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Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Final Rule

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 655****Wage and Hour Division****29 CFR Part 503**

RIN 1205-AB58

**Temporary Non-Agricultural
Employment of H-2B Aliens in the
United States**

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

ACTION: Final rule.

SUMMARY: The Department of Labor (the Department) is amending its regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. This Final Rule revises the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status. We have also created new regulations to provide for increased worker protections for both United States (U.S.) and foreign workers.

DATES: This Final Rule is effective April 23, 2012.

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

For further information on 29 CFR part 503 contact Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0071 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal

Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**I. Revisions to 20 CFR part 655 Subpart A***A. Statutory Standard and Current Department of Labor Regulations*

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H-2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary non-agricultural labor or services for which "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). Section 214(c)(1) of the INA requires DHS to consult with appropriate agencies before approving an H-2B visa petition. 8 U.S.C. 1184(c)(1). The regulations of the U.S. Citizenship and Immigration Services (USCIS), the agency within DHS which adjudicates requests for H-2B status, require that an intending employer first apply for a temporary labor certification from the Secretary of Labor (the Secretary). That certification informs USCIS that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). On Guam, H-2B employment requires certification from the Governor of Guam, not the Secretary. 8 CFR 214.2(h)(6)(iii).

Our regulations, at 20 CFR part 655, Subpart A, "Labor Certification Process for Temporary Employment in Occupations other than Agriculture or Registered Nursing in the United States (H-2B Workers)," govern the H-2B labor certification process, as well as the enforcement process to ensure U.S. and H-2B workers are employed in compliance with H-2B labor certification requirements. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in the Employment and Training Administration (ETA), the agency to which the Secretary has delegated her responsibilities as described in the USCIS H-2B regulations. Enforcement of the attestations made by employers in the course of submission of H-2B applications for labor certification is conducted by the Wage and Hour Division (WHD) within the Department, to which DHS on January 16, 2009 delegated enforcement authority granted to it by the INA. 8 U.S.C. 1184(c)(14)(B).

Under the 2008 H-2B regulations published at 73 FR 29942, May 22, 2008 (the 2008 Final Rule), an employer

seeking to fill job opportunities through the H-2B program must demonstrate that it has a temporary need for the services or labor, as defined by one of four regulatory standards: (1) A one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). Generally, that period of time will be limited to 1 year or less, except in the case of a one-time occurrence, which could last up to 3 years, consistent with the standard under DHS regulations at 8 CFR 214.2(h)(6) as well as current Department regulations at § 655.6(b).

The 2008 Final Rule also employed an attestation-based filing model, in which the employer conducted its recruitment with no direct Federal or State oversight. Lastly, the 2008 Final Rule provided WHD's enforcement authority under which WHD could impose civil money penalties and other remedies.

On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), invalidated various provisions of the 2008 Final Rule and remanded the rule to the Department to correct its errors. In the Notice of Proposed Rulemaking (NPRM) published March 18, 2011 (76 FR 15130), we proposed to amend the particular provisions that were invalidated by the Court, including specifying when H-2B employers must contact unions as a potential source of labor at § 655.44 and providing a new definition of full-time and a slightly modified definition of job contractor in § 655.5 and 29 CFR 503.4.

B. The Need for Rulemaking

The Department determined for a variety of reasons that a new rulemaking effort is necessary for the H-2B program. These policy-related reasons, which were discussed at length in the NPRM, include expansion of opportunities for U.S. workers, evidence of violations of program requirements, some rising to a criminal level, need for better worker protections, and a lack of understanding of program obligations. We accordingly proposed to revert to the compliance-based certification model that had been used from the inception of the program until the 2008 Final Rule. We also proposed to add new recruitment and other requirements to broaden the dissemination of job offer information, such as introducing the electronic job registry and requiring the job offer to remain open to U.S. workers for a longer period and closer to the date of need. We stated that these changes were necessary to ensure that there was

an adequate test of the U.S. labor market to determine whether U.S. workers are available for the jobs. Further, we proposed additional worker protections, such as increasing the number of hours per week required for full-time employment and requiring that U.S. workers in corresponding employment

who perform the same jobs at the same place as the H-2B workers receive the same wages and benefits as the H-2B workers. We discussed how increased worker protections were necessary to ensure that the employment of H-2B workers does not adversely affect the

wages and working conditions of U.S. workers.

Summing the present value of the costs associated with this rulemaking in Years 1–10 results in total discounted costs over 10 years of \$10.3 million to \$12.8 million (with 7 percent and 3 percent discounting, respectively).

TABLE 1—SUMMARY OF COSTS AND TRANSFERS

[Millions of dollars]

Cost component	Transfers and costs by year (millions of dollars)		
	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Undiscounted:			
Total Costs and Transfers—Low	\$96.34	\$94.73	\$948.91
Total Costs and Transfers—High	131.38	129.76	1,299.26
Total Transfers—Low	93.37	93.37	933.71
Total Transfers—High	128.41	128.41	1,284.06
Total Costs to Employers	2.83	1.31	14.64
Total Costs to Government	0.14	0.05	0.56
Present Value—7% Real Interest Rate:			
Total Costs & Transfers—Low			623.22
Total Costs & Transfers—High			853.20
Total Transfers—Low			612.89
Total Transfers—High			842.87
Total Costs			10.33
Present Value—3% Real Interest Rate:			
Total Costs & Transfers—Low			786.05
Total Costs & Transfers—High			1,076.20
Total Transfers—Low			773.27
Total Transfers—High			1,063.42
Total Costs			12.78

Note: Totals may not sum due to rounding.

TABLE 2—SUMMARY OF ESTIMATED COST BY PROVISION

[Millions of dollars]

Cost component	Provision costs by year (in millions of dollars)		
	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Transfers:			
Corresponding Workers' Wages—Low	\$17.52	\$17.52	\$175.18
Corresponding Workers' Wages—High	52.55	52.55	525.53
Transportation	61.33	61.33	613.28
Subsistence	2.81	2.81	28.09
Lodging	1.58	1.58	15.83
Visa and Border Crossing Fees	10.13	10.13	101.33
Total Transfers—Low	93.37	93.37	933.71
Total Transfers—High	128.41	128.41	1,284.06
Costs to Employers:			
Read and Understand Rule	1.20	0	1.20
Document Retention	0.32	0	0.32
Additional Recruiting	1.04	1.04	10.36
Disclosure of Job Order	0.26	0.26	2.63
Other Provisions ^a	0.014	0.014	0.14
Total Costs to Employers	2.83	1.31	14.65
Costs to Government:			
Electronic Job Registry	0.14	0.05	0.56
Enhanced U.S. Worker Referral Period	Not	Not	Not
Total First Year Costs to Government	0.14	0.05	0.56
Total Costs & Transfers:			
Total Costs & Transfers—Low	96.34	94.73	948.91
Total Costs & Transfers—High	131.38	129.76	1,299.26

TABLE 2—SUMMARY OF ESTIMATED COST BY PROVISION—Continued
[millions of dollars]

Cost component	Provision costs by year (in millions of dollars)		
	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Total Transfers—Low	93.37	93.37	933.71
Total Transfers—High	128.41	128.41	1,284.06
Total Costs	2.97	1.36	15.20

Note: Totals may not sum due to rounding.

^a Includes the sum of: Elimination of Attestation-Based Model; Post Job Opportunity; Workers Rights Poster.

C. Overview of the Comments Received

We received 869 comments on the proposed rule. We have determined that 457 were completely unique including 8 representative form letters, 4 were duplicates, 407 were considered a form letter or based on a form letter, and 1 comment was withdrawn at the request of the commenter. Those comments that were received by means not listed in the proposed rule or that we received after the comment period closed were not considered in this Final Rule.

Commenters represented a broad range of constituencies for the H-2B program, including small business employers, U.S. and H-2B workers, worker advocacy groups, State Workforce Agencies (SWAs), agents, law firms, employer and industry advocacy groups, union organizations, members of the U.S. Congress, and various interested members of the public. We received comments both in support of and in opposition to the proposed regulation, which are discussed in greater detail below.

One commenter contended that we dismiss comments simply because they are similar in nature. This statement is incorrect. We read and analyzed all comments that we received within the comment period. For purposes of posting comments for the public to view, we posted all comments we deemed unique with at least one copy of a form letter so that there is an opportunity to see the concerns being addressed. All form letters are considered in the final count of comments received and we address them as required by the Administrative Procedure Act (APA) in this Final Rule. Another commenter argued that we did not allow enough time to comment on the proposed rulemaking. We disagree and believe that 60 days was enough time for the public to comment on the rulemaking. We note that the APA does not provide a specific time period during which agencies must accept public comments in response to proposed rules, see 5 U.S.C. 553, but the

60-day comment period that we provided during this rulemaking is consistent with the directive of Executive Order 13563, see Improving Regulation and Regulatory Review, 76 FR 3821–22 (Jan. 21, 2011). Moreover, in light of the Court's ruling in the *CATA* case invalidating some of the current regulations, we believe it was necessary to proceed as expeditiously as reasonable through the rulemaking process.

There were several issues which we deemed to be beyond the scope of the proposed rule. Some of these issues included general disapproval of any foreigners being allowed to work in the U.S., elimination of temporary foreign worker programs, activities and rules related to the H-2A program, and general foreign relations and immigration reform issues (including increasing or decreasing the number of available visas). Also beyond the scope of this rulemaking were the collective bargaining rights of H-2B workers, the wage methodology promulgated by the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program, 76 FR 3452, Jan. 19, 2011 and the portability of visas.

Lastly, we received a large number of comments from the ski industry requesting an exemption from the regulations. Many of the commenters believed that because ski instructors require skills or experience, under the new rules they would be ineligible for the H-2B program. Generally, job positions certified under the H-2B program are low skilled, requiring little to no experience. We do recognize, however, that there are some occupations and categories under the H-2B program that may require experience and/or training. Employer applicants demonstrating a true need for a level of experience, training or certification in their application have never been prohibited in the H-2B program, given the breadth of the definition of H-2B under the INA. See 8 U.S.C. 1101(a)(15)(H)(ii)(b). We have

determined that an exemption for the ski industry is not appropriate as the commenters presented no valid argument as to why exemption is necessary. There is nothing about the workers they seek to hire that prevents them from participating in the H-2B program. Ski resorts are fixed-site locations that run on a seasonal basis with standard operating procedures. We do not see a reason, nor was one presented, that prevents a ski resort from meeting all the recruitment requirements.

