minimum benefits, wages, and working conditions.* Every job order accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) *Housing*—(1) *Obligation to provide housing.* The employer must provide housing at no cost to the H–2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing must meet the full set of the DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations.* Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the DOL OSHA standards at 29 CFR 1910.142(b)(2) (square footage per occupant); § 1910.142(b)(3) (provision of beds); § 1910.142(b)(9) (requirement for rooms where wookers cook, live, and sleep); § 1910.142(b)(11) (heating, cooking, and water heating equipment installed properly); § 1910.142(c) (water supply); § 1910.142(f) (laundry, handwashing, and bathing facilities); and § 1910.142(j) (insect and rodent control), state standards addressing such concerns will apply. In the absence of applicable local or state standards addressing such concerns, the relevant DOL OSHA standards at 29 CFR 1910.142(b)(2), (3), (9), and (11), (f), and (j) will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing.

(2) *Standards for range housing.* An employer employing workers under §§ 655.200 through 655.235 must comply with the housing requirements in §§ 655.230 and 655.235.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage that is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or state government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) *Compliance with applicable standards*—(i) *Timeframe.* The determination as to whether housing provided to workers under this section meets the applicable standards must be made not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification.*

(ii) *Certification of employer-provided housing.* (A) Except as provided under paragraph (d)(6)(ii)(B) of this section, the SWA (or another local, state, or Federal authority acting on behalf of the SWA) with jurisdiction over the location of the employer-provided housing must inspect and provide to the employer and CO documentation certifying that the employer-provided housing is sufficient to accommodate the number of workers requested and meets all applicable standards under paragraph (d)(1)(i) of this section. The inspector must indicate the validity period of the housing certification. Where appropriate, and only if the SWA has notified the Department that the SWA lacks resources to conduct timely, preoccupancy inspections of all employer-provided housing, the inspector may certify the employer-provided housing for a period of up to 24 months.

(B) Where the employer-provided housing has been previously inspected and certified under paragraph (d)(6)(ii)(A) of this section, the employer may self-inspect and -certify the

employer-provided housing. To self-inspect and -certify the employer-provided housing under this paragraph (d)(6)(ii)(B), the employer must inspect the housing and submit to the SWA and the CO a copy of the currently valid certification for the employer-provided housing and a written statement, signed and dated by the employer, attesting that the employer has inspected the housing, the housing is available and sufficient to accommodate the number of workers being requested, and continues to meet all of the applicable standards under paragraph (d)(1)(i) of this section.

(iii) *Certification of rental and/or public accommodations.* The employer must provide to the CO a written statement, signed and dated, that attests that the accommodations are compliant with the applicable standards under paragraph (d)(1)(ii) of this section and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). If applicable local or state rental or public accommodation standards under paragraph (d)(1)(ii) of this section require an inspection, the employer also must submit a copy of the inspection report or other official documentation from the relevant authority. If the applicable standards do not require an inspection, the employer's written statement must confirm that no inspection is required.

(iv) *Certified housing that becomes unavailable.* If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, state, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, state, or Federal safety and health standards, in accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to provide housing that complies with the applicable standards will result in either a denial of a pending *Application for Temporary Employment Certification* or revocation of the temporary agricultural labor certification granted under this subpart.

(e) *Workers' compensation.* (1) The employer must provide workers' compensation insurance coverage in compliance with state law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the state's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the state workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary agricultural labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph (e), including the name of the insurance carrier, the insurance policy number, and proof of insurance for the entire period of employment, or, if appropriate, proof of state law coverage.

(f) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(g) *Meals.* The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

(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 departed to the employer's place of employment. For an H–2A worker who must obtain a visa departing to work for the employer from a location outside of the United States, ''the place from which the worker departed'' will mean the appropriate U.S. Consulate or Embassy. 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 place of employment. 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 place of employment to such subsequent employer's place of employment, 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 place of employment to such subsequent employer's place of employment, 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 its obligation to hire U.S. workers who apply or are referred after the employer's date of need as described in § 655.135(d).

(3) *Transportation between living quarters and place of employment.* The employer must provide transportation between housing provided or secured by the employer and the employer's place of employment at no cost to the worker.

(4) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable 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, 29 CFR 500.104 through 500.105, and 29 CFR 500.120 through 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 it must have property damage insurance.

(i) *Three-fourths guarantee*—(1) *Offer to worker.* The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph (i)(1) a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks × 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 (i)(1), the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

(2) *Guarantee for piece rate paid worker.* If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) *Displaced H–2A worker.* The employer is not liable for payment of the three-fourths guarantee to an H–2A worker whom the CO certifies is displaced because of the employer's compliance with its obligation to hire U.S. workers who apply or are referred after the employer's date of need described in § 655.135(d) with respect to referrals made during that period.

(5) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H–2A employment, depart to the place outside of the United States from which the worker departed, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) *Earnings records.* (1) An employer must keep accurate and adequate records with respect to each worker's earnings, including, but not limited to, field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's permanent address; and the amount of and reasons for any and all deductions taken from the worker's wages. In the case of H–2A workers, the permanent address must be the worker's permanent address in the worker's home country.

(2) Each employer must keep the records required by paragraph (j) of this section, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G–28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph (j)(2).

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the

number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the date of the certification.

(k) *Hours and earnings statements.* The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

(6) If piece rates are used, the units produced daily;

(7) Beginning and ending dates of the pay period; and

(8) The employer's name, address, and FEIN.

(l) *Rates of pay.* Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the AEWR, a prevailing wage, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of § 655.120(c), the agreed-upon collective bargaining rate, the Federal minimum wage, or the state minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly, or monthly basis that equals or exceeds the AEWR, prevailing wage rate, the Federal minimum wage, the state minimum wage, or any agreed-upon collective bargaining rate, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the prevailing piece rate for the crop activity or agricultural activity in the geographic area if one has been issued by the OFLC Administrator; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for temporary agricultural labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the area of intended employment.

(m) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) *Abandonment of employment or termination for cause.* If a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and DHS in the case of an H–2A worker, in writing or by any other method specified by the Department 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 to work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. The employer is required to maintain records of such notification to the NPC, and DHS in the case of an H–2A worker, for not less than 3 years from the date of the certification.

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) departed to work for the employer, or transport the worker to the worker's next certified H–2A employer, whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* (1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be

included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(q) *Disclosure of work contract.* The employer must provide to an H–2A worker not later than the time at which the worker applies for the visa, or to a worker in corresponding employment not later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H–2A worker going from an H–2A employer to a subsequent H–2A employer, the copy must be provided not later than the time an offer of employment is made by the subsequent H–2A employer. For an H–2A worker that does not require a visa for entry, the copy must be provided not later than the time of an offer of employment. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 28 CFR part 501, or this subpart.

§ 655.123 Positive recruitment of U.S. workers.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers within a multi-state region of traditional or expected labor supply for the place(s) of employment as designated by the OFLC Administrator under § 655.154(d) to ensure that there are not able, willing, and qualified U.S. workers who will be available for the labor or services listed in the *Application for Temporary Employment Certification.* Positive recruitment under this section is in addition to, and must be conducted within the same time period as, circulation of the job order through the SWA interstate clearance system.

(b) *Positive recruitment steps.* Upon acceptance of the job order and prior to filing an *Application for Temporary Employment Certification,* the employer may commence the required positive recruitment, as set forth in §§ 655.151 through 655.154.

(c) *Positive recruitment period.* Unless otherwise instructed by the CO, if the employer chooses to engage in pre-filing positive recruitment, the employer must begin the recruitment required by this section within 7 calendar days of the date on which the job order was accepted. The positive recruitment period will terminate on the date specified in § 655.158.

(d) *Interviewing U.S. workers.* Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the U.S. worker is being recruited so that the worker incurs little or no cost due to the interview. Employers cannot provide potential H–2A workers with more favorable treatment than U.S. workers with respect to the requirement for, and conduct of, interviews.

(e) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity until the end of the recruitment period, as set forth in § 655.135(d). The employer must accept and hire all applicants who are qualified and who will be available for the job opportunity. U.S. applicants can be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired.

(f) *Pre-filing recruitment report.* No more than 50 calendar days before the date of need and where positive recruitment efforts have commenced, the employer may prepare a recruitment report, consistent with the requirements set forth in § 655.156, for submission with the *Application for Temporary Employment Certification.*

§ 655.124 Withdrawal of a job order.

(a) The employer may withdraw a job order if the employer no longer plans to file an *Application for Temporary Employment Certification.* However, the employer is still obligated to comply with the terms and conditions of employment contained in the job order with respect to all workers recruited in connection with that job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the job order and stating the reason(s) for the withdrawal.

Application for Temporary Employment Certification Filing Procedures

§ 655.130 Application filing requirements.

All employers who desire to hire H–2A foreign agricultural workers must apply for a certification from the Secretary by filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. The following section provides the procedures employers must follow when filing.

(a) *What to file.* An employer that desires to apply for temporary agricultural labor certification of one or more nonimmigrant workers must file a completed *Application for Temporary Employment Certification,* all supporting documentation and information required at the time of filing under §§ 655.131 through 655.135, and, unless a specific exemption applies, a copy of Form ETA–790/790A, submitted as set forth in § 655.121(a). The *Application for Temporary Employment Certification* must include a valid FEIN as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's first date of need.

(c) *Location and method of filing*—(1) *E-filing.* The employer must file the *Application for Temporary Employment Certification* and all required supporting documentation with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits the application in accordance with paragraph (c)(2) or (3) of this section.

(2) *Filing by mail.* Employers that lack adequate access to electronic filing may file the application by mail. The employer must indicate that it is filing by mail due to lack of adequate access to electronic filing. The OFLC Administrator will identify the address to which such filing must be mailed by public notice(s) and by instructions on DOL's website.

(3) *Reasonable accommodation.* Employers who are unable or limited in their ability to use and/or access the electronic *Application for Temporary Employment Certification,* or any other form or documentation required under this subpart, as a result of a disability may request a reasonable accommodation to enable them to

participate in the H–2A program. An employer in need of such an accommodation may contact the NPC in writing to the address designated in a notice published in the **Federal Register** or 202–513–7350 (this is not a toll-free number), or for individuals with hearing or speech impairments, 1–877–889–5627 (this is the TTY toll-free Federal Information Relay Service number) for assistance in using, accessing, or filing any form or documentation required under this subpart, including the *Application for Temporary Employment Certification.* All requests for an accommodation should include the employer's name, a detailed description of the accommodation needed, and the preferred method of contact. The NPC will respond to the request for a reasonable accommodation within 10 business days of the date of receipt.

(d) *Original signature.* The *Application for Temporary Employment Certification* must contain an electronic (scanned) copy of the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent) or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Scope of applications.* Except as otherwise permitted by this subpart, an *Application for Temporary Employment Certification* must be limited to places of employment within a single area of intended employment. An employer may file only one *Application for Temporary Employment Certification* covering the same area of intended employment, period of employment, and occupation or comparable work to be performed.

(f) *Staggered entry of H–2A workers.* (1) If a petition for H–2A workers filed by an employer, including a joint employer filing an *Application for Temporary Employment Certification* under § 655.131(b), is granted, the employer may bring those workers described in the petition, who are otherwise admissible, into the United States at any time up to 120 days from the first date of need stated on the certified *Application for Temporary Employment Certification,* including any approved modifications, without filing another H–2A petition with DHS.

(2) In order to comply with the provision in paragraph (f)(1) of this section, the employer must satisfy the following obligations:

(i) *Notice.* (A) At any time after the *Application for Temporary Employment Certification* is filed through 14 calendar days after the first date of need, as indicated in the certified *Application for Temporary Employment Certification,* notify the NPC electronically, unless the employer was permitted to file by mail as set forth in § 655.130(c), of its intent to stagger the entry of its H–2A workers into the United States, and the latest date on which such workers will enter.