D. Elimination of the Attestation-Based Model

One of the overarching changes we made in the proposed rule was the elimination of the attestation-based model adopted in the 2008 Final Rule. We received comments supporting the elimination of the attestation-based model as well as opposing that change. Generally, commenters who supported our decision to revert to a compliance-based model focused on the Department's desire to reduce the susceptibility of the H-2B program to fraud and abuse. Several commenters expressed concern about the rise of criminal and civil prosecutions which they felt demonstrate abuse in the H-2B program. Most of the commenters cited our audit experience, as discussed in the NPRM, and agreed that this data alone should foreclose any debate on the necessity of ending the attestation-based model. One commenter specifically pointed out that changes in the 2008 Final Rule made it easier for unscrupulous employers and their agents to use H-2B visas for the illicit purpose of suppressing wages. This same commenter suggested that a return to a compliance-based model brings us back to the proper focus of administering the H-2B program in a manner that fairly balances the protection of workers with the desires of employers. Another commenter pointed out that the OFLC's experience of 2 years under the attestation-based model

is sufficient to demonstrate that the model cannot be retained without doing serious damage to the employment prospects and wages and working conditions of U.S. workers. Similarly, an advocacy group stated that many aspects of the attestation-based model deprive domestic workers of employment opportunities, adversely affect their wages and working conditions, and encourage, rather than curb, the well-documented fraud in the H-2B program.

Generally, commenters who advocated the retention of an attestation-based model encouraged us to use our current resources and enforcement authority to crack down on bad actors, rather than overhaul the program. A few commenters stated that we did not give the 2008 Final Rule and the attestation-based model sufficient time to be successful. Contrary to the comments supportive of a change, these commenters argued that our audit of a random sample of cases is misleading given that the NPRM does not disclose the number of cases audited and the details about the audit process and that all violations appear to be counted with equal weight. Another commenter believed that reverting to the compliance-based model would create extensive processing delays.

We disagree with the commenters who asserted that increased enforcement authority is the answer to resolving concerns about the attestation-based model. Our enforcement authority is a separate regulatory component, regardless of the certification model we use. Our experience, as presented in the NPRM, indicates that despite the fact that the 2008 Final Rule contained elevated penalties for non-compliance with the program provisions, the results of the audited cases demonstrate that an attestation-based process does not provide an adequate level of protection for either U.S. or foreign workers.

Commenters who assert we did not give the 2008 Final Rule and its attestation-based model a chance to be successful undervalue the experience we have had over the last 2 years with the program. In making our decision to depart from the attestation-based model, we took into account not only the audits we conducted as described in the NPRM, but also the various comments and concerns raised by employers, advocates, and workers about compliance with the program. The attestation-based model of the 2008 Final Rule is highly vulnerable to fraud. Under that model, only after an employer has been certified and the foreign workers have come to the U.S. and begun working for the employer, is

there a probability that the employer's non-compliance will be discovered or that the foreign worker(s) will report a violation. Only if an employer is audited or investigated will we learn of any non-compliance, even minor violations of program obligations, since the attestation-based model relies on the employer's attestations.

Consistent with our concerns about the attestation-based model, the Department's Office of Inspector General (OIG) issued an audit report on October 17, 2011 in which OIG identified the attestation-based model as a weakness in the H-2B program¹. OIG found that the existing attestation-based application process did not allow for meaningful validation before application approval and hampered the Department's ability to provide adequate protections for U.S. workers in the H-2B applications OIG reviewed. OIG noted that the Department's proposed transition to a model requiring pre-approval review of compliance through documentation, as adopted in this Final Rule, would strengthen the program.

As to commenter concerns about the audit sample discussed in the NPRM, we reiterate that we conducted two rounds of audits of a random sample of cases, both of which resulted in an indication that many of the employers were not in compliance with the attestations they agreed to. These audits we reviewed were a random sample. Employers were not selected based on specific industries or occupations, nor were they selected based on compliance with specific provisions. The indication of employer non-compliance from those audits is not acceptable by our standards. Additionally, contrary to the commenter's claim that all violations were given equal weight, regardless of the type of violations or their consequences, our concern is that these audits evidenced a pattern of non-compliance with program obligations toward workers, regardless of the degree of such non-compliance. Moreover, the results of these audits showed the existence of deficiencies in the applications that would have warranted further action, the least of which would have included issuing a Notice of Deficiency, and affording the employer the opportunity to correct the deficiencies, before adjudicating the application. Again, under the

attestation-based program model, we are not aware of the non-compliance before certification.

Furthermore, despite the fact that H-2B cases continue to be processed under the 2008 Final Rule, which some commenters said implemented an ideal balance between the attestation-based model and stronger enforcement authority, we still see evidence in the H-2B program of a rising number of criminal violations. In addition to the specific cases cited in the NPRM, there has been more recent evidence of employers and agents filing fraudulent applications involving thousands of requested employees for non-existent job opportunities. For example, according to the OIG's "Semiannual Report to Congress" (October 2010 until March 2011),² OIG investigations found that emerging organized criminal groups are using the Department's foreign labor certification processes in illegal schemes, and in so doing are committing crimes that negatively impact workers. The report further lists at least 4 examples of fraud committed by employers or their attorneys/agents in the H-2B program.

Lastly, while some commenters were concerned about the processing delays that may result from reverting to a compliance-based certification model, our focus in administering the H-2B program is to provide employers with a viable workforce while protecting U.S. and foreign workers. We will, however, continue to endeavor to process applications as efficiently and quickly as possible and in accordance with the timeframes set forth in the application processing provisions of this Final Rule.

In the NPRM, we solicited comments on maintaining the 2008 Final Rule or some modification of the attestation-based program design. While we have chosen to adopt the certification-based model described in the NPRM, we discuss below the responses to the specific questions presented in the NPRM:

1. What kind of specific guidance could the Department provide that would benefit a first-time (or sporadic) employer in the H-2B program to avoid mistakes in making attestations of compliance with program obligations?

We received several comments directly addressing this question, one of which asserted that the attestation-based model was straightforward and that non-compliance is attributable to a

¹ *Program Design Issues Hampered ETA's Ability to Ensure the H-2B Visa Program Provided Adequate Protections for U.S. Forestry Workers in Oregon*, Office of the Inspector General of the U.S. Department of Labor, Report No. 17-12-001-03-321, Oct. 17, 2011. <http://www.oig.dol.gov/public/reports/oa/2012/17-12-001-03-321.pdf>.

² *Semiannual Report to Congress*, Office of the Inspector General of the U.S. Department of Labor, Volume 65 (October 1, 2010 to March 31, 2011); <http://www.oig.dol.gov/public/semiannuals/65.pdf> <http://www.oig.dol.gov/public/semiannuals/65.pdf>.

willful choice made by the employer or its attorney/agent. Another comment, submitted by several employer advocacy groups, encouraged us to establish additional ongoing education programs throughout the U.S. and to provide a hotline to answer questions about basic programmatic issues. The comment suggested the hotline be supplemented by the Certifying Officer (CO) notifying employers of any technical issues while the *Application for Temporary Employment Certification* is pending. An employer also expressed frustration with its inability to communicate directly with us to seek immediate guidance on program processes and policies.

While we have established an email box (tlc.chicago@dol.gov) to which employers can submit questions about their applications, we continue to rely on those questions to easily identify recurring issues for which we may need to issue a Frequently Asked Question (FAQ) and/or guidance or provide additional training to staff. We also anticipate stakeholder educational efforts to help familiarize program users and others with the regulatory requirements and changes in the H-2B program. Where feasible and necessary, we will provide additional educational outreach through briefings and other types of guidance documents for the benefit of all employers.

2. What kind of guidance would benefit frequent users of the program with respect to repetitive errors in recruitment? What kind of guidance would be beneficial in avoiding errors in unique situations for these users?

One commenter suggested that we implement a three-strike policy to eliminate willful violators from the H-2B program. Another commenter, including several employer advocacy groups, encouraged us to establish additional ongoing education programs throughout the U.S. and suggested that employers document their attendance, which we should consider in mitigation of employer error in the application process. The commenter also recommended that we provide a hotline to answer questions about basic programmatic issues and publish at appropriate intervals a top 10 errors and issues list and a public notice on the OFLC's Web site indicating where the CO identifies a trend.

We believe that debarment and other program integrity measures are sufficient to eliminate willful violators from the H-2B program, and therefore, do not consider a three strike policy to be necessary. As to the request for a hotline, as stated above, we have

established an email box to which employers can submit questions about the status of their applications; we believe this will be more accurate than a telephone line for receiving information and questions that can then be translated into public guidance as appropriate. We rely on such emailed questions and information to identify recurring issues for which we may need to publish an FAQ and/or guidance. We also draft FAQs and other guidance documentation at the recommendation of the COs, based on recurring trends and/or issues identified by them. In an effort to better provide information to the employer community, we will consider publishing guidance responsive to specific issues, such as a way to avoid common filing mistakes, once those have been determined under the re-engineered model. Lastly, we also plan to implement rollout activities and briefings to help familiarize program users and others with the regulatory requirements and changes in the H-2B program. Where we determine that more guidance is needed, we will provide additional educational outreach to the filing community and other interested parties.

3. Could pre-certification audits augment a post-certification audit in an attestation-based program model? If not, how would you propose the Department obtain information in the absence of supervised activity in order to arrive at certification while ensuring compliance with program obligations?

Several commenters stated that they would be supportive of more post-certification audits as long as we retain the attestation-based certification model. In asking this question, we were trying to gauge whether a pre-certification audit process would be a viable way to alleviate the obvious compliance problems that occur under the attestation-based certification model. One commenter believed that by adding a pre-certification audit process, we would only be contributing to the existing burden on the H-2B worker to report non-compliance without actually removing those employer applicants that continue to do poorly. Another commenter stated that a pre-certification audit process would imply that a review of the documentation will ensure compliance with program requirements. This same commenter believed that a pre-certification review cannot ensure that proper wages will be paid or that U.S. referrals will be properly considered for a job. The commenter also affirmed that the current enforcement scheme provides significant incentive for program users

to comply based on audits after an attestation has been made. Lastly, one commenter claimed that asking a hypothetical question about possible changes in the program structure, such as pre-certification audits, without actually proposing language or procedures does not qualify as appropriate notice and would require us to issue a new NPRM.

As discussed above, we sought comments about possible alternatives related to retaining the attestation-based certification model. Based on the comments on the retention of the attestation-based certification model and pre-certification audits, we have decided not to retain the attestation-based model. Therefore, we no longer consider the pre-certification audit process alternative, which was tied to the concept of the attestation-based model, to be an option.

4. What additional sanctions could be taken against employers to ensure compliance with program requirements, given the potential for fraud in the H-2B program?

We received several comments on sanctions. We discuss issues involving sanctions in the preamble discussions of 29 CFR part 503 and §§ 655.72 and 655.73.

5. What other kinds of actions could the Department take to prevent an H-2B employer from filing attestations that do not meet program requirements?

We did not receive specific alternatives in answer to this question. Any other incidental alternatives received that relate to specific sections of the Final Rule have been discussed under the appropriate related provisions.

For the reasons discussed above, we are reverting to a compliance-based model under the H-2B program as proposed.

II. Discussion of Comments Received

A. Introductory Sections

We address below those areas in which we received comments. For specific provisions on which we did not receive comments, we have retained the provisions as proposed, except where clarifying edits have been made.