(B) An agricultural association filing as a joint employer with its members must provide a single notice on behalf of all its members duly named on the application and must provide the latest date on which any of its members expects H–2A workers to enter the United States.

(ii) *Recruitment.* Comply with the duty to accept and hire U.S. worker applicants set forth in § 655.135(d)(2).

(iii) *Records.* Continue to maintain the recruitment report until the end of the additional recruitment period, as set forth in § 655.135(d)(2), and retain all recruitment documentation for a period of 3 years from the date of certification, consistent with the document retention requirements under § 655.167. The updated recruitment report and recruitment documentation is not to be submitted to the Department, unless requested by the Department or as set forth in § 655.156.

(3) Once the NPC receives the notice described in paragraph (f)(2)(i) of this section, it will inform all SWAs that received a copy of the employer's job order to extend the period of recruitment by the time period provided in the employer's written notice, if that period exceeds 30 days. In accordance with § 655.121(g), the SWA(s) will keep the employer's job order on its active file and refer any U.S. worker who applies for the job opportunity through the end of the new recruitment period.

(g) *Information dissemination.* Information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity measures such as audits may be forwarded from OFLC to WHD or any other Federal agency, as appropriate, for investigative or enforcement purposes.

§ 655.131 Agricultural association and joint employer filing requirements.

(a) *Agricultural association filing requirements.* If an agricultural association files an *Application for Temporary Employment Certification,* in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.

(1) The agricultural association must identify in the *Application for Temporary Employment Certification* for H–2A workers whether it is filing as a sole employer, a joint employer, or an agent. The agricultural association must retain documentation substantiating the employer or agency status of the agricultural association and be prepared to submit such documentation in response to a NOD from the CO prior to issuing a Final Determination, or in the event of an audit or investigation.

(2) The agricultural association may file a master application on behalf of its employer-members. The master application is available only when the agricultural association is filing as a joint employer. An agricultural association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, as long as the first dates of need for each employer-member named in the *Application for Temporary Employment Certification* are separated by no more than 14 calendar days and all places of employment are located in no more than two contiguous states. The agricultural association must identify in the *Application for Temporary Employment Certification* by name, address, total number of workers needed, period of employment, first date of need, and the crops and agricultural work to be performed, each employer-member that will employ H–2A workers.

(3) An agricultural association filing a master application as a joint employer may sign the *Application for Temporary Employment Certification* on behalf of its employer-members. An agricultural association filing as an agent may not sign on behalf of its employer-members but must obtain each employer-member's signature on the *Application for Temporary Employment Certification* prior to filing.

(4) If the application is approved, the agricultural association, as appropriate, will receive a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

(b) *Joint employer filing requirements.* (1) If an employer files an *Application for Temporary Employment Certification* on behalf of one or more other employers seeking to jointly employ H–2A workers in the same area of intended employment, in addition to complying with all the assurances,

guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply:

(i) The *Application for Temporary Employment Certification* must identify the name, address, and the crop(s) and agricultural work to be performed for each employer seeking to jointly employ the H–2A workers;

(ii) All H–2A workers must work for each employer for at least 1 workday, or its equivalent, each workweek; and

(iii) The *Application for Temporary Employment Certification* must be signed and dated by each joint employer named in the application, in accordance with the procedures contained in § 655.130(e). By signing the *Application for Temporary Employment Certification,* each joint employer attests to the conditions of employment required of an employer participating in the H–2A program, and assumes full responsibility for the accuracy of the representations made in the *Application for Temporary Employment Certification* and for compliance with all of the assurances and obligations of an employer in the H–2A program at all times during the period of employment on the *Application for Temporary Employment Certification;* and

(2) If the application is approved, the joint employer who submits the *Application for Temporary Employment Certification* will receive, on behalf of the other joint employers, a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

§ 655.132 H–2A labor contractor filing requirements.

An H–2ALC must meet all of the requirements of the definition of employer in § 655.103(b) and comply with all the assurances, guarantees, and other requirements contained in this part, including § 655.135, and in part 653, subpart F, of this chapter. The H–2ALC must include in or with its *Application for Temporary Employment Certification* at the time of filing the following:

(a) The name and location of each fixed-site agricultural business to which the H–2ALC expects to provide H–2A workers, the expected beginning and ending dates when the H–2ALC will be providing the workers to each fixed-site, and a description of the crops and activities the workers are expected to perform at such fixed-site.

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.,* identifying the specific farm labor contracting activities the H–2ALC is authorized to perform as an FLC.

(c) Proof of its ability to discharge financial obligations under the H–2A program by including with the *Application for Temporary Employment Certification* an original surety bond meeting the following requirements.

(1) *Requirements for the bond.* The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue NW, Room S–3502, Washington, DC 20210. Consistent with the enforcement procedure set forth at 29 CFR 501.9(b), the bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits, including any assessment of interest, owed to an H–2A worker or to a worker engaged in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 29 CFR part 501 relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond must remain in full force and effect for all liabilities incurred during the period of the labor certification, including any extension thereof. The bond may not be cancelled absent a finding by the WHD Administrator that the labor certification has been revoked.

(2) *Amount of the bond.* Unless a higher amount is sought by the WHD Administrator pursuant to 29 CFR 501.9(a), the required bond amount is the base amount adjusted to reflect the average AEWR, as defined in § 655.103, and any employment of 150 or more workers.

(i) The base amounts are $5,000 for a labor certification for which an H–2ALC employs fewer than 25 workers; $10,000 for a labor certification for which an H–2ALC employs 25 to 49 workers; $20,000 for a labor certification for which an H–2ALC employs 50 to 74 workers; $50,000 for a labor certification for which an H–2ALC employs 75 to 99 workers; and $75,000 for a labor certification for which an H–2ALC employs 100 or more workers.

(ii) The bond amount is calculated by multiplying the base amount by the average AEWR and dividing by $9.25. Thus, the required bond amounts will vary annually based on changes in the average AEWR.

(iii) For a labor certification for which an H–2ALC employs 150 or more workers, the bond amount applicable to the certification of 100 or more workers is further adjusted for each additional 50 workers as follows: The bond amount is increased by a value which represents 2 weeks of wages for 50 workers, calculated using the average AEWR (*i.e.,* 80 hours × 50 workers × Average AEWR); this increase is applied to the bond amount for each additional group of 50 workers.

(iv) The required bond amounts shall be calculated and published in the **Federal Register** on an annual basis.

(3) *Form of the bond and method of filing.* The bond shall consist of an executed Form ETA–9142A—Appendix B, and must contain the name, address, phone number, and contact person for the surety, and valid documentation of power of attorney. The bond must be filed using the method directed by the OFLC Administrator at the time of filing:

(i) *Electronic surety bonds.* When the OFLC Administrator directs the use of electronic surety bonds, this will be the required method of filing bonds for all applications subject to mandatory electronic filing. Consistent with the application filing requirements of § 655.130(c) and (d), the bond must be completed, signed by the employer and the surety using a verifiable electronic signature method, and submitted electronically with the *Application for Temporary Employment Certification* and supporting materials unless the employer is permitted to file by mail or a different accommodation under § 655.130(c)(2) or (3).

(ii) *Electronic submission of copy.* Until such time as the OFLC Administrator directs the use of electronic surety bonds, employers may submit an electronic (scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the certification is issued.

(iii) *Mailing original bond with application.* For applications not subject to mandatory electronic filing due under § 655.130(c)(2) or (3), employers may submit the original bond as part of its mailed, paper application package, or consistent with the accommodation provided.

(d) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (a) of this section.

(e) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that:

(1) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA; and

(2) All transportation between all places of employment and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable 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 500.104 through 500.105 and 500.120 through 500.128, except where workers' compensation is used to cover such transportation as described in § 655.122(h).

§ 655.133 Requirements for agents.

(a) An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer.

(b) In addition the agent must provide a copy of the MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.,* identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.134 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period for filing for employers who did not make use of temporary foreign agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause, provided the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

(b) *Employer requirements.* The employer requesting a waiver of the required time period must submit to the NPC all documentation required at the time of filing by § 655.130(a) except evidence of a job order submitted pursuant to § 656.121 of this chapter, a completed job order on the Form ETA–790/790A and all required addenda, and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H–2A workers during the prior year's agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (*e.g.,* a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control.

(c) *Processing of emergency applications.* (1) Upon receipt of a complete emergency situation(s) waiver request, the CO promptly will transmit a copy of the job order to the SWA serving the area of intended employment. The SWA will review the contents of the job order for compliance with the requirements set forth in § 653.501(c) of this chapter and § 655.122. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO of the noted deficiencies within 5 calendar days of the date the job order is received by the SWA.

(2) The CO will process emergency *Applications for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167. The CO may notify the employer, in accordance with the procedures contained in § 655.141, that the application cannot be accepted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.161. Such notification will so inform the employer of the opportunity to submit a modified *Application for Temporary Employment Certification* and/or job order in accordance with the procedures contained in § 655.142.

§ 655.135 Assurances and obligations of H–2A employers.

An employer seeking to employ H–2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances:

(a) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hires and rejections as required by § 655.167.

(b) *No strike or lockout.* The place(s) of employment for which the employer is requesting a temporary agricultural labor certification does not currently have employees on strike or being locked out in the course of a labor dispute.

(c) *Recruitment requirements.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the end of the period as specified in paragraph (d) of this section and must independently conduct the positive recruitment activities, as specified in §§ 655.123 and 655.154, until the date on which the H–2A workers depart for the place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H–2A workers departed for the employer's place of employment.

(d) *Thirty-day rule.* (1) Subject to paragraph (d)(2) of this section, the employer must provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days after the first date of need stated on the *Application for Temporary Employment Certification* under which the H–2A worker who is in the job was hired, including any approved modifications.

(2) If an employer chooses to use the procedures for the staggered entry of H–2A workers at § 655.130(f), the employer must provide employment to any qualified, eligible U.S. worker who applies for the job opportunity through the date provided on the employer's notice described at § 655.130(f)(2) or the end of the 30-day period described in paragraph (d)(1) of this section, whichever is longer.

(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, Public Law 110–457, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents. H–2A employers may also be subject to the

FLSA. The FLSA operates independently of the H–2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.

(f) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek.

(g) *No recent or future layoffs.* The employer has not laid off and will not lay off any worker in the United States similarly employed in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment except for lawful, job-related reasons within 60 days of the first date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the *Application for Temporary Employment Certification* to those laid-off U.S. worker(s) and the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired. A layoff for lawful, job-related reasons such as lack of work or the end of the growing season is permissible if all H–2A workers are laid off before any U.S. worker in corresponding employment.

(h) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188, or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188; 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 under or related to 8 U.S.C. 1188.

(i) *Notify workers of duty to leave United States.* (1) The employer must inform H–2A workers of the requirement that they leave the United States at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under paragraph (i)(2) of this section, unless the H–2A worker is being sponsored by another subsequent H–2A employer.

(2) As defined further in the DHS regulations, a temporary agricultural 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 the DHS regulations. *See* 8 CFR 214.2(h)(5)(viii)(B).

(j) *Comply with the prohibition against employees paying fees.* The employer and its agents have not sought or received payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H–2A labor certification, including payment of the employer's attorney fees, application fees, or recruitment costs. For purposes of this paragraph (j), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. The provision in this paragraph (j) does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(k) *Contracts with third parties comply with prohibitions.* The employer must contractually prohibit in writing any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H–2A workers to seek or receive payments or other compensation from prospective employees. The contract must include the following statement: ''Under this agreement, [name of foreign labor contractor or recruiter] and any agent or employee of [name of foreign labor contractor or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorney fees, agent fees, application fees, or any other fees related to obtaining H–2A labor certification.'' This documentation is to be made available upon request by the CO or another Federal party.

(l) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188.

§ 655.136 Withdrawal of *an Application for Temporary Employment Certification* and job order.

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order at any time before the CO makes a determination under § 655.160. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the *Application for Temporary Employment Certification* and job order and stating the reason(s) for the withdrawal.

Processing of Applications for Temporary Employment Certification

§ 655.140 Review of applications.

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart, and make a decision to issue a NOD under § 655.141, a Notice of Acceptance (NOA) under § 655.143, or a Final Determination under § 655.160.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO(s) to an employer requiring a response will be sent electronically or via traditional methods to assure next day delivery using the address, including electronic mail address, provided on the *Application for Temporary Employment Certification.* The employer's response to such a

notice or request must be filed electronically or via traditional methods to assure next day delivery. The employer's response must be sent by the date due or the next business day if the due date falls on a Sunday or Federal holiday.

§ 655.141 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification.* A copy of this notification will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice will:

(1) State the reason(s) the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 5 business days from date of receipt stating the modification that is needed for the CO to issue the NOA;

(3) State that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made not later than 30 calendar days before the first date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* or job order within 5 business days and in a manner specified by the CO; and

(4) State that if the employer does not comply with the requirements of § 655.142, the CO will deny the *Application for Temporary Employment Certification.*

§ 655.142 Submission of modified applications.

(a) *Submission requirements and certification delays.* If in response to a NOD the employer chooses to submit a modified *Application for Temporary Employment Certification* or job order, the CO's Final Determination will be postponed by 1 calendar day for each day that passes beyond the 5-business-day period allowed under § 655.141(b) to submit a modified *Application for Temporary Employment Certification* or job order, up to a maximum of 5 calendar days. The CO may issue one or more additional NODs before issuing a Final Determination. The *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Employment Certification* or job order within 12 calendar days after the NOD was issued.

(b) *Provisions for denial of modified Application for Temporary Employment Certification.* If the modified *Application for Temporary Employment Certification* or job order does not cure the deficiencies cited in the NOD(s) or otherwise fails to satisfy the criteria required for certification, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.164.

(c) *Appeal from denial of modified Application for Temporary Employment Certification.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* are the same as for a non-modified *Application for Temporary Employment Certification* as long as the employer timely requests an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

§ 655.143 Notice of acceptance.

(a) *Notification timeline.* When the CO determines the *Application for Temporary Employment Certification* and job order meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification.* A copy of the notice will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice must:

(1) When recruitment of U.S. workers, as specified in §§ 655.151 through 655.154, has not commenced prior to the filing of the *Application for Temporary Employment Certification,* or when recruitment has commenced but not concluded prior to the filing of the *Application for Temporary Employment Certification,* and the CO has determined that the recruitment activities undertaken are compliant with positive recruitment requirements:

(i) Authorize conditional access to the interstate clearance system and direct each SWA receiving a copy of the job order to commence recruitment of U.S. workers as specified in § 655.150;

(ii) Direct the employer to engage in positive recruitment of U.S. workers under §§ 655.151 through 655.154 and to submit a report of its positive recruitment efforts meeting the requirements of § 655.156; and

(iii) 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 date specified in § 655.158.

(2) When recruitment of U.S. workers, as specified in §§ 655.151 through 655.154, has commenced prior to the filing of the *Application for Temporary Employment Certification,* but the CO has determined the employer failed to comply with one or more of its positive recruitment obligations:

(i) Direct the employer to engage in corrective positive recruitment of U.S. workers and submit proof of compliant advertising concurrently with a report of its positive recruitment efforts meeting the requirements of § 655.156;

(ii) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated for interstate clearance under § 655.150 and will terminate on the date specified in § 655.158;

(3) State any other documentation or assurances needed for the *Application for Temporary Employment Certification* to meet the requirements for certification under this subpart; and

(4) State that the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need, except as provided for under § 655.142 for modified *Applications for Temporary Employment Certification* or when the *Application for Temporary Employment Certification* does not meet the requirements for certification but is expected to before the first date of need.

§ 655.144 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.143, the CO will promptly place for public examination a copy of the job order on an electronic job registry maintained by the Department, including any required modifications approved by the CO, as specified in § 655.142.

(b) *Length of posting on electronic job registry.* Unless otherwise provided, the Department will keep the job order posted on the electronic job registry in active status until the end of the recruitment period, as set forth in § 655.135(d).

§ 655.145 Amendments to Applications for Temporary Employment Certification.

(a) *Increases in number of workers.* The *Application for Temporary Employment Certification* may be amended at any time before the CO's

certification determination to increase the number of workers requested in the initial *Application for Temporary Employment Certification* by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the employer demonstrates that the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. All requests for increasing the number of workers must be made in writing.

(b) *Minor changes to the period of employment.* The *Application for Temporary Employment Certification* may be amended to make minor changes in the total period of employment. Changes will not be effective until submitted in writing and approved by the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. If the request is for a delay in the first date of need and is made after workers have departed for the employer's place of employment, the CO may only approve the change if the employer includes with the request a written assurance signed and dated by the employer that all workers who are already traveling to the place of employment will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

Post-Acceptance Requirements

§ 655.150 Interstate clearance of job order.

(a) *CO approves for interstate clearance.* The CO will promptly transmit a copy of the approved job order for interstate clearance to all states listed in the job order as anticipated place(s) of employment and all other states designated by the OFLC Administrator as states of traditional or expected labor supply for the anticipated place(s) of employment under § 655.154(d).

(b) *Duration of posting.* Each of the SWAs to which the CO transmits the job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

§ 655.151 Advertising in the area of intended employment.

(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 content requirements.

All advertising conducted to satisfy the required recruitment activities under §§ 655.151 and 655.154 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, each joint employer's name, or in the event that a master application will be filed by an agricultural association, the agricultural association's name and a statement indicating that the name and location of each member of the agricultural 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 labor or services;

(c) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of labor or services 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 (*e.g.,* where a master application will be filed by an agricultural 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 agricultural 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 place of employment 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; and

(k) Contact information for the applicable SWA and, if available, the job order number.

§ 655.153 Contact with former U.S. workers.

The employer must contact, by mail or other effective means, U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. This contact must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 and before the date specified in § 655.158. Documentation sufficient to prove contact must be maintained in the event of an audit or investigation. An employer has no obligation to contact U.S. workers it terminated for cause or who abandoned employment at any time during the previous year if the employer provided timely notice to the NPC of the termination or abandonment in the manner described in § 655.122(n).

§ 655.154 Additional positive recruitment.

(a) *Where to conduct additional positive recruitment.* The employer

must conduct positive recruitment within a multistate region of traditional or expected labor supply where the OFLC Administrator 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 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 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 for Temporary Employment Certification* and job order.

(d) *Determination of labor supply states.* (1) The OFLC Administrator will make an annual determination with respect to each state whether there are other traditional or expected labor supply states in which there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work in that state. The OFLC Administrator will publish the determination annually on the OFLC's website. The traditional or expected labor supply states designated by the OFLC Administrator will become effective on the date of publication on the OFLC's website for employers who have not commenced positive recruitment under this subpart and will remain valid until the OFLC Administrator publishes a new determination.

(2) The determination as to whether any state is a source of traditional or expected labor supply to another state will be based primarily upon information provided by the SWAs to the OFLC Administrator within 120 calendar days preceding the determination.

§ 655.155 Referrals of U.S. workers.

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that they are qualified, able, willing, and available for employment.

§ 655.156 Recruitment report.

(a) *Requirements of a recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must contain the following information:

(1) Identify the name of each recruitment source and date of advertisement;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker;

(3) Confirm that former U.S. employees were contacted and by what means or state there are no former U.S. employees to contact; and

(4) If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update recruitment report.* The employer must continue to update the recruitment report until the end of the recruitment period, as set forth in § 655.135(d). The updated report is not to be submitted to the Department, unless requested by the Department. The updated report mustbe made available in the event of a post-certification audit or upon request by the Department or any other Federal agency.

§ 655.157 Withholding of U.S. workers prohibited.

(a) *Filing a complaint.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the place of employment of H–2A workers in order to force the hiring of U.S. workers during the recruitment period, as set forth in § 655.135(d), may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (*e.g.,* dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(b) *Duty to investigate.* Upon receipt, the CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(c) *Duty to suspend the recruitment period.* Where the CO determines, after conducting the interviews required by paragraph (b) of this section, that the employer's complaint is valid and justified, the CO will immediately suspend the applicable recruitment period, as set forth in § 655.135(d), to the employer. The CO's determination is the final decision of the Secretary.

§ 655.158 Duration of positive recruitment.

Except as otherwise noted, the obligation to engage in positive recruitment described in §§ 655.150 through 655.154 will terminate on the date H–2A workers depart for the employer's place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H–2A workers departed for the employer's place of employment.

Labor Certification Determinations

§ 655.160 Determinations.

Except as otherwise noted in this section, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification.* An *Application for Temporary Employment Certification* that is modified under § 655.142 or that otherwise does not meet the requirements for certification in this subpart is not subject to the 30-day timeframe for certification.

§ 655.161 Criteria for certification.

(a) The criteria for certification include whether the employer has complied with the applicable requirements of parts 653 and 654 of this chapter, and all requirements of this subpart, which are necessary to grant the labor certification.

(b) In making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, whom the employer has not rejected for a lawful, job-related reason.

§ 655.162 Approved certification.

If temporary agricultural labor certification is granted, the CO will send a Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic

method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.130(c), the CO will send the Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order by means normally assuring next day delivery. The CO will send the certified *Application for Temporary Employment Certification* and job order, including any approved modifications, on behalf of the employer, directly to USCIS using an electronic method(s) designated by the OFLC Administrator.

§ 655.163 Certification fee.

A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part will include a bill for the required certification fees. Each employer of H–2A workers under the *Application for Temporary Employment Certification* (except joint employer agricultural associations, which may not be assessed a fee in addition to the fees assessed to the members of the agricultural association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the *Application for Temporary Employment Certification* (in whole or in part), as follows:

(a) *Amount.* The *Application for Temporary Employment Certification* fee for each employer receiving a temporary agricultural labor certification is $100 plus $10 for each H–2A worker certified under the *Application for Temporary Employment Certification,* provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than $1,000. There is no additional fee to the association filing the *Application for Temporary Employment Certification.* The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its H–2A employer-members, the aggregate fees for all employers of H–2A workers under the *Application for Temporary Employment Certification* must be paid by one check or money order.

(b) *Timeliness.* Fees must be received by the CO no more than 30 calendar days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182.

§ 655.164 Denied certification.

If temporary agricultural labor certification is denied, the CO will send a Final Determination notice to the employer and a copy, if appropriate, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.130(c), the CO will send the Final Determination notice by means normally assuring next day delivery. The Final Determination notice will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the denial under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the denial is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification.*

§ 655.165 Partial certification.

The CO may issue a partial certification, reducing either the period of employment or the number of H–2A workers being requested or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification,* an audit, or otherwise. The number of workers certified will be reduced by one for each U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and has not been rejected for lawful, job-related reasons, to perform the labor or services. If a partial labor certification is issued, the CO will send the Final Determination notice approving partial certification using the procedures at § 655.162. The Final Determination notice will:

(a) State the reason(s) the period of employment and/or the number of H–2A workers requested has been reduced, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the partial certification under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the partial certification is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification.*

§ 655.166 Requests for determinations based on nonavailability of U.S. workers.

(a) *Standards for requests.* If a temporary agricultural labor certification has been partially granted or denied based on the CO's determination that able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the first date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or available, the employer may request a new temporary agricultural labor certification determination from the CO. Prior to making a new determination, the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request under paragraph (c) of this section. An employer may appeal a denial of such a determination in accordance with the procedures contained in § 655.171.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO in writing using an electronic method(s) designated by the OFLC Administrator, unless the employer requests to file the request by mail as set forth in § 655.130(c). If the employer requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

(c) *Notification of determination.* If the CO determines that U.S. workers have become unavailable and cannot identify sufficient available U.S. workers who are able, willing, eligible, and qualified or who are likely to become available, the CO will grant the employer's request for a new determination on the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162 or § 655.165. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts

concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful, job-related reasons.