1. § 655.1 Scope and Purpose of Subpart A

The proposed provision informs program users of the statutory basis and regulatory authority for the H-2B labor certification process. This provision also describes our role in receiving, reviewing, adjudicating, and preserving the integrity of an *Application for*

Temporary Employment Certification. We are adopting the provision as proposed. We received several general comments relating to this section. One commenter stated that the scope and purpose was to pay the highest of all the prevailing wages and to make sure that H-2B workers are offered the same protections under the law as any other worker. Another commenter stated that the original scope and purpose was to find temporary workers or certify applications for foreign workers. These comments misunderstand our responsibility and the criteria that must be met before we certify an H-2B *Application for Temporary Employment Certification.* Under DHS' regulations at 8 CFR 214.2(h)(6)(iv), the purpose of these regulations is for the Secretary of Labor to determine that: (1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to import foreign workers; and (2) the employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed. It is through the regulatory provisions set forth below that the Department ensures that that the criteria for its labor certification determinations are met.

2. § 655.2 Authority of Agencies, Offices and Divisions in the Department of Labor

This section describes the authority and division of activities related to the H-2B program among the Department's agencies. The NPRM discussed the authority of OFLC, the office within ETA that exercises the Secretary's responsibility for determining the availability of U.S. workers and whether the employment of H-2B nonimmigrant workers will adversely affect the wages and working conditions of similarly employed workers. It also discussed the authority of WHD, the agency responsible for investigation and enforcement of the terms and conditions of H-2B labor certifications, as delegated by DHS. We are retaining this provision as proposed.

We received several comments from employer advocacy organizations on our authority to administer the H-2B labor certification program. These commenters alleged that Congress has not vested authority in the Department and that the statutory provision mandating consultation with other agencies does not necessarily give us the right to effectuate the requirements proposed under these regulations. We address this general assertion below; however, our authority for specific

provisions of this Final Rule is addressed in the discussions of the sections containing those provisions.

Under the INA, Congress did not specifically address the issue of the Department's authority to engage in legislative rulemaking in the H-2B program but the legislative history of the Immigration Reform and Control Act (IRCA) specifically acknowledges the Department's practice of issuing legislative rules, *see* H.R. Rep. No. 99-682, pt. 1, at 79-80, 1986 WL 31950, at **34. Since 1968, DOL has had regulations governing the H-2 non-agricultural program, *see* 33 FR at 7570-71, and in enacting IRCA in 1986, Congress acknowledged DOL's rulemaking without withdrawing its authority to issue legislative rules, *see* H.R. Rep. No. 99-682, pt. 1, at 80. Ordinarily, when Congress adopts a new law incorporating sections of a prior law it is presumed to be aware of existing administrative regulations interpreting the prior law. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Moreover, when Congress re-enacts a statutory provision, an agency's prior long-standing administrative practice under that statutory provision is deemed to have received congressional approval. *Fribourg Nav. Co. v. CIR*, 383 U.S. 272, 283 (1966). In this case, Congress did more than re-enact the H-2 non-agricultural statutory provision, it expressly acknowledged DOL's rules governing the H-2 program. *See* H.R. Rep. No. 99-682, pt. 1, at 80. Thus, Congress approved of DOL's rulemaking authority in the H-2B program, and saw fit not to alter or further define DOL's practices, unlike the H-2A agricultural program. *Id.*

Even if the legislative history does not resolve the issue of DOL's rulemaking authority, when the statute does not delegate rulemaking authority explicitly, such statutory ambiguities are implicit delegations to the agency administering the statute to interpret the statute through its rulemaking authority. *Arnett v. CIR*, 473 F.3d 790, 792 (7th Cir. 2007).³ Congress expected DOL to ensure that employers using the H-2B program would not adversely affect similarly situated United States workers. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(b); H.R. Rep. No. 99-682, pt. 1, at 80. This involves policy-type determinations beyond disputed facts in a particular case, *see U.S. v. Fla.*

³ In recent decisions, the Supreme Court has affirmed this approach by applying *Chevron* deference to an agency's construction of a jurisdictional provision in its organic statute. *See Coeur Alaska v. Southeast Alaska Conserv. Council*, 129 S. Ct. 2458, 2469 (2009); *United States v. Eurodif*, 129 S. Ct. 878, 888 (2009).

E. Coast Ry., 410 U.S. 224, 245-46 (1973), which renders DOL's use of legislative rulemaking more appropriate in the administration of the H-2B program than case-by-case adjudication, *see Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1982). Given the type of global considerations confronting DOL in administering the program, it would defeat Congress's goals to conclude that DOL is only authorized to engage in case-by-case adjudication. *See USV Pharm. Corp. v. Weinberger*, 412 U.S. 655, 665 (1973). DOL's use of legislative rulemaking also comports with the judicial preference for filling in the interstices of the law through a quasi-legislative enactment of rules of general applicability. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). Courts encourage agencies to adopt legislative rules when seeking to establish norms of widespread application. *See Ford Motor Co.*, 673 F.2d at 1009. Notice and comment rulemaking provides important procedural protections to the public, allows agencies to apprise themselves of relevant issues and views, and promotes predictability. *See Int'l Union v. MSHA*, 626 F.3d 84, 95 (DC Cir. 2010). Without the use of this process, the public would be deprived of important protections that are unavailable in case-by-case adjudication. *Nat'l Petroleum Ref. Ass'n v. FTC*, 482 F.2d 672, 683-84 (1973).

Importantly, the CATA decision recently held that the Department is not permitted to adopt an H-2B prevailing wage regime without engaging in legislative rulemaking. *See CATA I*, 2010 WL 3431761, at *19 (E.D. Pa. Aug.30,2010). That decision specifically invalidated the Department's attempt to use guidance documents to announce the applicable prevailing wage methodology for H-2B employers, holding that doing so deprives the public of the opportunity to comment on important issues for the administration of the H-2B program. *Id.* Given the CATA decision's holding that the Department cannot use guidance documents to establish prevailing wage rates, without any legislative rulemaking authority, the Department would lack the authority to administer the H-2B program in a fair and predictable manner. Lastly, given Congress' delegation of enforcement authority under 8 U.S.C. 1184(c)(14)(B) to USCIS and the Department, it would be irrational to assume that Congress didn't intend for the Department to issue rules to define the terms of the H-2B program in the absence of statutory standards. *Cf. Nat'l Ass'n of*

Home Bds. v. OSHA, 602 F.3d 464, 467 (DC Cir. 2010).

3. § 655.3 Territory of Guam

As in the 2008 Final Rule, under the proposed rule, the granting of H-2B labor certifications and the enforcement of the H-2B visa program on Guam continue to reside with the Governor of Guam, under DHS regulations. However, the NPRM proposed that we would determine all H-2B prevailing wages, including those for Guam. Recently, DHS, which consults with the Governor of Guam about the admission of H-2B construction workers on Guam, has determined that prevailing wages for construction workers on Guam will be determined by the Secretary. 8 CFR 214.2(h)(6)(v)(E)(v). DHS and the Department agree that it is more appropriate for OFLC to issue H-2B prevailing wages for all workers, including construction workers on Guam, because OFLC already provides prevailing wage determinations (PWDs) for all other U.S. jurisdictions. We therefore proposed that the process for obtaining a prevailing wage in § 655.10 also would apply to H-2B job opportunities on Guam. Employment opportunities on Guam accordingly would be subject to the same process and methodology for calculating prevailing wages as any other jurisdiction within OFLC's purview. We received no comments on this section and therefore are retaining the provision as proposed.

4. § 655.4 Special Procedures

The proposed rule maintained our authority to establish, continue, revise, or revoke special procedures that establish variations for processing certain H-2B *Applications for Temporary Employment Certification*. These are situations where we recognize that variations from the normal H-2B labor certification processes are necessary to permit the temporary employment of foreign workers in specific industries or occupations when U.S. workers are not available and the employment of foreign workers will not adversely affect the wages or working conditions of similarly employed U.S. workers. These variations permit those who would otherwise be unable to readily comply with the program's established processes to participate, such as by allowing itinerant employment for reforestation employers and certain employers in the entertainment industry. These special procedures permit us to accommodate the unique circumstances of certain classes of employers without undermining our essential

responsibilities. We are retaining the proposed section with one minor clarification reminding the employer that it must request special procedures.

We also proposed that special procedures already in place on the effective date of the regulations will remain in force until we otherwise modify or withdraw them. A couple of commenters objected to the continuance of current special procedures because they had not participated in the process. We see no need to upset the settled expectations of the employers who have relied upon the special procedures for many years at least to the extent they do not conflict with these regulations. To the extent that the current special procedures are in conflict with these regulations, the regulations will take precedence. An example of a possible conflict would be the current special procedure provision which allows pre-certification to Canadian musicians who enter the U.S. to perform within a 50-mile area adjacent to the Canadian border for a period of 30 days or less. TEGL 31-05 Procedures for Temporary Labor Certification in the Entertainment Industry under the H-2B Visa program, May 31, 2006, available at http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31-05.pdf. Since the Final Rule does not provide for pre-certification for any occupations, such exemption would no longer be allowed.

A few commenters requested that we revise the proposed language under this section from "the Administrator, OFLC may consult with affected employers and worker representatives" to "the Administrator, OFLC must consult with affected employers and worker representatives." In addition, some commenters, including labor organizations and employees in the reforestation industry, recommended that we should present special procedures through a notice and comment period similar to an NPRM. Finally, a couple of commenters felt that the special procedures process violates the APA.

We decline to make the changes proposed by the commenters. We have complied with the procedural requirements of the APA by proposing this provision and soliciting public comments. See 5 U.S.C. 553. The purpose of the special procedures is to allow a particular group of employers with a need for H-2B workers to participate in the program by waiving certain regulatory provisions when the provisions cannot be reconciled with the operational norms of the industry and when the employers comply with industry-specific alternative procedures. Although we are not required to provide

procedures for requesting a waiver, see *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 601 (1981), the Department is committed to ensuring that the views of affected employers and worker representatives are considered. The process under which a special procedure is considered is in most cases initiated by an industry or group of employers presenting us evidence that demonstrates their occupations are unique and that application of certain provisions in the regulations cannot be reconciled with the operational norms of the industry. Before effectuating such procedures, we will consult with other employer and worker representatives as well as agencies within and outside the Department, as appropriate, to identify necessary revisions which will, at the same time, keep the integrity and principal concepts of the program intact. We also will continue to look to our program experts in OFLC and WHD and review industry data gathered from employers that have previously used the H-2B program. Additionally, while special procedures allow for necessary and specific variations to regulations, we expect employers to adhere to all other aspects of the regulations not addressed in the special procedures. The application of a special procedure by an employer or an industry in no way relieves an employer from its obligation to obtain an approved temporary labor certification from the Department before submitting a request for workers to USCIS.

5. § 655.5 Definition of Terms

a. Area of substantial unemployment. We proposed to add a definition of area of substantial unemployment to the H-2B program. The proposed definition reflected the established definition of area of substantial unemployment in use within ETA as it relates to Workforce Investment Act (WIA) fund allocations. We have retained the proposed definition of area of substantial unemployment without change.