§ 655.167 Document retention requirements of H–2A employers.

(a) *Entities required to retain documents.* All employers must retain documents and records demonstrating compliance with this subpart.

(b) *Period of required retention.* Records and documents must be retained for a period of 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of determination if the *Application for Temporary Employment Certification* is denied or withdrawn.

(c) *Documents and records to be retained by all employers.* All employers must retain:

(1) Proof of recruitment efforts, including:

(i) Job order placement as specified in § 655.121;

(ii) 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; and

(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).

(7) If applicable, records of notice to the NPC and DHS of the abandonment of employment or termination for cause of a worker as set forth in § 655.122(n).

(d) *Additional retention requirement for agricultural associations filing an Application for Temporary Employment Certification.* In addition to the documents specified in paragraph (c) of this section, associations must retain documentation substantiating their status as an employer or agent, as specified in § 655.131.

Post-Certification

§ 655.170 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances.

(a) *Short-term extension.* Employers seeking extensions of 2 weeks or less of the certified *Application for Temporary Employment Certification* must apply directly to DHS for approval. If granted, the *Application for Temporary Employment Certification* will be deemed extended for such period as is approved by DHS.

(b) *Long-term extension.* Employers seeking extensions of more than 2 weeks may apply to the CO. Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). Such requests must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. The CO will not grant an extension where the total work contract period under that *Application for Temporary Employment Certification* and extensions would last longer than 1 year, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.171.

(c) *Disclosure.* The employer must provide to the workers a copy of any approved extension in accordance with § 655.122(q), as soon as practicable.

§ 655.171 Appeals.

(a) *Request for review.* Where authorized in this subpart, an employer wishing review of a decision of the CO must request an administrative review or de novo hearing before an ALJ of that decision to exhaust its administrative remedies. In such cases, the request for review:

(1) Must be received by the Chief ALJ, and the CO who issued the decision, within 10 business days from the date of the CO's decision;

(2) Must clearly identify the particular decision for which review is sought;

(3) Must include a copy of the CO's decision;

(4) Must clearly state whether the employer is seeking administrative review or a de novo hearing. If the request does not clearly state the employer is seeking a de novo hearing, then the employer waives its right to a hearing, and the case will proceed as a request for administrative review;

(5) Must set forth the particular grounds for the request, including the specific factual issues the requesting party alleges needs to be examined in connection with the CO's decision in question;

(6) May contain any legal argument that the employer believes will rebut the basis of the CO's action, including any briefing the employer wishes to submit where the request is for administrative review;

(7) May contain only such evidence as was actually before the CO at the time of the CO's decision, where the request is for administrative review; and

(8) May contain new evidence for the ALJ's consideration, where the request is for a de novo hearing, provided that the new evidence is introduced at the hearing.

(b) *Appeal file.* After the receipt of the request for review, the CO will send a copy of the OFLC administrative file to the Chief ALJ as soon as practicable by means normally assuring next-day delivery.

(c) *Assignment.* The Chief ALJ will immediately assign an ALJ to consider the particular case, which may be a single member or a three-member panel of the BALCA.

(d) *Administrative review*—(1) *Briefing schedule.* If the employer wishes to submit a brief on appeal, it must do so as part of its request for review. Within 7 business days of receipt of the OFLC administrative file, the counsel for the CO may submit a brief in support of the CO's decision and, if applicable, in response to the employer's brief.

(2) *Standard of review.* The ALJ must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(3) *Scope of review.* The ALJ will affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The ALJ will reach this decision after due consideration of the documents in the OFLC administrative file that were before the CO at the time of the CO's decision and any written submissions from the parties or amici curiae that do not contain new evidence. The ALJ may not consider evidence not before the CO at the time of the CO's decision, even if such evidence is in the administrative file.

(4) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, and counsel for the CO within 7 business

days of the submission of the CO's brief or 10 business days after receipt of the OFLC administrative file, whichever is later, using means normally assuring next-day delivery.

(e) *De novo hearing*—(1) *Conduct of hearing.* Where the employer has requested a de novo hearing the procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 14 business days after the ALJ's receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence during the hearing as appropriate;

(iii) The ALJ may authorize discovery and the filing of pre-hearing motions, and so limit them to the types and quantities which in the ALJ's discretion will contribute to a fair hearing without unduly burdening the parties;

(iv) The ALJ's decision must be rendered within 10 calendar days after the hearing; and

(v) If the employer waives the right to a hearing, such as by asking for a decision on the record, or if the ALJ determines there are no disputed material facts to warrant a hearing, then the standard and scope of review for administrative review applies.

(2) *Standard and scope of review.* The ALJ will review the evidence presented during the hearing and the CO's decision de novo. The ALJ may determine that there is no genuine issue covering some or all material facts and limit the hearing to any issues of material fact as to which there is a genuine dispute. If new evidence is submitted with a request for a de novo hearing, and the ALJ subsequently determines that a hearing is warranted, the new evidence provided with the request must be introduced at the hearing to be considered by the ALJ. After a de novo hearing, the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action.

(3) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, and counsel for the CO by means normally assuring next-day delivery.

§ 655.172 Post-certification withdrawals.

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order after the CO grants certification under § 655.160. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the certification and stating the reason(s) for the withdrawal.

§ 655.173 Setting meal charges; petition for higher meal charges.

(a) *Meal charges.* An employer may only charge workers up to a maximum amount per day for providing them with three meals. The maximum charge allowed by this paragraph (a) will begin at $12.26 per day and will be updated 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 not later than 14 calendar days following the date of their publication by the OFLC Administrator of a document 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) *Petitions for higher meal charges.* The employer may file a petition with the CO to request approval to charge more than the applicable amount set under paragraph (a) of this section, up to $14.94, until a new maximum higher meal charge is set. The maximum higher meal charge allowed by this paragraph (b) will be changed annually following the same methodology and procedure as paragraph (a).

(1) *Filing higher meal charge request.* To request approval to charge up to the maximum higher meal charge, the employer must submit the documentation required by either paragraph (b)(1)(i) or (ii) of this section. A higher meal charge request will be denied, in whole or in part, if the employer's documentation does not justify the higher meal charge requested, if the amount requested exceeds the current maximum higher meal charge permitted, or both.

(i) *Meals prepared directly by the employer.* Documentation submitted must include only the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served, and the number of days meals were provided. The cost of the following items may be included in the employer's charge to workers for providing prepared meals: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period must be retained and must be available for inspection for a period of 3 years.

(ii) *Meals provided through a third party.* Documentation submitted must identify each third party that the employer will engage to prepare meals, describe how the employer will fulfill its obligation to provide three meals per day to workers through its agreement with the third party, and document the third party's charge(s) to the employer for the meals to be provided. Neither the third party's charge(s) to the employer nor the employer's meal charge to workers may include a profit, kick back, or other direct or indirect benefit to the employer, a person affiliated with the employer, or to another person for the employer's benefit. Receipts and other cost records documenting payments made to the third party that prepared the meals and meal charge deductions from employee pay must be retained for the period provided in § 655.167(b) and must be available for inspection by the CO and WHD during an investigation.

(2) *Effective date and scope of validity of a higher meal charge approval.* The employer may begin charging the higher rate upon receipt of approval from the CO, unless the CO sets a later effective date in the decision, and after disclosing to workers any change in the meal charge or deduction. A favorable decision from the CO is valid only for the meal provision arrangement documented under paragraph (b)(1) of this section and the approved higher meal charge amount. If the approved meal provision arrangement changes, the employer may charge no more than the maximum permitted under paragraph (a) of this section until a new petition for a higher meal charge based on the new arrangement is approved.

(3) *Appeal rights.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial.

Appeals will be filed with the Chief ALJ, pursuant to § 655.171.

§ 655.174 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary agricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§ 655.175 Post-certification amendments.

(a) *Scope of post-certification amendments.* A certified *Application for Temporary Employment Certification* and job order may be amended to make minor changes to the certified place(s) of employment, provided the employer has good and substantial cause for the amendment requested, the circumstance(s) underlying the request for amendment could not have been reasonably foreseen before certification and is wholly outside the employer's control, the material terms and conditions of the job order are not affected, and the amendment requested is within the certified area(s) of intended employment.

(b) *Employer requirements.* The employer must submit to the NPC a written request to amend the certified place(s) of employment. The written request must:

(1) Specify each place of employment the employer requests to add to or remove from the certified *Application for Temporary Employment Certification* and job order, the expected beginning and ending dates of work at each place of employment, and, if applicable, the name of each fixed-site agricultural business;

(2) Describe the good and substantial cause justifying the need for the requested amendment, as that term is defined in § 655.134, and explain how the circumstance could not have been reasonably foreseen before certification and is wholly outside the employer's control;

(3) Assure the amendment requested will not change the material terms and conditions of the job order;

(4) Assure the employer will provide to the workers a copy of the amendment as soon as practicable after receiving notice that the requested amendment is approved by the CO, consistent with § 655.122(q); and

(5) Assure the employer will retain and make available all documentation substantiating the requested amendment, where approved by the CO and required by § 655.167, in the event of a post-certification audit or upon request by the Department.

(c) *Processing and effective date of amendments.* The CO will expeditiously, but in no case later than 3 business days after the date the request is received, decide whether to grant the requested amendment and provide notification of the decision to the employer. In considering whether to approve the request, the CO will determine whether the requested amendment is sufficiently justified, whether the employer has provided assurances that it will satisfy all program requirements and obligations to workers, and how the amendment will affect the underlying labor market test for the job opportunity. Requests that do not satisfy all requirements will not be approved. Changes will not be effective until approved by the CO. Upon approval of an amendment, the CO will submit to the SWA any necessary changes to the job order.

Integrity Measures

§ 655.180 Audit.

The CO may conduct audits of applications for which certifications have been granted.

(a) *Discretion.* The CO has the sole discretion to choose the certified applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's agent or attorney. The audit letter will:

(1) Specify the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and

(3) Advise that failure to fully comply with the audit process may result in the revocation of the certification or program debarment.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS, WHD, or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

§ 655.181 Revocation.

(a) *Basis for DOL revocation.* The OFLC Administrator may revoke a temporary agricultural labor certification approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process;

(2) The employer substantially violated a material term or condition of the approved temporary agricultural labor certification, as defined in § 655.182;

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (as discussed in § 655.180), or law enforcement function under 8 U.S.C. 1188, 29 CFR part 501, or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(b) *DOL procedures for revocation—*(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's temporary agricultural labor certification, the OFLC Administrator will send to the employer (and its attorney or agent) a Notice of Revocation. The Notice will contain a detailed statement of the grounds for the revocation, and it will inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 14 calendar days of the date of the Notice of Revocation, the Notice is the final agency action and will take effect immediately at the end of the 14-day period.

(2) *Rebuttal.* The employer may submit evidence to rebut the grounds stated in the Notice of Revocation within 14 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed by the employer, the OFLC Administrator will inform the employer of the OFLC Administrator's final determination on the revocation within 14 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification should be revoked, the OFLC Administrator will inform the

employer of its right to appeal according to the procedures of § 655.171. If the employer does not appeal the final determination, it will become the final agency action.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the OFLC Administrator after the review of rebuttal evidence, according to the appeal procedures of § 655.171. 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 to DHS and the Department of State (DOS).

(c) *Employer's obligations in the event of revocation.* If an employer's temporary agricultural labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(1);

(2) The worker's outbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.122(i); and

(4) Any other wages, benefits, and working conditions due or owing to the worker under this subpart.

§ 655.182 Debarment.

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501 subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H–2A workers; workers in corresponding employment; or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Effect on future applications.* No application for H–2A workers may be filed by a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, subject to the term limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Statute of limitations and period of debarment.* (1) The OFLC Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2A workers and/or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H–2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180;

(vii) Employing an H–2A worker outside the area of intended employment, in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of § 655.135(j) or (k);

(ix) A violation of any of the provisions listed in 29 CFR 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) The employer's failure to pay a necessary certification fee in a timely manner;

(3) The H–2ALC's failure to submit an original surety bond meeting the requirements of § 655.132(c) within 30 days of the date the temporary agricultural labor certification was issued or failure to submit additional surety within 30 days of a finding under 20 CFR 501.9(a) that the face value of the bond is insufficient;

(4) Fraud involving the *Application for Temporary Employment Certification;* or

(5) A material misrepresentation of fact during the application process.

(e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial 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; or

(7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

(f) *Debarment procedure*—(1) *Notice of Debarment.* If the OFLC Administrator makes a determination to debar an employer, agent, or attorney, the OFLC Administrator will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and it will inform the party subject to the Notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice will be the final agency action and the debarment will take effect at the end of the 30-day period.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 30 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party

should be debarred, the OFLC Administrator will inform the party of its right to request a debarment hearing according to the procedures of paragraph (f)(3) of this section. The party must request a hearing within 30 calendar days after the date of the OFLC Administrator's final determination, or the OFLC Administrator's determination will be the final agency action and the debarment will take effect at the end of the 30-calendar-day period.

(3) *Hearing.* The recipient of a Notice of Debarment may request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the OFLC Administrator after review of rebuttal evidence submitted pursuant to paragraph (f)(2) of this section. To obtain a debarment hearing, the debarred party must, within 30 calendar days of the date of the Notice or the final determination, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street NW, Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the OFLC Administrator. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is properly filed within 30 calendar days from the issuance of the Notice of Debarment or final determination. The timely filing of a request for a hearing stays the debarment pending the outcome of the hearing. Within 10 calendar days of receipt of the request for a hearing, the OFLC Administrator will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided immediately to the parties to the debarment hearing by means normally assuring next day delivery. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ will be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete hearing record to the ARB.

(iii) Where the ARB has determined to review such decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (*e.g.,* briefs or oral argument), and the time within which such presentation must be submitted.

(6) *ARB decision.* The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ. If the ARB fails to provide a decision within 90 calendar days from the notice granting the petition, the ALJ's decision will be the final agency decision.

(g) *Concurrent debarment jurisdiction.* OFLC and WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and WHD may inform one another and may coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS promptly.

(h) *Debarment involving members of agricultural associations.* If the OFLC Administrator determines that an individual employer-member of an agricultural association has committed a substantial violation, the debarment determination will apply only to that member unless the OFLC Administrator determines that the agricultural association or another agricultural association member participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) as well.

(i) *Debarment involving agricultural associations acting as joint employers.* If the OFLC Administrator determines that an agricultural association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the OFLC Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(j) *Debarment involving agricultural associations acting as sole employers.* If the OFLC Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

§ 655.183 Less than substantial violations.

(a) *Requirement of special procedures.* If the OFLC Administrator determines that a less than substantial violation has occurred but has reason to believe that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before and after the temporary agricultural labor certification determination. These special procedures may include special on-site positive recruitment and streamlined interviewing and referral techniques. The special procedures are designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary agricultural labor certification. Such requirements will be reasonable; will not require the employer to offer better wages, working conditions, and benefits than those specified in § 655.122; and will be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart.

(b) *Notification of required special procedures.* The OFLC Administrator will notify the employer (or agent or

attorney) in writing of the special procedures that will be required in the coming year. The notification will state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary agricultural labor certification, and will offer the employer an opportunity to request an administrative review or a de novo hearing before an ALJ. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.171 will apply.

(c) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (a) of this section, the OFLC Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H–2A certification determination will be reduced by 25 percent of the total number of H–2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC Administrator in a written temporary agricultural labor certification determination. The notice will offer the employer an opportunity to request administrative review or a de novo hearing before an ALJ. If administrative review or a de novo hearing is requested, the procedures prescribed in § 655.171 will apply, provided that if the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (a) of this section, the reduction in the number of workers requested will be 25 percent of the total number of H–2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year.

§ 655.184 Applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification,* the CO may refer the matter to DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If WHD, a court, or DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* and certification has been granted, a finding under this paragraph 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 work contracts must be referred by the SWA to WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, WHD may report the results of its investigation to the OFLC Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) *Filing with the Department of Justice.* Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if the Immigrant and Employee Rights Section becomes aware of a violation of the regulations in this subpart, it may provide such information to the appropriate SWA and the CO.

Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Occupations

§ 655.200 Scope and purpose of herding and range livestock regulations in §§ 655.200 through 655.235.

(a) *Purpose.* The purpose of §§ 655.200 through 655.235 is to establish certain procedures for employers who apply to the Department to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the range, as defined in § 655.201. Unless otherwise specified in §§ 655.200 through 655.235, employers whose job opportunities meet the qualifying criteria under §§ 655.200 through 655.235 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to §§ 655.200 through 655.235.* The procedures in §§ 655.200 through 655.235 apply to job opportunities with the following unique characteristics:

(1) The work activities involve the herding or production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock), as defined under § 655.201;

(2) The work is performed on the range for the majority (meaning more than 50 percent) of the workdays in the work contract period. Any additional work performed at a place other than the range must constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock); and

(3) The work activities generally require the workers to be on call 24 hours per day, 7 days a week.

§ 655.201 Definition of herding and range livestock terms.

The following are terms that are not defined in §§ 655.100 through 655.185 and are specific to applications for labor certifications involving the herding or production of livestock on the range.

Herding. Activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the range.

Livestock. An animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of §§ 655.200 through 655.235, livestock refers to those species raised on the range.

Production of livestock. The care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides on the range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock. This term also includes duties performed off the range that are closely and directly related to herding and/or the production of livestock. The following are non-exclusive examples of ranch work that is closely and directly related: Repairing fences used to contain the herd; assembling lambing jugs; cleaning out lambing jugs; feeding and caring for the dogs that the workers use on the range to assist with herding or

guarding the flock; feeding and caring for the horses that the workers use on the range to help with herding or to move the sheep camps and supplies; and loading animals into livestock trucks for movement to the range or to market. The following are examples of ranch work that is not closely and directly related: Working at feedlots; planting, irrigating and harvesting crops; operating or repairing heavy equipment; constructing wells or dams; digging irrigation ditches; applying weed control; cutting trees or chopping wood; constructing or repairing the bunkhouse or other ranch buildings; and delivering supplies from the ranch to the herders on the range.

Range. The range is any area located away from the ranch headquarters used by the employer. The following factors are indicative of the range: It involves land that is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in a remote, isolated area; and typically range housing is required so that the herder can be in constant attendance to the herd. No one factor is controlling, and the totality of the circumstances is considered in determining what should be considered range. The range does not include feedlots, corrals, or any area where the stock involved would be near ranch headquarters. Ranch headquarters, which is a place where the business of the ranch occurs and is often where the owner resides, is limited and does not embrace large acreage; it only includes the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The range also does not include any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health.

Range housing. Range housing is housing located on the range that meets the standards articulated under § 655.235.

§ 655.205 Herding and range livestock job orders.

An employer whose job opportunity has been determined to qualify for the procedures in §§ 655.200 through 655.235 is not required to comply with the job order filing timeframe requirements in § 655.121(a) and (b) or the job order review process in § 655.121(e) and (f). Rather, the employer must submit the job order along with a completed *Application for Temporary Employment Certification,* as required in § 655.215, to the designated NPC for the NPC's review.

§ 655.210 Contents of herding and range livestock job orders.

(a) *Content of job offers.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* The job offer must include a statement that the workers are on call for up to 24 hours per day, 7 days per week and that the workers spend the majority (meaning more than 50 percent) of the workdays during the contract period in the herding or production of livestock on the range. Duties may include activities performed off the range only if such duties constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). All such duties must be specifically disclosed on the job order. The job offer may also specify that applicants must possess up to 6 months of experience in similar occupations involving the herding or production of livestock on the range and require reference(s) for the employer to verify applicant experience. An employer may specify other appropriate job qualifications and requirements for its job opportunity. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers engaged in herding or the production of livestock on the range. Any such requirements must be applied equally to both U.S. and foreign workers. Each job qualification and requirement listed in the job offer must be bona fide, and the CO may require the employer to submit documentation to substantiate the appropriateness of any other job qualifications and requirements specified in the job offer.

(c) *Range housing.* The employer must specify in the job order that range housing will be provided. The range housing must meet the requirements set forth in § 655.235.

(d) *Employer-provided items.* (1) The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. The employer must specify in the job order which items it will provide to the worker.

(2) Because of the unique nature of the herding or production of livestock on the range, this equipment must include effective means of communicating with persons capable of responding to the worker's needs in case of an emergency including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order:

(i) The type(s) of electronic communication device(s) and that such device(s) will be provided without charge or deposit charge to the worker during the entire period of employment; and

(ii) If there are periods of time when the workers are stationed in locations where electronic communication devices may not operate effectively, the employer must specify in the job order, the means and frequency with which the employer plans to make contact with the workers to monitor the worker's well-being. This contact must include either arrangements for the workers to be located, on a regular basis, in geographic areas where the electronic communication devices operate effectively, or arrangements for regular, pre-scheduled, in-person visits between the workers and the employer, which may include visits between the workers and other persons designated by the employer to resupply the workers' camp.

(e) *Meals.* The employer must specify in the job offer and provide to the worker, without charge or deposit charge:

(1) Either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to enable the worker to prepare his or her own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and

(2) Adequate potable water, or water that can be easily rendered potable and the means to do so. Standards governing the provision of water to range workers are also addressed in § 655.235(e).

(f) *Hours and earnings statements.* (1) The employer must keep accurate and adequate records with respect to the worker's earnings and furnish to the worker on or before each payday a statement of earnings. The employer is exempt from recording the hours actually worked each day, the time the worker begins and ends each workday, as well as the nature and amount of work performed, but all other regulatory requirements in § 655.122(j) and (k) apply.

(2) The employer must keep daily records indicating whether the site of the employee's work was on the range or off the range. If the employer prorates a worker's wage pursuant to paragraph (g)(2) of this section because of the worker's voluntary absence for personal reasons, it must also keep a record of the reason for the worker's absence.

(g) *Rates of pay.* The employer must pay the worker at least the monthly AEWR, as specified in § 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or state law or judicial action, in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof.

(1) The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or state law or judicial action, or any agreed-upon collective bargaining rate, whichever is highest, and must be paid to each worker free and clear without any unauthorized deductions.

(2) The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if a worker is voluntarily unavailable to work for personal reasons.

(h) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly. Employers must pay wages when due.

§ 655.211 Herding and range livestock wage rate.

(a) *Compliance with rates of pay.* (1) To comply with its obligation under § 655.210(g), an employer must offer, advertise in its recruitment, and pay each worker employed under §§ 655.200 through 655.235 a wage that is the highest of the monthly AEWR established under this section, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or state law or judicial action.

(2) If the monthly AEWR established under this section is adjusted during a work contract, and is higher than both the agreed-upon collective bargaining wage and the applicable minimum wage imposed by Federal or state law or judicial action in effect at the time the work is performed, the employer must pay that adjusted monthly AEWR not later than 14 calendar days following the date of publication by the Department in the **Federal Register**.

(b) *Publication of the monthly AEWR.* The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to the monthly AEWR as a notice in the **Federal Register**.