Some commenters suggested alternative methods of defining an area of substantial unemployment. Several commenters contended that a different threshold percentage than 6.5 percent (e.g., 8 percent or 9 percent, the current national unemployment rate) or a different time period than 12 months (e.g., 3 months or the period of need requested) should be used to identify an area of substantial unemployment. One labor organization proposed more than a definitional alternative, suggesting that employers in areas with 5 percent or higher unemployment should be subject to an automatic legal presumption that there is no labor

shortage sufficient to support an H-2B application and that those employers' applications should be given a strict, high level review, including review by a senior official in Washington, DC.

The definition proposed in the NPRM and retained in the Final Rule is the existing definition of area of substantial unemployment within ETA. ETA uses this definition to identify areas with concentrated unemployment and focus WIA funding for services to facilitate employment in those areas. We proposed using this existing definition, and have chosen to retain it in the Final Rule, both as a way to improve labor market test quality and for the sake of operational simplicity. This existing definition provides the appropriate standard for identifying areas of concentrated unemployment where additional recruitment could result in U.S. worker employment. Also, the process of collecting data and designating an area of substantial unemployment using the existing definition is already established, as discussed in ETA's Training and Employment Guidance Letter No. 5-11, Aug. 12, 2011,⁴ providing OFLC with a ready resource for identifying areas to focus additional recruitment. Finally, using this definition of area of substantial unemployment in the Final Rule enables an employer to check the list of areas of substantial unemployment ETA publishes to determine whether its job opportunity may fall within an area of substantial unemployment and, as appropriate, be subject to enhanced recruitment.

Adopting a legal presumption of the availability of domestic workers in areas with 5 percent or higher unemployment would significantly impact employers' access to the H-2B program and could not be viewed as a logical outgrowth of the proposal. Furthermore, while we appreciate the commenter's concern, we disagree with the approach suggested. We thoroughly review all applications submitted for all areas of intended employment. We consider enhanced recruitment requirements, as proposed in the NPRM, to be the most appropriate way to handle job opportunities in areas of substantial unemployment. Accordingly, we will retain the provision as proposed in the Final Rule.

b. Corresponding employment. The NPRM proposed to include a definition of corresponding employment and to require that employers provide to

workers engaged in corresponding employment at least the same protections and benefits as those provided to H-2B workers (except for border crossing and visa fees which would not be applicable). The NPRM defined corresponding employment as the employment of workers who are not H-2B workers by an employer that has an accepted H-2B application in any work included in the job order (*i.e.*, the certified job duties in places of employment or worksite locations specified by the employer) or in any work performed by the H-2B workers during the period of the job order (anywhere the H-2B employer places H-2B workers outside the scope of the labor certification), including any approved extension.

For the reasons discussed below, the Final Rule modifies the corresponding employment definition by deleting the word "any" from before the word "work" in two places and inserting the words "doing substantially the same" instead. The preamble also clarifies and provides examples of what is and is not covered. The Final Rule also excludes from the definition of corresponding employment two categories of incumbent employees: (1) Those employees who have been continuously employed by the H-2B employer in the relevant occupation for at least the prior 52 weeks, who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and have averaged at least 35 hours of work or pay over the prior 52 workweeks, and whose terms and conditions of employment are not substantially reduced during the period of the job order. In determining whether the standard is met, the employer may take credit for any hours that were reduced because the employee voluntarily chose not to work due to personal reasons such as illness or vacation; and (2) those employees who are covered by a collective bargaining agreement or individual employment contract that guarantees an offer of at least 35 hours of work each week and continued employment with the H-2B employer through at least the period of the job order, except that the employee may be dismissed for cause.

Significantly, the Final Rule retains in the definition the requirement that "to qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof." Any work performed by U.S. workers outside the specific period of the job order does not qualify as corresponding employment. Accordingly, the Final Rule does not require employers to offer their U.S.

workers (part-time or full-time workers) corresponding employment protections outside of the period of the job order. If, for example, a U.S. worker works year-round and is in corresponding employment with the H-2B workers during the period of the job order, the employer must provide corresponding employment protections during the time period of the job order but may choose *not to do so* during the time period outside of the job order.

There were many comments related to the proposed protections for workers in corresponding employment. Employee advocates, unions, and a member of Congress strongly endorsed the proposed provision, stating that it was essential to ensuring that the employment of H-2B workers does not adversely affect the wages, benefits, and working conditions of similarly employed domestic workers. They emphasized that it is important for corresponding workers to receive not just the prevailing wage, but all the other assurances and benefits offered to H-2B workers, such as transportation, the three-fourths guarantee, and full-time employment, in order to place U.S. workers on at least the same footing as foreign workers. These commenters noted that the principle that there should be no preference for foreign workers is fundamental to the INA, and that a corresponding employment requirement prohibits employer practices that would hurt the employment prospects of U.S. workers. They also emphasized that the proposed rule's assurance of equal protection was a significant improvement for domestic workers who have, in the past, been bypassed in favor of foreign workers. Thus, they stated that this protection is necessary to provide a meaningful test of whether there are U.S. workers available for employment. The employee advocates also stated that the proposed definition's broadening of the requirement to protect incumbent employees, rather than just those newly hired in response to the H-2B recruitment, is important because many employers employ some U.S. workers on a year-round basis, and they should not be employed alongside H-2B workers who receive greater pay, benefits, and protections. Similarly, an employee advocate specifically commended the proposed rule's coverage of situations where employers place H-2B workers in occupations and/or job sites outside the scope of the labor certification, which the commenter stated happens regularly. Thus, it asserted that protecting U.S. workers (including incumbent workers)

⁴ TEGL 5-11—Designation of Areas of Substantial Unemployment (ASUs) under the Workforce Investment Act (WIA) for Program Year (PY) 2012 has been added to the ETA Advisory Web site and is available at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3069.

who are performing the same work as the H-2B workers is necessary to ensure that U.S. workers are not adversely affected by the presence of H-2B workers in the labor market. Finally, one union stated that this additional protection for U.S. workers would also protect H-2B workers, because U.S. workers would be empowered to assist in policing unscrupulous H-2B employers.

Employers, on the other hand, generally opposed the extension of protections to workers in corresponding employment. Some stated that they could not afford to provide the same terms and conditions of employment to corresponding workers, including paying the prevailing wage and guaranteeing three-fourths of the hours. For example, a golf course association stated that it would be financially impossible to provide the same wages and benefits to summer high school and college laborers as it provided to H-2B workers performing the same manual labor. Others stated that paying the prevailing wage to corresponding workers would not be problematic, but that they wanted to be able to continue to reward long-tenured employees (foreign or U.S.) or more skilled staff with higher pay than new workers, such as by providing a pay increase based upon years of service.

It appeared there was confusion about the impact of the corresponding employment requirement. Employers expressed concern because they have overlap in the job duties of various positions, with supervisors performing some of the same tasks as the workers they supervise. They believed that, if there is some slight nexus between what an H-2B workers does and what a higher-paid year-round worker does, the employer would have to pay all workers the higher wage. They stated that this requirement would compel changes to management techniques and eliminate or greatly reduce employers' flexibility to have employees perform whatever task is necessary to complete their work, thereby harming productivity. Employer representatives stated that the definition is so broadly worded ("any" work included in the job order or "any" work performed by the H-2B workers) that it would cover the entire workforce of many businesses. One firm gave the example of a large resort with roughly 2000 employees where senior management (including the resident manager, the director of food and beverage, and even the finance manager) clean rooms on a busy day; supervisors carry guests' luggage; managers in the restaurant clear tables; and managers on the golf course pick up trash or cut the

grass. The firm wondered what the H-2B workers should be paid in this case and whether every employee is a corresponding employee who would be entitled to the three-fourths guarantee. Other employers assumed that their laborers would have to be compensated at the same rate as a supervisor if the supervisor occasionally performed some of their same tasks, such as mowing, because of a weather event, large golf tournament, or shortage of staff due to illness. An employer association stated that employers, such as restaurants, needed the flexibility to have a waitress serve as a cashier or hostess, or to have a dishwasher assist with food preparation or cooking, in order to get the work done and keep employees working throughout the day.

Therefore, some employer representatives suggested that the rule should limit the definition to work in the occupation listed in the job order. They stated this would avoid a situation where all U.S. workers who dig holes and plant bushes would be viewed as corresponding employees if the H-2B job order was for a supervisory landscaper with knowledge of irrigation systems and plant species but the supervisor occasionally helped to dig or plant. These commenters also suggested that the Department limit the rule's scope to those U.S. workers who are newly hired by the employer on or after the beginning of the job order period, rather than extending it to workers employed prior to the employment of H-2B workers. Some employer commenters suggested that the Department delete the word "any" from before the word "work." Other commenters questioned whether the Department has the legal authority to impose the requirement.

After carefully considering all of these comments, the Department has decided to modify the definition of corresponding employment to delete the word "any" from before "work" in two places and insert the words "substantially the same," and to exclude two categories of incumbent employees: (1) Those who have worked in the relevant job continuously for the H-2B employer for at least the prior 52 weeks, have averaged at least 35 hours of work or pay over those 52 weeks and have received at least 35 hours of work or pay in at least 48 of the 52 weeks, as demonstrated by the employer's payroll records and whose terms and conditions of employment are not substantially reduced during the job order period (an employer may take credit for those hours that were reduced due to an employee's voluntary leave); and (2) those who are covered by a collective

bargaining agreement or individual employment contract that guarantees at least 35 hours of work each week and continued employment with the H-2B employer at least through the end of the job order period. Incumbent employees who fall within one of these categories may have valuable terms of employment, including job security and benefits, that neither H-2B workers nor other temporary workers have. This may account for wage differentials between these incumbents and those who are entitled to the H-2B prevailing wage, as well as other differences in terms and conditions of employment.

The Final Rule continues to include other workers within the definition of corresponding employment as proposed in order to fulfill the DHS regulatory requirement that an *H-2B Petition* will not be approved unless the Secretary certifies that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). As the NPRM explained, Congress has long intended that similarly employed U.S. workers should not be treated less favorably than temporary foreign workers. For example, a 1980 Senate Judiciary Report on Temporary Worker Programs stated that U.S. employers were required to offer domestic workers wages equal to foreign workers as a prerequisite for labor certification. See Congressional Research Service: "Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues, 53 (1980)"; see also H.R. Rep. No. 99-682, pt. 1 at 80 (1986) ("The essential feature of the H-2 program has been and would continue to be the requirement that efforts be made to find domestic workers before admitting workers from abroad. A corollary rule, again preserved in the bill, is that the importation of foreign workers will not be allowed if it would adversely affect the wages and working conditions of domestic workers similarly employed"). Current § 655.22(a) reflects this principle, in part, by requiring that the terms and conditions of offered employment cannot be less favorable than those offered to H-2B workers. Thus, the current regulation provides for equal treatment of workers newly hired during the current 10-day H-2B recruitment process.