(c) *Monthly AEWR rate.* (1) The monthly AEWR shall be $7.25 multiplied by 48 hours, and then multiplied by 4.333 weeks per month; and

(2) Beginning for calendar year 2017, the monthly AEWR shall be adjusted annually based on the ECI for wages and salaries published by BLS for the preceding October—October period.

(d) *Transition rates.* (1) For the period from November 16, 2015 through calendar year 2016, the Department shall set the monthly AEWR at 80 percent of the result of the formula in paragraph (c) of this section.

(2) For calendar year 2017, the Department shall set the monthly AEWR at 90 percent of the result of the formula in paragraph (c) of this section.

(3) For calendar year 2018 and beyond, the Department shall set the monthly AEWR at 100 percent of the result of the formula in paragraph (c) of this section.

§ 655.215 Procedures for filing herding and range livestock Applications for Temporary Employment Certification.

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification* and job order.

(1) The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment and one or more contiguous states.

(2) The period of need identified on the *Application for Temporary Employment Certification* and job order for range sheep or goat herding or production occupations must be no more than 364 calendar days. The period of need identified on the *Application for Temporary Employment Certification* and job order for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months.

(3) An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous states with different first dates of need. Unless modifications to a sheep or goat herding or production of livestock job order are required by the CO or requested by the employer, pursuant to § 655.121(h), the agricultural association is not required to re-submit the job order during the calendar year with its *Application for Temporary Employment Certification.*

§ 655.220 Processing herding and range livestock Applications for Temporary Employment Certification.

(a) *NPC review.* Unless otherwise specified in §§ 655.200 through 655.235, the CO will review and process the *Application for Temporary Employment Certification* and job order in accordance with the requirements outlined in §§ 655.140 through 655.145, and will work with the employer to address any deficiencies in the job order in a manner consistent with §§ 655.140 through 655.141.

(b) *Notice of acceptance.* Once the job order is determined to meet all regulatory requirements, the NPC will issue a NOA consistent with § 655.143(b), provide notice to the employer authorizing conditional access to the interstate clearance system, and transmit an electronic copy of the approved job order to each SWA with jurisdiction over the anticipated place(s) of employment. The CO will direct the SWA to place the job order promptly in clearance and commence recruitment of U.S. workers. Where an agricultural association files as a joint employer and submits a single job order on behalf of its employer-members, the CO will transmit a copy of the job order to the SWA having jurisdiction over the location of the agricultural association, those SWAs having jurisdiction over other States where the work will take place, and to the SWAs in all States designated under § 655.154(d), directing each SWA to place the job order in intrastate clearance and commence recruitment of U.S. workers.

(c) *Electronic job registry.* Under § 655.144(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, the Department will keep the job order posted on the OFLC electronic job registry until the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all

employer-members identified on the job order.

§ 655.225 Post-acceptance requirements for herding and range livestock.

(a) Unless otherwise specified in this section, the requirements for recruiting U.S. workers by the employer and SWA must be satisfied, as specified in §§ 655.150 through 655.158.

(b) Pursuant to § 655.150(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, each of the SWAs to which the job order was transmitted by the CO or the SWA having jurisdiction over the location of the agricultural association must keep the job order on its active file the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all employer-members identified on the job order, and must refer to the agricultural association each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(c) Any eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity and is hired will be placed at the location nearest to him or her absent a request for a different location by the U.S. worker. Employers must make reasonable efforts to accommodate such placement requests by the U.S. worker.

(d) The employer will not be required to place an advertisement in a newspaper of general circulation serving the area of intended employment, as required in § 655.151.

(e) An agricultural association that fulfills the recruitment requirements for its members is required to maintain a written recruitment report containing the information required by § 655.156 for each individual employer-member identified in the application or job order, including any approved modifications.

§ 655.230 Range housing.

(a) Housing for work performed on the range must meet the minimum standards contained in §§ 655.235 and 655.122(d)(2).

(b) The SWA with jurisdiction over the location of the range housing must inspect and certify that such housing used on the range is sufficient to accommodate the number of certified workers and meets all applicable standards contained in § 655.235. The SWA must conduct a housing inspection no less frequently than once every three calendar years after the initial inspection and provide documentation to the employer certifying the housing for a period lasting no more than 36 months. If the SWA determines that an employer's housing cannot be inspected within a 3-year timeframe or, when it is inspected, the housing does not meet all the applicable standards, the CO may deny the H–2A application in full or in part or require additional inspections, to be carried out by the SWA, in order to satisfy the regulatory requirement.

(c)(1) The employer may self-certify its compliance with the standards contained in § 655.235 only when the employer has received a certification from the SWA for the range housing it seeks to use within the past 36 months.

(2) To self-certify the range housing, the employer must submit a copy of the valid SWA housing certification and a written statement, signed and dated by the employer, to the SWA and the CO assuring that the housing is available, sufficient to accommodate the number of workers being requested for temporary agricultural labor certification, and meets all the applicable standards for range housing contained in § 655.235.

(d) The use of range housing at a location other than the range, where fixed-site employer-provided housing would otherwise be required, is permissible only when the worker occupying the housing is performing work that constitutes the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). In such a situation, workers must be granted access to facilities, including but not limited to toilets and showers with hot and cold water under pressure, as well as cooking and cleaning facilities, that would satisfy the requirements contained in § 655.122(d)(1)(i). When such work does not constitute the production of livestock, workers must be housed in housing that meets all the requirements of § 655.122(d).

§ 655.235 Standards for range housing.

An employer employing workers under §§ 655.200 through 655.235 may use a mobile unit, camper, or other similar mobile housing vehicle, tents, and remotely located stationary structures along herding trails, which meet the following standards:

(a) *Housing site.* Range housing sites must be well drained and free from depressions where water may stagnate.

(b) *Water supply.* (1) An adequate and convenient supply of water that meets the standards of the state or local health authority must be provided.

(2) The employer must provide each worker at least 4.5 gallons of potable water, per day, for drinking and cooking, delivered on a regular basis, so that the workers will have at least this amount available for their use until this supply is next replenished. Employers must also provide an additional amount of water sufficient to meet the laundry and bathing needs of each worker. This additional water may be non-potable, and an employer may require a worker to rely on natural sources of water for laundry and bathing needs if these sources are available and contain water that is clean and safe for these purposes. If an employer relies on alternate water sources to meet any of the workers' needs, it must take precautionary measures to protect the worker's health where these sources are also used to water the herd, dogs, or horses, to prevent contamination of the sources if they collect runoff from areas where these animals excrete.

(3) The water provided for use by the workers may not be used to water dogs, horses, or the herd.

(4) In situations where workers are located in areas that are not accessible by motorized vehicle, an employer may request a variance from the requirement that it deliver potable water to workers, provided the following conditions are satisfied:

(i) It seeks the variance at the time it submits its *Application for Temporary Employment Certification;*

(ii) It attests that it has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located, and that these sources will remain available during the period the worker is at that location;

(iii) It attests that it shall provide each worker an effective means to test whether the water is potable and, if not potable, the means to easily render it potable; and

(iv) The CO approves the variance.

(5) Individual drinking cups must be provided.

(6) Containers appropriate for storing and using potable water must be provided and, in locations subject to freezing temperatures, containers must be small enough to allow storage in the housing unit to prevent freezing.

(c) *Excreta and liquid waste disposal.* (1) Facilities, including shovels, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the state health authority or involved Federal agency; and

(2) If pits are used for disposal by burying of excreta and liquid waste, they must be kept fly-tight when not

filled in completely after each use. The maintenance of disposal pits must be in accordance with state and local health and sanitation requirements.

(d) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants;

(2) Housing, other than tents, must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering;

(3) Each housing unit must have at least one window that can be opened or skylight opening directly to the outdoors; and

(4) Tents appropriate to weather conditions may be used only where the terrain and/or land use regulations do not permit the use of other more substantial housing.

(e) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(5) A heater may be used in a tent if the heater is approved by a testing service and if the tent is fireproof.

(f) *Lighting.* (1) In areas where it is not feasible to provide electrical service to range housing units, including tents, lanterns must be provided (kerosene wick lights meet the definition of lantern); and

(2) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit, including tents.

(g) *Bathing, laundry, and hand washing.* Bathing, laundry, and hand washing facilities must be provided when it is not feasible to provide hot and cold water under pressure.

(h) *Food storage.* When mechanical refrigeration of food is not feasible, the worker must be provided with another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator. Other proven methods of safeguarding fresh foods, such as dehydrating or salting, are acceptable.

(i) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation; and

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(j) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, including tents, for storing garbage and other refuse; and

(2) Provision must be made for collecting or burying refuse, which includes garbage, at least twice a week or more often if necessary, except where the terrain in which the housing is located cannot be accessed by motor vehicle and the refuse cannot be buried, in which case the employer must provide appropriate receptacles for storing the refuse and for removing the trash when the employer next transports supplies to the location.

(k) *Insect and rodent control.* Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents and other vermin.

(l) *Sleeping facilities.* A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement, unless a variance is requested from and granted by the CO. When filing an application for certification and only where it is demonstrated to the CO that it is impractical to provide a comfortable and clean bed, cot, or bunk, with a clean mattress, for each range worker, the employer may request a variance from this requirement to allow for a second worker to join the range operation. Such a variance must be used infrequently, and the period of the variance will be temporary (*i.e.,* the variance shall be for no more than 3 consecutive days). Should the CO grant the variance, the employer must supply a sleeping bag or bed roll for the second occupant free of charge or deposit charge.

(m) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable state or local fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Housing units for range use must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Tents are not required to have a second means of escape, except when large tents with walls of rigid material are used.

(5) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the range housing.

Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations

§ 655.300 Scope and purpose.

(a) *Purpose.* The purpose of §§ 655.300 through 655.304 is to establish certain procedures for employers who apply to the Department of Labor to obtain labor certifications to hire temporary agricultural foreign workers to perform animal shearing, commercial beekeeping, custom combining, and reforestation, as defined in this subpart. Unless otherwise specified in §§ 655.300 through 655.304, employers whose job opportunities meet the qualifying criteria under §§ 655.300 through 655.304 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to §§ 655.*300 *through 655.*304. The procedures in §§ 655.300 through 655.304 apply to job opportunities for animal shearing, commercial beekeeping, custom combining, and reforestation as defined under §§ 655.103 and 655.301, where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment in one or more contiguous states.

§ 655.301 Definition of terms.

The following are terms that are not defined in §§ 655.100 through 655.185 and are specific to applications for labor certifications involving animal shearing, commercial beekeeping, and custom combining.

Animal shearing. Activities associated with the shearing and crutching of sheep, goats, or other animals producing wool or fleece, including gathering, moving, and sorting animals into shearing yards, stations, or pens; placing animals into position, whether loose, tied, or otherwise immobilized, prior to shearing; selecting and using suitable handheld or power-driven equipment and tools for shearing; shearing animals with care according to industry standards; marking, sewing, or disinfecting any nicks and cuts on animals due to shearing; cleaning and washing animals after shearing is complete; gathering, storing, loading, and delivering wool or fleece to storage yards, trailers or other containers; and maintaining, oiling, sharpening, and repairing equipment and other tools used for shearing. Transporting equipment and other tools used for shearing qualifies as an activity associated with animal shearing for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew. Wool or fleece grading, which involve examining, sorting, and placing unprocessed wool or fleece into containers according to government or industry standards, qualify as activities associated with animal shearing for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew.

Commercial beekeeping. Activities associated with the care or husbandry of bee colonies for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers, including assembling, maintaining, and repairing hives, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing, raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies.

Custom combining. Activities associated with combining crops for agricultural producers, including operating self-propelled combine equipment (*i.e.,* equipment that reaps or harvests, threshes, and swath or winnow the crop); performing manual or mechanical adjustments to cutters, blowers and conveyers; performing safety checks on harvesting equipment; and maintaining and repairing equipment and other tools used for performing swathing or combining work. Transporting harvested crops to elevators, silos, or other storage areas, and transporting combine equipment and other tools used for custom combining work from one field to another, qualify as activities associated with custom combining for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the custom combining crew and who travel and work with the custom combining crew. Component parts of custom combining not performed by the harvesting entity (*e.g.,* grain cleaning), are not eligible for the variance granted by this provision. The planting and cultivation of crops, and other related activities, are not considered custom combining or activities associated with custom combining for the purposes of this definition.

§ 655.302 Contents of job orders.

(a) *Content of job offers.* Unless otherwise specified in §§ 655.300 through 655.304, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* (1) For job opportunities involving animal shearing, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must possess experience with an industry shearing method or pattern, must be willing to join the employer at the time the job opportunity is available and at the place the employer is located, and must be available to complete the scheduled itinerary under the job order. U.S. applicants whose experience is based on a similar or related industry shearing method or pattern must be afforded a break-in period of no less than 5 working days to adapt to the employer's preferred shearing method or pattern.

(2) For job opportunities involving commercial beekeeping, the job offer may specify that applicants must possess up to 3 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants may not have bee, pollen, or honey-related allergies, must possess a valid commercial U.S. driver's license or be able to obtain such license not later than 30 days after the first workday after the arrival of the worker at the place of employment, must be willing to join the employer at the time and place the employer is located, and must be available to complete the scheduled itinerary under the job order.

(3) For job opportunities involving custom combining, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must be willing to join the employer at the time and place the employer is located and must be available to complete the scheduled itinerary under the job order.

(4) An employer may specify other appropriate job qualifications and requirements for its job opportunity, subject to § 655.122(a) and (b).

(c) *Employer-provided communication devices.* For job opportunities involving animal shearing and custom combining, the employer must provide to the worker, without charge or deposit charge, effective means of communicating with persons capable of responding to the worker's needs in case of an emergency, including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order the type(s) of electronic communication device(s) and that such devices will be provided without charge or deposit charge to the worker during the entire period of employment.

(d) *Housing.* For job opportunities involving animal shearing and custom combining, the employer must specify

in the job order that housing will be provided as set forth in § 655.304.

§ 655.303 Procedures for filing Applications for Temporary Employment Certification.

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.300 through 655.304 the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification.* The employer must identify each place of employment with as much geographic specificity as possible, including the names of each farmer/rancher, the names, physical locations and estimated period of employment where work will be performed under the job order.

(1) The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment in one or more contiguous states. An *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping may include one noncontiguous state at the beginning and end of the period of employment for the overwintering of bee colonies.

(2) An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous states. An agricultural association filing as a joint employer may file an *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping may include one noncontiguous state at the beginning and end of the period of employment for the overwintering of bee colonies.

§ 655.304 Standards for mobile housing.

(a) *Use of mobile housing.* An employer employing workers engaged in animal shearing or custom combining, as defined by § 655.301, may use a mobile unit, camper, or other similar mobile housing unit that complies with all of the following standards, except as provided in paragraph (a)(1) or (2) of this section:

(1) When the mobile housing unit is located on the range as defined in § 655.201 to enable work to be performed on the range, the mobile housing is subject only to the standards for range housing in § 655.235. As soon as the mobile housing unit is moved to a location off of the range, the mobile housing standards in this section apply. An employer whose mobile housing unit is or will be located on the range must have the housing unit inspected and approved by an a SWA with jurisdiction over the location of the mobile unit when not in use, at least once every 36 months, subject to the procedures for range housing inspection and self-certification in § 655.230(b) and (c).

(2) A Canadian employer performing custom combining operations in the United States whose mobile housing unit is located in Canada when not in use must have the housing unit inspected and approved by an authorized representative of the federal or provincial government of Canada, in accordance with inspection procedures and applicable standards for such housing under Canadian law or regulation.

(b) *Compliance with mobile housing standards.* The employer may comply with the standards for mobile housing in this section in one of two ways:

(1) The employer may provide a mobile housing unit that complies with all applicable standards; or

(2) The employer may provide a mobile housing unit and supplemental facilities (*e.g.,* located at a fixed housing site) if workers are afforded access to all facilities contained in these standards.

(c) *Housing site.* (1) Mobile housing sites must be well drained and free from depressions where water may stagnate. They shall be located where the disposal of sewage is provided in a manner that neither creates, nor is likely to create, a nuisance or a hazard to health.

(2) Mobile housing sites shall not be in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards.

(3) Mobile housing sites shall be free from debris, noxious plants (*e.g.,* poison ivy, etc.), and uncontrolled weeds or brush.

(d) *Drinking water supply.* (1) An adequate and convenient supply of potable water that meets the standards of the local or state health authority must be provided.

(2) Individual drinking cups must be provided.

(3) A cold water tap shall be available within a reasonable distance of each individual living unit when water is not provided in the unit.

(4) Adequate drainage facilities shall be provided for overflow and spillage.

(e) *Excreta and liquid waste disposal.* (1) Toilet facilities, such as portable toilets, RV or trailer toilets, privies, or flush toilets, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the applicable local, state, or Federal health authority, whichever is most stringent.

(2) Where mobile housing units contain RV or trailer toilets, such facilities must be connected to sewage hookups whenever feasible (*i.e.,* in campgrounds or RV parks).

(3) If wastewater tanks are used, the employer must make provisions to regularly empty the wastewater tanks.

(4) If pits are used for disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with local and state health and sanitation requirements.

(f) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition, and must provide shelter against the elements to occupants.

(2) Housing must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering.

(3) Each housing unit must have at least one window or a skylight that can be opened directly to the outdoors.

(g) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(h) *Electricity and lighting.* (1) Barring unusual circumstances that prevent access, electrical service or generators must be provided.

(2) In areas where it is not feasible to provide electrical service to mobile housing units, lanterns must be provided (*e.g.,* battery operated lights).

(3) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit.

(i) *Bathing, laundry, and hand washing.* (1) Bathing facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per day.

(2) Laundry facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per week.

(3) Alternative bathing and laundry facilities must be available to occupants at all times when water under pressure is unavailable.

(4) Hand washing facilities must be available to all occupants at all times.

(j) *Food storage.* (1) Provisions for mechanical refrigeration of food at a temperature of not more than 45 degrees Fahrenheit must be provided.

(2) When mechanical refrigeration of food is not feasible, the employer must provide another means of keeping food fresh and preventing spoilage (*e.g.,* a butane or propane gas refrigerator).

(k) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation, and stoves or hotplates.

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(l) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, for storing garbage and other refuse.

(2) Provision must be made for collecting refuse, which includes garbage, at least twice a week or more often if necessary for proper disposal in accordance with applicable local, state, or Federal law, whichever is most stringent.

(m) *Insect and rodent control.* Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents, and other vermin.

(n) *Sleeping facilities.* (1) A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement.

(2) Clean and sanitary bedding must be provided for each person.

(3) No more than two deck bunks are permissible.

(o) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable local or state fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Mobile housing units must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the mobile housing.

(p) *Maximum occupancy.* The number of occupants housed in each mobile housing unit must not surpass the occupancy limitations set forth in the manufacturer specifications for the unit.

Title 29—Labor

■ 5. Revise part 501 to read as follows:

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

Subpart A—General Provisions

Sec.

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 H–2A worker, as defined at 8 U.S.C. 1188, may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied for and received a temporary agricultural labor certification from the Secretary of Labor (Secretary). The

temporary agricultural labor certification establishes that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition; and

(ii) The employment of the H–2A worker in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR part 655, subpart B, or the regulations in this part, including imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations. *See* 8 U.S.C. 1188(g)(2).

(b) *Authority and role of the Office of Foreign Labor Certification.* The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, *e.g.,* a Certifying Officer (CO).

(c) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part (''the H–2A program''), and to carry out other statutory responsibilities required by 8 U.S.C. 1188. Certain investigatory, inspection, and law enforcement functions to carry out the provisions under 8 U.S.C. 1188 have been delegated by the Secretary to the WHD. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and workers in corresponding employment are enforced by WHD, including whether employment was offered to U.S. workers as required under 8 U.S.C. 1188 or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certification(s), and to seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages and reinstatement of laid off or displaced U.S. workers.

(d) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

(e) *Effect of regulations.* The enforcement functions carried out by WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part apply to the employment of any H–2A worker and any other worker in corresponding employment as the result of any *Application for Temporary Employment Certification* processed under 20 CFR 655.102(c).

§ 501.2 Coordination between Federal agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the worker will be immediately forwarded to the appropriate WHD office for appropriate action under the regulations in this part.

(b) Information received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H–2A program, other Departments or agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is imposed will be cited in a single debarment proceeding. OFLC and WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

§ 501.3 Definitions.

(a) *Definitions of terms used in this part.* The following defined terms apply to this part: *Act.* The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

Administrative Law Judge. A person within the Department's Office of Administrative Law Judges (OALJ) appointed pursuant to 5 U.S.C. 3105.

Administrator. See definitions of *OFLC Administrator* and *WHD Administrator* in this section.

Adverse effect wage rate. The wage rate published by the OFLC Administrator in the **Federal Register** for the occupational classification and State based on either the U.S. Department of Agriculture's Farm Labor Survey or the Bureau of Labor Statistics' Occupational Employment Statistics survey, as set forth in 20 CFR 655.120(b).

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and

(iii) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Applicant. A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

Application for Temporary Employment Certification. The Office of Management and Budget (OMB)-approved Form ETA–9124A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

Area of intended employment. The geographic area within normal commuting distance of the place(s) of employment for which the temporary agricultural labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the place(s) of employment, or quality of the regional transportation network). If a place of employment is within a Metropolitan Statistical Area (MSA), including a

multi-State MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (*e.g.,* near the border of) the MSA.

Attorney. Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia (DC). Such a person is also permitted to act as an agent under this part. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Certifying Officer. The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H–2A program. The OFLC Administrator is the National CO. Other COs may be designated by the OFLC Administrator to also make the determination required under 20 CFR part 655, subpart B.

Chief Administrative Law Judge. The chief official of the Department's OALJ or the Chief ALJ's designee.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.

Department of Homeland Security. The Federal department having jurisdiction over certain immigration-related functions, acting through its component agencies, including U.S. Citizenship and Immigration Services (USCIS).

Employee. A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer. A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(i) Has an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; or

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) A person on whose behalf an *Application of Temporary Employment Certification* is filed.

Employment and Training Administration. The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations from the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

First date of need. The first date the employer anticipates requiring the labor or services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this part; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part as incident to or in conjunction with the owner's or operator's own agricultural operation.

H–2A labor contractor. 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 United States and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

H–2 A Petition. The USCIS Form I–129, Petition for a Nonimmigrant Worker, with H Supplement or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2A nonimmigrant workers.

Job offer. The offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity. Full-time employment at a place in the United States to which U.S. workers can be referred.

Job order. The document containing the material terms and conditions of employment that is posted by the SWA on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA–790/ETA–790A and all appropriate addenda), as submitted to the National Processing Center.

Joint employment. (i) Where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker.

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H–2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H–2A workers sponsored under the *Application for Temporary Employment Certification.*

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under 20 CFR 655.131(b) are, at all times, joint employers of all H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

Metropolitan Statistical Area. A geographic entity defined by OMB for

use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center. The offices within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification.*

Office of Foreign Labor Certification. OFLC means the organizational component of ETA that provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the United States to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

OFLC Administrator. The primary official of OFLC, or the OLFC Administrator's designee.

Period of employment. The time during which the employer requires the labor or services of H–2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification.*

Piece rate. A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

Place of employment. A worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment.

Secretary of Labor. The chief official of the Department, or the Secretary's designee.

State Workforce Agency. State government agency that receives funds pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.,* to administer the state's public labor exchange activities.