The current regulation, however, does not protect U.S. workers who engage in similar work performed by H-2B workers during the validity period of the job order, because it does not protect any incumbent employees. Therefore, for example, a U.S. employee hired three months previously performing the

same work as the work requested in the job order, but earning less than the advertised wage, would be required to quit the current employment and re-apply for the same job with the same employer to obtain the higher wage rate offered to H-2B workers. This would be disruptive for the employer and could create an additional administrative burden for the SWAs with respect to any workers being referred through them. It also puts too high a premium on employees understanding their rights under the regulations, and feeling secure enough—rare in low-wage employment—to quit a job with the expectation of being immediately rehired. Therefore, the Final Rule does not require incumbent employees to jump through this unnecessary hoop; U.S. workers generally would be entitled to the wage rates paid to H-2B employees without having to quit their jobs and be rehired.

There are only two categories of incumbent U.S. employees who would be excluded from the definition of corresponding employment. The first category covers those incumbents who have been continuously employed by the H-2B employer for at least the 52 weeks prior to the date of need, who have averaged at least 35 hours of work or pay over those 52 weeks, and who have worked or been paid for at least 35 hours in at least 48 of the 52 weeks, and whose terms and conditions of employment are not substantially reduced during the period of the job order. The employer may take credit for any hours that were reduced because the employee voluntarily chose for personal reasons not to work hours that the employer offered, such as due to illness or vacation. Thus, for example, assume an employee took six weeks of unpaid leave due to illness, and the employer offered the employee 40 hours of work each of those weeks. In that situation, the employer could take credit for all those hours in determining the employee's average number of hours worked in the prior year and could take credit for each of those six weeks in determining whether it provided at least 35 hours of work or pay in 48 of the prior 52 weeks. Similarly, if the employer provided a paid day off for Thanksgiving and an employee worked the other 32 hours in that workweek, the employer would be able to take credit for all 40 hours when computing the average number of hours worked and count that week toward the required 48 weeks. In contrast, assume another situation where the employer offered the employee only 15 hours of work during each of three weeks, and the

employee did not work any of those hours. The employer could only take credit for the hours actually offered when computing the average number of hours worked or paid during the prior 52 weeks, and it would not be able to count those three weeks when determining whether it provided at least 35 hours of work or pay for the required 48 weeks.

The second category of incumbent workers excluded from the definition of corresponding employment includes those covered by a collective bargaining agreement or individual employment contract that guarantees both an offer of at least 35 hours of work each week and continued employment with the H-2B employer at least through the period of the job order (except that the employee may be dismissed for cause). As noted above, incumbent employees in the first category are year-round employees who began working for the employer before the employer took the first step in the H-2B process by filing an *Application for Temporary Employment Certification*. They work 35 hours per week for the employer, even during its slow season. The Department recognizes that there may be some weeks when, due to personal factors such as illness or vacation, the employee does not work 35 hours. The employer may still treat such a week as a week when the employee worked 35 hours for purposes of the corresponding employment definition, so long as the employer offered at least 35 hours of work and the employee voluntarily declined to work, as demonstrated by the employer's payroll records. Thus, these workers have valuable job security that H-2B workers and those hired during the recruitment period or the period of the job order lack. Such full-time, year-round employees may have other valuable benefits as well, such as health insurance or paid time off. Similarly, employees covered by a collective bargaining agreement or an individual employment contract with a guaranteed weekly number of hours and just cause provisions also have valuable job security; they may also have benefits beyond those guarantees provided by the H-2B program. These valuable terms and conditions of employment may account for any difference in wages between what they receive and what H-2B workers receive. Therefore, these U.S. workers are excluded from corresponding employment only if they continue to be employed full-time at substantially the same terms and conditions throughout the period covered by the job order, except that they may be dismissed for cause.

The Final Rule's inclusion of other workers within the definition of corresponding employment is important because the current regulation does not protect U.S. workers in the situation where an H-2B employer places H-2B workers in occupations and/or at job sites outside the scope of the labor certification, in violation of the regulations. For example, if an employer submits an application for workers to serve as landscape laborers, but then assigns the H-2B workers to serve as bricklayers constructing decorative landscaping walls, the employer has bypassed many of the H-2B program's protections for U.S. workers. The employer has deprived them of their right to protections such as domestic recruitment requirements, the right to be employed if available and qualified, and the prevailing wage requirement. The Final Rule guards against this abuse of the system and protects the integrity of the H-2B process by ensuring that the corresponding U.S. workers employed as bricklayers receive the prevailing wage for that work.

The current regulation also does not protect U.S. workers if the employer places H-2B workers at job sites outside the scope of the labor certification. For example, an employer may submit an application for workers to serve as landscape laborers in a rural county in southern Illinois, but instead assign its H-2B workers to work as landscape laborers in the Chicago area. Because the employer did not fulfill its recruitment obligations in Chicago, U.S. workers were not aware of the job opportunity, they could not apply and take advantage of their priority hiring right, and the prevailing wage assigned was not the correct rate for Chicago. Such a violation of the employer's attestations results both in the absence of a meaningful test of the labor market for available U.S. workers and U.S. workers being adversely affected by the presence of the underpaid H-2B workers. The Final Rule's definition of corresponding employment ensures that the employer's incumbent landscape laborers who work where the H-2B workers actually are assigned to work will receive the appropriate prevailing wage rate; paying the proper wage to such workers is necessary to protect against possible adverse effects on U.S. workers due to wage depression from the introduction of foreign workers. Therefore, adoption of the definition of corresponding employment in the Final Rule is necessary to allow the Department to fulfill its mandate from DHS to provide labor certifications only in appropriate circumstances.

On the other hand, it is important to clarify that the corresponding employment requirement does not apply in the way that a number of employer commenters feared it would apply. Employers expressed concern that, if a supervisor or manager picked up a piece of trash on a golf course, planted a tree, or cleared a dining room table (the duties of its H-2B workers), all its employees who performed such work would be entitled to the higher wage rate paid to the supervisor. This concern is misplaced because this is not what the definition of corresponding employment requires. Under the Final Rule, a U.S. employee who performs work that is either within the H-2B job order or work actually performed by H-2B workers is entitled to be paid at least the H-2B required wage for that work. However, as the employer commenters recognized, the supervisor already is earning more than the H-2B workers. The corresponding employment requirement does not impose obligations in the opposite direction. Thus it does not, for example, require an employer to bump up the wages it pays to its landscape laborers to the supervisor's wage rate simply because the supervisor performed some of their landscaping laborer duties. Of course, if the H-2B certification was for a landscaping supervisor, and one of its laborers actually worked as a supervisor (perhaps because the supervisor was away on vacation for a week or was out sick for a day or two), then that laborer would be entitled to the H-2B prevailing supervisory rate for those hours actually worked as a supervisor. The laborer would not be entitled to the supervisory wage rate on an ongoing basis after the worker has returned to performing laborer duties.

Employers also expressed concern about how the corresponding employment provision would affect their flexibility in assigning workers different tasks. It is the employer's obligation to state accurately on the *Application for Temporary Employment Certification* the job duties that their H-2B workers will perform and to comply with the terms of their labor certifications by limiting the H-2B workers to those duties. This will maximize the employers' flexibility with regard to their U.S. employees. For example, if a restaurant receives a labor certification based on its temporary need for dishwashers, and it limits its H-2B employees to such duties, the restaurant may freely assign any of its U.S. workers to other jobs as needed, such as cashiers, servers and cooks. If the restaurant had previously used both

its H-2B and U.S. workers interchangeably in various jobs, it must plan more carefully in the future in order to comply with the terms of its certification.

Nevertheless, in order to address employer concerns that the proposed definition of corresponding employment ("any work included in the job order" or "any work performed by the H-2B workers") was so broadly worded that it would encompass the entire workforce of a company, the Final Rule deletes the word "any" in both places and uses the term "substantially the same" instead. The Department did not intend for the word "any" to indicate that occasional or insignificant instances of overlapping job duties would transform a U.S. worker employed in one job into someone in corresponding employment with an H-2B worker employed in another job. The following explanation is intended to provide clarity regarding when work is substantially the same that it should be considered corresponding employment. We note that the Wage and Hour Division has considerable enforcement experience under a number of statutes in determining the extent to which employees who are assigned to one type of work actually perform other types of work and that employers are generally familiar with these analyses.

Where the U.S. worker is performing "either substantially the same work included in the job order or substantially the same work performed by the H-2B workers * * * during the period of the job order, including an approved extension thereof," the U.S. worker is in corresponding employment and entitled to the H-2B prevailing wage if it is higher than the worker currently receives. This includes situations where the U.S. worker performs the same job as the H-2B worker as well as those situations where the U.S. worker regularly performs a significant number of the duties of the H-2B worker for extended periods of time, because that worker's job is substantially the same as the H-2B worker's job. The U.S. worker in both situations is in corresponding employment and thus entitled to the higher H-2B prevailing wage.

Because the definition of corresponding employment also applies to "work performed by H-2B workers," it is important to note that corresponding employment can also arise where H-2B worker is assigned to perform a job that significantly deviates from the job order; effectively making the H-2B worker perform a different job than was stated in the labor certification. If this violation causes the

H-2B worker to regularly perform a job for extended periods of time that U.S. workers perform, then the U.S. workers performing the same job are in corresponding employment. If the prevailing wage for that job is higher than the wages the U.S. workers earn, then the U.S. workers are entitled to the higher wage.

An issue of corresponding employment will arise if the employer assigns the H-2B worker to work at a different worksite(s) or place(s) of employment than the worksite(s) or place(s) of employment listed in the certified application. U.S. workers at the new, non-certified location may be performing the same or substantially the same job as the H-2B worker. Deviating from the labor certification in this manner and moving an H-2B worker to the non-certified place of employment will cause the U.S. workers who perform the same work to be deemed to be in corresponding employment. They will be entitled to the H-2B prevailing wage if it is higher than what they currently earn.

Finally, employers expressed their interest in continuing to reward their experienced employees with higher wage rates than those paid to new workers. The H-2B program does not prohibit such higher wage rates for an employer's experienced employees. Of course, an employer must offer at least the same terms and conditions of employment to its U.S. workers in corresponding employment as it offers, plans to offer, or will provide to its H-2B workers. So if an employer rewards an H-2B worker with extra pay and/or benefits based on the H-2B employee's previous work experience, the employer must offer and provide at least the same extra pay and/or benefits to U.S. workers in corresponding employment with same or similar level of previous work experience. Employers can and should indicate the additional pay amounts based upon years of experience on any *Application for Temporary Employment Certification*, and properly advertise and recruit for those positions.

c. Full-time. The Department proposed to change the definition of full-time from 30 or more hours of work per workweek to 35 or more hours of work per week. This proposal was precipitated by the District Court's decision in *CATA v. Solis*, 2010 WL 3431761 (E.D. Pa. 2010), invalidating the 2008 Final Rule's 30-hour definition. The Department stated in its NPRM that a 35-hour workweek was more reflective of empirical data, was consistent with other temporary work programs, and would comport with H-2B employment relationships that the

Department has encountered during its limited enforcement experience. In addition, the Department solicited comment for an alternative definition of 40 hours, noting that the December 2010 Bureau of Labor Statistics (BLS) Current Population Survey (CPS) found that the average workweek for employees who consider themselves full-time was 42.4 hours per week.⁵

Several trade associations and private businesses supported retaining the 2008 Final Rule's standard of 30 hours per workweek, citing the difficulties of scheduling work around unpredictable and uncontrollable events, particularly the weather. A number of those commenters suggested that full-time employment should be determined not in each individual workweek, but by averaging workweeks over the length of the certified employment period. Two trade associations and a private business claimed that increasing full-time to 35 hours per workweek would decrease employer flexibility and/or increase costs. Comments from several trade associations and a professional association stated that a 35-hour workweek would be burdensome in combination with other aspects of the proposed rule, particularly the three-quarter guarantee. Finally, one private business commented that the definition of full-time should be determined by industry standards.

A private business, a private citizen, a research institute, two unions, and a number of worker advocacy groups commented that a definition of full-time as 40 hours per workweek is preferable to 35, arguing that the higher standard is more representative of typical full-time jobs. Several of these commenters referred to the CPS findings cited by the Department. Two H-2B worker advocacy groups asserted their experience indicated that long hours are standard in many industries employing H-2B workers and, therefore, a 40-hour definition would be more representative of H-2B job opportunities. Another union and a research institute, in their support of a 40-hour standard, noted that the H-1B visa program also defines full-time as 40 hours per workweek. Finally, a private business, a union, a research organization, and two advocacy organizations argued that establishing a 40-hour standard is more protective of U.S. workers than a 35-hour standard, as more U.S. workers are likely to consider jobs that offer 40 hours of work. One union suggested changing the definition

to 37.5 hours per workweek, arguing that this was a common measure.

In accord with the District Court's decision in *CATA v. Solis*, the Department has continued to carefully consider relevant factors in determining the hours threshold for full-time, including national labor market statistics, empirical evidence from a random sample of approved applications, and other employment laws. All available evidence suggests that the existing definition of 30 hours or more per workweek is not an accurate reflection of full-time employment. According to the May 2011 Employment Situation report published by BLS, the average number of hours worked per week for employees who consider themselves full-time was 42.7.⁶ Another BLS publication, the Current Population Survey, uses a 35-hour threshold to define full-time employment. Employer practices also strongly suggest that the existing definition of 30 hours is not reflective of actual employer practices: in a randomly selected sample of 200 Applications that the Department certified or partially certified in 2009 and 2010, more than 99 percent reflected workweeks of at least 35 hours. This finding is consistent with the Department's enforcement experience: the vast majority of Applications that are the subject of investigations are certified for 35 or more hours per week. Under another similar nonimmigrant visa program the Department regulates, H-2A program for agricultural workers, full-time is defined as 35-hours per week.

The Department recognizes that there is no universally-accepted definition of full-time employment and, without such a standard, must determine a reasonable floor of hours per week below which a job is not considered full-time and therefore ineligible for inclusion in the H-2B program. After careful consideration, the Department has decided to retain the proposed definition of at least 35 hours per week, which more accurately reflects full-time employment expectations than the current 30-hour definition, will not compromise worker protections, and is consistent with other existing Department standards and practices in the industries that currently use the H-2B program to obtain workers.

Though a 40-hour threshold, as some commenters pointed out, would be more consistent with the BLS-reported average of workweek of nearly 43 hours,

an average level, by definition, accounts for both higher and lower values. The average includes, for example, hours worked by exempt managerial and professional employees who are not entitled to overtime and who tend to work longer hours. The Department observes that it is entirely likely that the average calculation includes employment relationships in which both the employer and the workers consider full-time to be 35 hours of work per week. This assertion is borne out by some *Applications for Temporary Employment Certification* currently being filed with ETA that request such a weekly schedule.

The Department's decision to define full-time as 35 or more hours does not conflict with worker advocacy groups' claims that many H-2B jobs require 40 or more hours per week. The 35-hour floor simply allows employers access to the H-2B program for a relatively small number of full-time jobs that would not have been eligible under a 40-hour standard. H-2B employers are and will remain required to accurately represent the actual number of hours per week associated with the job, recruit U.S. workers on the basis of those hours, and pay for all hours of work. Therefore, the employer is obligated to disclose and offer those hours of employment—whether 35, 40 or 45, or more—that accurately reflect the job being certified. Failure to do so could result in a finding of violation of these regulations.

d. Job contractor. We proposed to amend the definition of job contractor to resolve concerns raised by the U.S. District Court for the Eastern District of Pennsylvania in *CATA v. Solis*, 2010 WL 3431761, about our adoption of language in the 2008 Final Rule that states a job contractor “will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.” The Court found that our explanation that we adopted this language to “make clear that the job contractor, rather than the contractor's client, must control the work of the individual employee,” 73 FR 78020, 78024, Dec. 19, 2008, “did precisely the opposite—it clarified that it is the contractor's client who ‘must control the work of the individual employee.’ The explanation is therefore not rationally connected to the change, which will accordingly be invalidated as arbitrary.” *CATA*, 2010 WL 3431761 at *16.

The proposed definition of job contractor included the phrase “will not exercise substantial, direct day-to-day supervision or control.” This addition further clarified that an entity exercising

⁵ Bureau of Labor Statistics, *Labor Force Statistics*, Table A-24: Persons at work in agriculture and related nonagricultural industries by hours of work, Dec. 2010. <http://www.bls.gov/web/empsit/cpseea24.htm>.

⁶ Bureau of Labor Statistics, *Employment Situation*, Table A-24: Persons at work in agriculture and related and in nonagricultural industries by hours of work, May 2011. <http://www.bls.gov/web/empsit/cpseea24.htm>.

some limited degree of supervision or control over the H-2B workers would still be considered a job contractor, while an entity exercising substantial, direct day-to-day supervision or control over the H-2B workers would not be considered a job contractor. For the reasons stated below, we have decided to amend the definition as proposed to include the phrase supervision and control rather than supervision or control.

While some commenters contended that the CATA decision was flawed and urged us to use existing enforcement mechanisms rather than change the definition, other commenters welcomed the additional language clarifying that an employer exercising substantial, daily supervision and control would not be considered a job contractor. A specialty bar association suggested that since an employer's status as a job contractor determines an employer's eligibility to use the H-2B program under the NPRM, we should provide more concrete examples of employers that we would or would not consider to be job contractors.

While we appreciate the bar association's suggestion, given the infinite variety of business arrangements employers can make with other employers for the provision of labor or services, it is impossible to provide a definitive list of types of employers that would or would not be deemed job contractors. However, the following examples may be instructive for illustrating the differences between an employer that is a job contractor and an employer that is not. Employer A is a temporary clerical staffing company. It sends several of its employees to Acme Corporation to answer phones and make copies for a week. While Employer A has hired these employees and will be issuing paychecks to these employees for the time worked at Acme Corporation, Employer A will not exercise substantial, direct day-to-day supervision and control over its employees during their performance of services at Acme Corporation. Rather, Acme Corporation will direct and supervise the Employer A's employees during that week. Under this particular set of facts, Employer A would be considered a job contractor. By contrast, Employer B is a landscaping company. It sends several of its employees to Acme Corporation once a week to do mowing, weeding, and trimming around the Acme campus. Among the employees that Employer B sends to Acme Corporation are several landscape laborers and one supervisor. The supervisor instructs and supervises the laborers as to the tasks to be performed

on the Acme campus. Under this particular set of facts, Employer B would not be considered a job contractor. Note that the provision of services under a contract alone does not render an employer a job contractor; rather, each employment situation must be evaluated individually to determine the nature of the employer-employee relationship and accordingly, whether the petitioning employer is in fact a job contractor.

We believe that our discussion of reforestation employers in the NPRM also may help to further clarify the definition of job contractor. As described in the NPRM, a typical reforestation employer, such as those who have historically used the H-2B program, performs contract work using crews of workers subject to the employer's on-site, day-to-day supervision and control. Such an employer, whose relationship with its employees involves substantial, direct, on-site, day-to-day supervision and control would not be considered a job contractor under this Final Rule. However, if a reforestation employer were to send its workers to another company to work on that company's crew and did not provide substantial, direct, on-site, day-to-day supervision and control of the workers, that employer would be considered a job contractor under this Final Rule.

Some commenters asserted that a job contractor's degree of supervision does not change the fact that its need for workers is permanent. These commenters appear to misunderstand our objective in proposing to prohibit job contractors from participating in the H-2B program. The NPRM created an irrebuttable presumption that a job contractor's need for workers is inherently permanent. The implementation of that determination necessitates that we create a definition of job contractor. Only after a job contractor is identified through the definition can we conclude that the entity's need is permanent.

One commenter asserted that the language "where the job contractor will not exercise substantial, direct day-to-day supervision or control in the performance of the services or labor to be performed other than hiring, paying and firing the workers" created a loophole for job contractors to artificially increase their level of supervision in order to avoid being labeled job contractors. Another commenter was concerned that an employer performing contracts on a year-round basis with on-site supervised crews would avoid being designated a job contractor based on its level of

supervision. Both suggested removing the supervision or control language from the definition. While we are concerned about job contractors artificially changing their business model to circumvent a job contractor designation, we believe that the permanency of such an employer's need will be evident and addressed during the registration and application processes. Moreover, we believe that retaining the supervision and control language in the definition is essential to continuing to provide access to employers with legitimate temporary needs who perform contracts for services (e.g. reforestation or landscaping). Therefore, we will not alter the definition of job contractor in such a way as to bar all employers that perform contracts for services.

A specialty bar association contended that the phrase "substantial, direct day-to-day supervision or control" is ambiguous and will lead to confusion and uncertainty. The commenter asserted that the word "or" could lead to proof of either supervision or control enabling an employer to avoid designation as a job contractor and suggested that the word substantial adds to interpretive difficulty. Contrary to the commenter's reading, we intended supervision or control to prevent an employer which did not exercise both supervision and control from avoiding designation as a job contractor. In order to resolve this ambiguity, we have changed "or" to "and" in the Final Rule. We believe the use of the word substantial is important because some job contractors do exercise minimal levels of supervision and control, for example, by sending a foreman to check that a crew is working. We have retained the rest of the definition without change because, as discussed above, we believe the language is essential to distinguishing between employers who perform contracts for services and employers who fill staffing contracts. The Final Rule now states that job contractors do not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

e. Other definitions. As discussed under § 655.6, we have decided to permit job contractors to participate in H-2B program where they can demonstrate their own temporary need, not that of their clients. The particular procedures and requirements that govern their participation are set forth in § 655.19 and provide in greater detail the responsibilities of the job contractors and their clients. Accordingly, we are adding a definition

of employer-client to this Final Rule to define the characteristics of the employer that is served by the job contractor and the nature of their relationship.