Successor in interest. (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

(F) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(G) Similarity in machinery, equipment, and production methods;

(H) Similarity of products and services; and

(I) The ability of the predecessor to provide relief.

(ii) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

Temporary agricultural labor certification. Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification,* job order, and all supporting documentation, with respect to an employer seeking to file 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, and 20 CFR part 655, subpart B.

United States. The continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services. The Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2A workers to perform temporary or seasonal agricultural labor or services in the United States.

U.S. worker. A worker who is:

(i) A citizen or national of the United States;

(ii) An individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized by the INA or DHS to be employed in the United States; or

(iii) An individual who is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3), with respect to the employment in which the worker is engaging.

Wages. All forms of cash remuneration to a worker by an employer in payment for labor or services.

Wage and Hour Division. The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part.

WHD Administrator. The primary official of the WHD, or the WHD Administrator's designee.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) *Definition of agricultural labor or services.* For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: Agricultural labor as defined and applied in section 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; logging employment; reforestation activities; or pine straw activities. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (b)(1) through (6) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (b) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock,

bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in 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)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (b)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (b) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in section 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in section 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780, is agricultural labor or services for purposes of paragraph (b) of this section.

(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, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites, is agricultural labor or services for purposes of paragraph (b) of this section.

(5) *Reforestation activities.* Reforestation activities are predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas, including, but not limited to, planting tree seedlings in specified patterns using manual tools; and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. Reforestation activities may include some forest fire prevention or suppression duties, such as constructing fire breaks or performing prescribed burning tasks, when such duties are in connection with and incidental to other reforestation activities. Reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way.

(6) *Pine straw activities.* Operations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations, is agricultural labor or services for purposes of paragraph (b) of this section.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

§ 501.4 Discrimination prohibited.

(a) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188 or this part;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(5) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by WHD. Where WHD has determined through investigation that such allegations have been substantiated,

appropriate remedies may be sought. WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the worker whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any such violator's current temporary agricultural labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by WHD to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

§ 501.5 Waiver of rights prohibited.

A person may not seek to have an H–2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Any agreement by a worker purporting to waive or modify any rights given to said person under 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 the Secretary.

(a) *General.* The Secretary, through WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, either pursuant to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, housing, vehicles, and records (and make transcriptions thereof), question any person, and gather any information as may be appropriate.

(b) *Confidential investigation.* WHD shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(c) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.7 Cooperation with Federal officials.

All persons must cooperate with any Federal officials assigned to perform an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and this part during the performance of such duties. WHD will take such action as it deems appropriate, including initiating debarment proceedings, seeking an injunction to bar any failure to cooperate with an investigation, and/or assessing a civil money penalty therefor. In addition, WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing temporary agricultural labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 114.

§ 501.8 Accuracy of information, statements, and data.

Information, statements, and data submitted in compliance with 8 U.S.C. 1188 or this part are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 501.9 Enforcement of surety bond.

Every H–2A labor contractor (H–2ALC) must obtain a surety bond demonstrating its ability to discharge financial obligations as set forth in 20 CFR 655.132(c).

(a) Notwithstanding the required bond amounts set forth in 20 CFR 655.132(c), the WHD Administrator may require that an H–2ALC obtain a bond with a higher face value amount after notice and opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(b) Upon a final decision reached pursuant to the administrative proceedings of subpart C of this part, including any timely appeal, or resulting from an enforcement action brought directly in a District Court of the United States finding a violation or violations of 20 CFR part 655, subpart B, or this part, the WHD Administrator may make a written demand on the surety for payment of any wages and benefits, including the assessment of interest, owed to an H–2A worker, a worker engaged in corresponding employment, or a U.S. worker improperly rejected or improperly laid off or displaced. The WHD Administrator shall have 3 years from the expiration of the certification, including any extension thereof, to make such written demand for payment on the surety. This 3-year period for making a demand on the surety is tolled by commencement of any enforcement action of the WHD Administrator pursuant to § 501.6, § 501.15, or § 501.16 or the commencement of any enforcement action in a District Court of the United States.

Subpart B—Enforcement

§ 501.15 Enforcement.

The investigation, inspection, and law enforcement functions to carry out the provisions of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, as provided in this part for enforcement by WHD, pertain to the employment of any H–2A worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. Such enforcement includes the work contract provisions as defined in § 501.3(a).

§ 501.16 Sanctions and remedies—general.

Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including, but not limited to, the following:

(a)(1) Institute appropriate administrative proceedings, including: The recovery of unpaid wages (including recovery of recruitment fees paid in the absence of required contract clauses (*see* 20 CFR 655.135(k)); the enforcement of provisions of the work contract, 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, or improperly laid off or displaced; or debarment for up to 3 years.

(2) The remedies referenced in paragraph (a)(1) of this section will be sought either directly from the

employer, agent, or attorney, or from its successor in interest, as appropriate. In the case of an H–2ALC, the remedies will be sought from the H–2ALC directly and/or monetary relief (other than civil money penalties) from the insurer who issued the surety bond to the H–2ALC, as required by 20 CFR part 655, subpart B, and § 501.9.

(b) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief, including to prohibit the withholding of unpaid wages and/or for reinstatement, or to restrain violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, by any person.

(c) Petition any appropriate District Court of the United States for an order directing specific performance of covered contractual obligations.

§ 501.17 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in 20 CFR part 655, subpart B, and § 501.1(b) . WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c). The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. OFLC and WHD have concurrent jurisdiction to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

§ 501.18 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, shall represent the WHD Administrator and the Secretary in all administrative hearings under 8 U.S.C. 1188 and this part.

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part constitutes a separate violation.

(b) In determining the amount of penalty to be assessed for each violation, the WHD Administrator shall consider the type of violation committed and other relevant factors. The factors that the WHD Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(2) The number of H–2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188; and

(7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

(c) A civil money penalty for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part will not exceed $1,692 per violation, with the following exceptions:

(1) A civil money penalty for each willful violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, or for each act of discrimination prohibited by § 501.4 shall not exceed $5,695.

(2) A civil money penalty for a violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, that proximately causes the death or serious injury of any worker shall not exceed $56,391 per worker.

(3) For purposes of paragraphs (c)(2) and (4) 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 this part, that proximately causes the death or serious injury of any worker, shall not exceed $112,780 per worker.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed $5,695 per investigation.

(e) A civil money penalty for laying off or displacing any U.S. worker employed in work or activities that are encompassed by the approved *Application for Temporary Employment Certification* for H–2A workers in the area of intended employment either within 60 calendar days preceding the first date of need or during the validity period of the job order, including any approved extension thereof, other than for a lawful, job-related reason, shall not exceed $16,917 per violation per worker.

(f) A civil money penalty for improperly rejecting a U.S. worker who is an applicant for employment, in violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, shall not exceed $16,917 per violation per worker.

§ 501.20 Debarment and revocation.

(a) *Debarment of an employer, agent, or attorney.* The WHD Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, subject to the time limits set forth in paragraph (c) of this section, if the WHD Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H–2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Effect on future applications.* No application for H–2A workers may be filed by a debarred employer, or any successor in interest to a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Statute of limitations and period of debarment.* (1) The WHD Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney, or their successors in interest, may be debarred under this part for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2A workers and/or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H–2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or this part, or an audit under 20 CFR part 655, subpart B;

(vii) Employing an H–2A worker outside the area of intended employment, or in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of 20 CFR 655.135(j) or (k);

(ix) A violation of any of the provisions listed in § 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(2) In determining whether a violation is so substantial as to merit debarment, the factors set forth in § 501.19(b) shall be considered.

(e) *Procedural requirements.* The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, must identify appeal opportunities under § 501.33 and a timeframe under which such rights must be exercised and must comply with § 501.32. The debarment will take effect 30 calendar days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 calendar days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 501.33(d).

(f) *Debarment involving members of agricultural associations.* If, after investigation, the WHD Administrator determines that an individual employer-member of an agricultural association has committed a substantial violation, the debarment determination will apply only to that member unless the WHD Administrator determines that the agricultural association or another agricultural association member participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) as well.

(g) *Debarment involving agricultural associations acting as sole employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

(h) *Debarment involving agricultural associations acting as joint employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the WHD Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(i) *Revocation.* WHD may recommend to the OFLC Administrator the revocation of a temporary agricultural labor certification if WHD finds that the employer:

(1) Substantially violated a material term or condition of the approved temporary agricultural labor certification;

(2) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(3) Failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

§ 501.21 Failure to cooperate with investigations.

(a) No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority.

(b) Where an employer (or employer's agent or attorney) does not cooperate with an investigation concerning the employment of an H–2A worker, a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H–2A workers giving rise to the investigation. In addition, WHD may take such action as appropriate, including initiating proceedings for the debarment of the employer, agent, or attorney from future certification for up to 3 years, seeking an injunction, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action shall not bar the taking of any additional action.

§ 501.22 Civil money penalties—payment and collection.

Where a civil money penalty is assessed in a final order by the WHD Administrator, an ALJ, or the Administrative Review Board (ARB), the amount of the penalty must be received by the WHD Administrator within 30 calendar 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 money order, made payable to ''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 in this subpart.

The procedures and rules contained in this subpart prescribe the administrative process that will be applied with respect to a determination to assess civil money penalties, debar, or increase the amount of a surety bond and which may be applied to the enforcement of provisions of the work contract, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, or to the collection of monetary

relief due as a result of any violation. Except with respect to the imposition of civil money penalties, debarment, or an increase in the amount of a surety bond, the Secretary may, in the Secretary's discretion, seek enforcement action in a District Court of the United States without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the WHD Administrator decides to assess a civil money penalty, debar, increase a surety bond, or proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, including for the recovery of the monetary relief, the person against whom such action is taken shall be notified in writing of such determination.

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the WHD Administrator including the amount of any monetary relief due or actions necessary to fulfill a contractual obligation or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; the amount of any civil money penalty assessment; whether debarment is sought and if so its term; and any change in the amount of the surety bond, and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the WHD Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 calendar days after the date of issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

(d) The determination shall take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings, provided that any surety bond remains in effect until the conclusion of any such proceedings.

Rules of Practice

§ 501.34 General.

(a) Except as specifically provided in this part, the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges* established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and 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 that is immaterial, irrelevant, or unduly repetitive.

§ 501.35 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1188 and the regulations in this part shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

§ 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1188 and the regulations in this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of_____, Respondent.

(b) For the purposes of such administrative proceedings, the WHD Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the WHD Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or the Regional Solicitor for the Region in which the action arose, will, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or the authorized representative of such person, to the Chief ALJ, for a determination in an administrative proceeding as provided 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 29 CFR part 18 or this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the WHD Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief ALJ shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 calendar days from the date on which the Order of Reference was filed.

§ 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, and one copy on the attorney

representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the ALJ, within 30 calendar days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 calendar days after completion of the hearing and closing of the record, a decision on the issues referred by the WHD Administrator.

(b) The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the ARB.

(d) The decision concerning civil money penalties, debarment, monetary relief, and/or enforcement of other contractual obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and/or this part, when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, WHD, or any other party wishing review, including judicial review, of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision within 30 calendar days after receipt of a timely filing of the petition, or within 30 calendar days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding.

§ 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the ARB's notice to accept the petition, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

§ 501.44 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify each party of:

(a) The issue or issues raised;

(b) The form in which submissions must be made (*e.g.,* briefs or oral argument); and

(c) The time within which such presentation must be submitted.

§ 501.45 Final decision of the Administrative Review Board.

The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by the regulations in this part shall be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

§ 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a District Court of the United States, after the administrative remedies have been exhausted, the Chief ALJ or, where the case has been the subject of administrative review, the ARB shall promptly index, certify, and file with the appropriate District Court of the United States, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Molly E. Conway,

Acting Assistant Secretary for Employment and Training, Labor.

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