We also proposed to define several terms not previously defined in the 2008 Final Rule, including job offer and job order. We proposed definitions for job offer and job order to ensure that employers understand the difference between the offer that is made to workers, which must contain all the material terms and conditions of the job, and the order that is the published document used by SWAs in the dissemination of the job opportunity. In response to comments about the definitions of job offer and job order, we have retained the definition of job offer without change but have revised the definition of job order to indicate that it must include some, but not all, of the material terms and conditions of employment as reflected in modified § 655.18 which identifies the minimum content required for job orders.

Some commenters expressed concern that both the definition of job offer and the definition of job order require the employer to include all material terms and conditions for the job opportunity. The commenters contended that since employment contracts typically incorporate employee handbooks and other documents by reference, it would be difficult, if not impossible, to draft a document that contains all material terms and conditions. In addition, the commenters argued that including such extensive content would infringe on an employer's legitimate business interest in maintaining the confidentiality of employment terms and subject employers to exorbitant fees when the document was used in mandatory advertising. We agree that including all material terms and conditions for the job opportunity in the job order and advertising would be difficult, if not impossible, as well as a dramatic departure from how employers hire for these positions. Accordingly, we have amended the definition of job order so that it now reads "[t]he document containing the material terms and conditions of employment * * *" rather than "[t]he document containing all the material terms and conditions of employment * * *" and "including obligations and assurances under 29 CFR part 503 * * *" and we have amended § 655.18 to reflect the minimum content requirements for job orders. We also removed the phrase "on their inter- and intra-State job clearance systems" as unnecessary. The definition of job offer remains unchanged and requires an employer's job offer to

contain all material terms and conditions of employment.

We also proposed revising the definition of strike so that the term is defined more consistently with our 2010 H-2A regulations. We are retaining the proposed definition without change. Some worker advocacy organizations supported the revised definition, appreciating that the definition recognizes a broad range of protected concerted activity and clearly notifies employers and workers of their obligations when workers engage in these protected activities. Other commenters, representing employer concerns, opposed the revised definition, finding it too broad. These commenters contended that the proposed definition includes minor disagreements not rising to the level of what the commenters or prior regulatory language would consider a strike and that the definition covered an employer's local workforce, rather than just the H-2B position. Some commenters requested a return to the language of the 2008 Final Rule, arguing that the proposed definition rejects our longstanding position limiting the admission of H-2B workers where the specific job opportunity is vacant because the incumbent is on strike or being locked out in the course of a labor dispute. These commenters were concerned that two workers could claim to have a dispute and, thereby, prevent the employer from using the program.

Given our desire to align the definition of strike in this Final Rule with the definition in the 2010 H-2A regulations, we have decided to retain the definition as proposed. As we explained in the preamble to the 2010 H-2A Final Rule at 75 FR 6884, Feb. 12, 2010, we believe narrowing the provision as recommended by commenters would unjustifiably limit the freedom of workers to engage in concerted activity during a labor dispute.

6. § 655.6 Temporary Need

We proposed to interpret temporary need in accordance with the DHS definition of that term and of our experience in the H-2B program. The DHS regulations define temporary need as a need for a limited period of time, where the employer must "establish that the need for the employee will end in the near, definable future." 8 CFR. 214.2(h)(6)(ii)(B). The Final Rule, as discussed in further detail below, is consistent with this approach.

Also, consistent with the definition of temporary need, we proposed to exclude job contractors from participation in the H-2B program, in

that they have an ongoing business of supplying workers to other entities, even if the receiving entity's need for the services is temporary. The proposal was based on our view that a job contractor's ongoing need is by its very nature permanent rather than temporary and therefore the job contractor does not qualify to participate in the program. As discussed below, we have revised the proposed provisions in the Final Rule.

a. Job Contractors. We received a number of comments on our proposal to eliminate job contractors from the H-2B program. We received some comments related to the definition of job contractor and how we will identify a job contractor. Those comments related to the definition of job contractor rather than the nature of a job contractor's need. Specifically, commenters from the reforestation industry expressed concerns over being classified as job contractors. These comments are addressed in the discussion of § 655.5.

A number of commenters expressed support for the elimination of job contractors, agreeing that job contractors' need is permanent and that the job openings are actually with a job contractor's employer-client, rather than with the job contractor. A worker advocacy organization asserted that the proposed approach, ensuring that the program is reserved for temporary job openings and excluding job contractors whose need is inherently permanent, was consistent with Congressional intent with respect to the program. One commenter expressed support for the changes in the proposed rule which reflected the court's ruling in *CATA v. Solis* and which prohibited job contractors from filing in the program if their clients did not also submit an application to the Department.

Other commenters generally supported the elimination of job contractors from the program as a way of protecting workers from trafficking and forced labor. One commenter also asserted that the elimination of job contractors will prevent circumstances where the H-2B workers are left without sufficient work or pay while in the job contractor's employ and where H-2B workers, who may be willing to work for less pay or in worse conditions, compete with similarly situated U.S. workers.

Another commenter offered support for the prohibition on job contractors due to the difficulty in holding them accountable for program violations, either because they disappear at the threat of litigation or because they have so little money that they are judgment-proof when they violate employment and labor laws. This commenter

reasoned that the job contractors act as a shield for the employers who actually employ the workers and indicated that the proposed change to the regulations would stem violations of laws by both contractors and the employers who work in concert with them.

On the other hand, one commenter asserted that the bar on job contractors should not be complete because to the extent that any one job contractor does not have a year-round need and routinely does not employ workers in a particular occupation for a specific segment of the year, its needs are seasonal. This commenter argued that the standard for rejection from the H-2B program should be definitively permanent, not potentially permanent, with respect to whether or not a job contractor's need is permanent. Job contractors should be afforded the same opportunity as all other employers to prove they have a temporary need for services or labor. Relying on *Matter of Vito Volpe*, 91-INA-300 (BALCA 1994), this commenter indicated that any need that does not constitute "permanent full-time work, such as where the occupation is one where employers have seasonal layoffs each year, the position is temporary."

As discussed in the NPRM, a person or entity that is a job contractor, as defined under § 655.5, has no individual need for workers. Rather, its need is based on the underlying need of its employer-clients, some which may be concurrent and/or consecutive. However, we recognize the validity of the concern raised by the commenter that we should exclude from the program only those who have a definitively permanent need for workers, and that job contractors who only operate several months out of the year and thus have a genuine temporary need should not be excluded. Therefore, we are revising § 655.6 to permit only those contractors that demonstrate their own temporary need, not that of their employer-clients, to continue to participate in the H-2B program. Job contractors will only be permitted to file applications based on seasonal need or a one-time occurrence. In other words, in order to participate in the H-2B program, a job contractor would have to demonstrate, just as all employers seeking H-2B workers based on seasonal need have always been required: (1) If based on a seasonal need that the services or labor that it provides are traditionally tied to a season of the year, by an event or pattern and is of a recurring nature; or (2) if based on a one-time occurrence, that the employer has not employed workers to perform the services or labor in the past and will

not need workers to perform the services in the future or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

For a job contractor with a seasonal need, the job contractor must specify the period(s) or time during each year in which it does not provide any services or labor. The employment is not seasonal if the period during which the services or labor is not provided is unpredictable or subject to change or is considered a vacation period for the contractor's permanent employees. For instance, a job contractor that regularly supplies workers for ski resorts from October to March but does not supply any workers outside of those months would have its own temporary need that is seasonal.

Limiting job contractor applications to seasonal need and a one-time occurrence is appropriate, as it is extremely difficult, if not impossible, to identify appropriate peakload or intermittent needs for job contractors with inherently variable client bases. The seminal, precedent decision in *Matter of Artee*, 18 I. & N. Dec 366, Interim Decision 2934, 1982 WL 190706 (Comm'r 1982), established that a determination of temporary need rests on the nature of the underlying need for the duties of the position. To the extent that a job contractor is applying for a temporary labor certification, the job contractor whose need rests on that of its clients has itself no independent need for the services or labor to be performed. The Board of Alien Labor Certification Appeals (BALCA) has further clarified the definition of temporary need in *Matter of Caballero Contracting & Consulting LLC*, 2009-TLN-00015 (Apr. 9, 2009), finding that "the main point of *Artee* * * * is that a job contractor cannot use [solely] its client's needs to define the temporary nature of the job where focusing solely on the client's needs would misrepresent the reality of the application." The BALCA, in *Matter of Cajun Constructors, Inc.* 2009-TLN-00096 (Oct. 9, 2009), also decided that an employer that by the nature of its business works on a project until completion and then moves on to another has a permanent rather than a temporary need.

The limited circumstances under which job contractors may continue to participate in the H-2B program would still be subject to the limitations provided in the *CATA* decision, which resulted in the Department no longer being able to accept H-2B labor certification applications from job

contractors if the job contractor's employer-clients also did not submit labor certification applications. Section 655.19 sets forth the procedures and requirements governing the filing of applications by job contractors.

The Department understands that in some cases the use of a job contractor may be advantageous to employers. However, the advantages provided to employers by using job contractors do not overcome the fact that many job opportunities with job contractors are inherently permanent and therefore such job contractors are not permitted to participate in the program. We recognize that by taking this position the result may be that some employers who have been clients of such job contractors, and who have not previously participated in the program, may now seek to do so. In the proposed rule, the Department encouraged employers to submit information about their changed circumstances as a result of the proposal to bar job contractors from the program, including the potential costs and savings that may result. The Department did not receive any comments from employers describing or quantifying the cost of the elimination of job contractors from the program to aid in the Department's estimation of the economic impact of this proposal.

One commenter was concerned that job contractors would get around this prohibition by representing employers as agents. Agents, by their role in the program, have no temporary need apart from the underlying need of the employer on whose behalf they are filing the *Application for Temporary Employment Certification*. When considering any employer's H-2B Registration, the Department will require that employer to substantiate its temporary need by providing evidence required to support such a need. The Department does not anticipate an issue with this type of misclassification.

b. Change in the Duration of Temporary Need. In addition to proposing to bar job contractors from the H-2B program based on their underlying permanent need for the employees, we proposed to define temporary need, except in the event of a one-time occurrence, as 9 months in duration, a decrease from the 10-month limitation under the 2008 Final Rule. As also discussed in the NPRM, this definition is more restrictive than, yet still consistent with, the DHS definition of temporary need, in which the "period of time will be 1 year or less, but in the case of a one-time event could last up to 3 years." 8 CFR 214.2(h)(6)(ii)(B). We

are adopting this provision in the Final Rule as proposed.

We received a number of comments on this proposal. Most commenters supported the clarification of the temporary need standard. Two such commenters recommended a further reduction in the duration of temporary need to no more than 6 months. In support of their proposal, these commenters suggested that half a year is a reasonable amount of time for an employer to have an unskilled temporary foreign worker, because there are currently millions of unemployed unskilled U.S. workers seeking employment across the country. These commenters hoped that shortening the certification periods for H-2B workers will compel employers to increase recruitment of U.S. workers (because they will have to recruit more often), which better achieves the statutory mandate not to use H-2B labor unless “unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Other commenters opposed the proposal to change the maximum duration of temporary need from 10 months to 9 months. One commenter, who conducted a private survey of H-2B employers, indicated that 32 percent of its respondents indicated that curtailing the temporary work period to 9 from 10 months will have a severe effect on their bottom line. The remainder of respondents indicated moderate to no effect. This commenter indicated that some industries reported greater effects than others; those primarily concerned over the shorter season included: Landscaping, seafood processing, ski resorts, summer resorts, and forestry. As reported by this commenter, for some of these industries, a shorter season would mean less time for training and quality control, decreased revenues and loss of permanent full-time employees. Another commenter concurred that the adoption of a 9-month limit would have a devastating impact on many types of businesses, ranging from hospitality and food service to landscaping and numerous others. This commenter raised concerns about a significant drop in participation in the program by nearly a third of the businesses currently using the H-2B program and predicted substantial effects on the economy, including upstream ripple effects. In contrast to commenters who called for a yet shorter duration, most of these commenters agreed that they would not be able to use the H-2B program if we define a temporary need as less than 9 months.

Another commenter asserted that the standard for temporary need should be the employer's actual need (up to 1 year, or up to 3 years for one-time events) and not an arbitrary time period defined by the Department under the guise of ensuring the integrity of the program. Supporting the retention of a 10-month standard, this commenter challenged our reasoning for reducing the duration of seasonal, peakload, or intermittent need, including referring to the discussion under the 2008 Final Rule which indicated that a period of need in excess of 1 year may be justified in certain circumstances. Finally, an association of employers and temporary workers argued that temporary need should not be generally quantified because it is industry-specific and suggested that each employer should be able to argue that its need is temporary and consistent with the definition of seasonal or peakload.

DHS categorizes and defines temporary need into four classifications: seasonal need; peakload need; intermittent need; and one-time occurrence. A one-time occurrence may be for a period of up to 3 years. The other categories are limited to 1 year or less in duration. See, generally, 8 CFR 214.2(h)(6)(ii)(B).

We believe that the proposed time period is an appropriate interpretation of the one year *or less* limitation contained in the DHS regulations. Allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year (364 days is less than 1 year) would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. The closer the period of employment is to one year, the more the opportunity resembles a permanent position. For instance, it would be difficult, if not impossible, to distinguish between a permanent job opportunity and one in which the work begins on March 1st and ends on February 20th, only to begin again on March 1st. We believe that a maximum employment period of 9 months definitively establishes the temporariness of the position, as there is an entire season in which there is simply no need for the worker(s). Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from the permanent position, particularly one that offers time off due to a slow-down in work activity. Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate. The current approach that

permits temporary certifications for periods up to 10 months encompasses job opportunities that we believe are permanent in nature and not consistent with Congressional intent to limit H-2B visas to employers with temporary or seasonal needs. However, we recognize that some employers may have a legitimate temporary need that lasts up to 9 months, and for that reason, we decline to reduce the duration of temporary need to 6 months. A job opportunity that does not exist in the winter months would likely be considered seasonal. We believe that the 9-month limitation that fairly describes the maximum scope of a seasonal need should also be applied to peakload need since there is no compelling rationale for creating a different standard for peakload.

While we recognize the impact that a movement from 10 months, which had been previously acceptable, to 9 months will have an adverse impact on some employers, the impact is not relevant to our legal obligation to protect the wages and working conditions of U.S. workers. The Department previously relied on the standard articulated in *In the Matter of Vito Volpe Landscaping*, 91-INA-300, 91-INA-301, 92-INA-170, 91-INA-339, 91-INA-323, 92-INA-11 (Sept. 29, 1994), which stated that a period of 10 months was not permanent. The Department may adopt through notice and comment rulemaking a new standard that is within our obligation to administer the program. See *United States v. Storer Broadcasting*, 351 U.S. 192, 203 (1956); *Heckler v. Campbell*, 461 U.S. 458, 467 (1983). We have determined that 9 months better reflects a recurring seasonal or temporary need and have accordingly proposed a new standard which has been adopted in this Final Rule. Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certifications are not appropriate. The majority of H-2B employer applicants will not be affected by this change. According to H-2B program data for FY 2007–2009, 68.7 percent of certified and partially certified employer applicants had a duration of temporary need less than or equal to 9 months, while 31.3 percent of certified or partially certified applicants had a duration of temporary need greater than 9 months. Many seasonal businesses experience “shoulder seasons,” which are periods of time at the beginning and end of the season when fewer workers are needed. Therefore, we anticipate that employers will be able to meet their labor needs during the short additional period they

must cover of the shoulder seasons with U.S. workers and, therefore, will not be impacted by the change from the 10-month standard.

Similarly, we have determined that limiting the duration of temporary need on a peakload basis would ensure that the employer is not mischaracterizing a permanent need as one that is temporary. For example, since temporary need on a peakload basis is not tied to a season, under the current 10-month standard, an employer may be able to characterize a permanent need for the services or labor by filing consecutive applications for workers on a peakload basis. To the extent that each application does not exceed the 10 months, the 2-month inactive period may correspond to a temporary reduction in workforce due to annual vacations or administrative periods. Increasing the duration of time during which an employer must discontinue operations from 2 months to 3 will ensure that the use of the program is reserved for employers with a genuine temporary need. Similarly, a 9-month limitation is appropriate for ensuring that the employer's intermittent need is, in fact, temporary. In addition, under the Final Rule, each employer with an intermittent need will be required to file a separate *H-2B Registration and Application for Temporary Employment Certification* to ensure that any disconnected periods of need are accurately portrayed and comply with the 9-month limitation.

With respect to one commenter's assertion that we have acknowledged in the 2008 Final Rule that temporary need may last longer than 1 year in some circumstances, the definition of a one-time occurrence as lasting up to 3 years is consistent with DHS regulations and is intended to address those limited circumstances where the employer has a one-time need for workers that will exceed the 9-month limitation.

With respect to the commenter's concern regarding the potential economic impact of the shorter standard on the operations of businesses and the drop in program participation, the Department has accounted in both the NPRM and this Final Rule for the potential drop in program use. Employers participating in the H-2B program must demonstrate that they have a temporary need for the labor or services to be performed which they are unable to meet with U.S. workers. In interpreting the DHS standard for defining temporary need, the Department has struck a balance between ensuring that each position certified will comport with the regulatory requirements and

accommodating an employer's legitimate need to fill its job opportunities in cases where United States workers are not available.

c. Peakload need. In addition to re-defining the duration of temporary need, we expressed concern in the NPRM that certain employers who lack the ability to demonstrate temporary need on a seasonal basis may mischaracterize a permanent need as a short-term temporary need which would fit under the peakload need standard. We used as an example the landscaping industry in which the off season is primarily a product of the absence of H-2B workers rather than a reduction in the underlying need for the services or labor. In that context, we sought comments and ideas from the public on the factors or criteria that we should consider in determining whether the employer has a genuine peakload need based on short-term demand. In addition, we requested input on whether we should limit these occurrences to those resulting from climactic, environmental or other natural conditions, or on limiting short-term demand to 6 months.

We received several comments on this proposal. The majority of commenters opposed the restriction of the peakload need standard. One commenter indicated that approximately a quarter of all H-2B applications are filed for landscaping employment, and that the employer's underlying need may well depend on the location of the company and the climate in that location. This commenter suggested that these employers should not be precluded from program participation by virtue of where they are located, and requested that we retain our peakload need definition as proposed.

In response to commenters' suggestions, we have concluded that no commenters offered a practical rationale indicating that a 6 month limitation would be more effective at curbing the issue of misclassifying the nature of the employer's need, rather than a 9 month limitation but we received a large number of comments noting that such a change would have an unintended consequence of effectively barring at least one sustaining industry—landscaping—from the program. With respect to another commenter's suggestion that we estimate short-term demand in relation to the number of temporary workers on a peakload basis as a percentage of the employer's total workforce, we note that such a suggestion is not operationally feasible.

One commenter responded to the request for comments on establishing criteria for distinguishing genuine

peakload need from a permanent need. The commenter proposed the application of a specific criterion, namely: a limitation of peakload need to 6 months, defining short-term demand in relation to the percentage of temporary workers on a peakload basis as a percentage of the employer's total workforce. This commenter proposed concrete numbers of workers and percentages based on the numbers of workers employed by the employer, indicating that such an approach ought to preclude employers that conduct year-round activities constituting permanent need from using the H-2B program.

Having considered all comments on this proposal, we have determined to retain the provision as proposed. We thank the commenters for their valuable suggestions; however, we have determined that this regulation, as proposed, better meets our program mandate than any of the suggested alternatives. Therefore, we are retaining this provision as proposed.

d. One-Time Occurrence. In addition to barring job contractors, and reducing the duration of the seasonal/peakload need to 9 months, we proposed an interpretation of a one-time occurrence to be consistent with DHS regulations under which such an occurrence could last up to 3 years. We received a number of comments on this proposal.

The majority of commenters opposed the apparent expansion of this requirement. One commenter indicated that while the reduction in the duration of seasonal/peakload need to 9 months was a notable improvement, the 3-year one-time occurrence provided employers with a loophole. This commenter referred to the H-2B definition under section 101 of the INA to indicate an inconsistency. Other commenters suggested that we institute an across the board 9-month limitation to the duration of temporary need. Many of the commenters opposing this proposal referred to average durations U.S. workers stay in their jobs, noting that the duration was typically less than 3 years and thus that our proposal was inconsistent with labor market information.

Other commenters addressing the needs of the construction industry indicated that the standard for proving a temporary need based on a one-time occurrence would be difficult to meet under the definition, in that the employer must establish that [1] it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or [2] it has an employment situation that is

otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. These commenters expressed concern that construction contractors will not be able to pass the first test unless the project for which the H-2B worker is hired is the only project they ever work on, because they invariably use the same types of workers. As to the second alternative, they argued that the construction industry consists primarily of short-term and intermittent work and therefore does not qualify under this test. Another commenter opposing the change in the definition for consistency with DHS regulations indicated that in crafting its definition DHS relied on an example from the construction industry which was not an accurate portrayal of the way in which that industry operates. Another commenter opposing the 3-year standard for one-time occurrences indicated that circumstances where an employer will be able to comply with the requirements for meeting the standard may be rare.

We proposed to define temporary need consistent with DHS regulations, so that both agencies make consistent decisions on applications/petitions. The majority of commenters asserted that our reliance on DHS regulations, in this instance, is misplaced. These commenters focused on the examples relied upon by DHS in the preamble to its 2008 regulations at 73 FR 78104, Dec. 19, 2008 to explain the operation of the 3-year, one-time occurrence. Although we adopt the DHS regulatory standard, we acknowledge, as DHS did, that it did not intend for the 3-year accommodation of special projects to provide a specific exemption for the construction industry in which many of an employer's projects or contracts may prove a permanent rather than a temporary need. Therefore, we will closely scrutinize all assertions of temporary need on the basis of a one-time occurrence to ensure that the use of this category is limited to those special and rare circumstances where the employer has a non-recurring need which exceeds the 9 month limitation. For example, an employer who has a construction contract which exceeds 9 months may not use the program under a one-time occurrence if it has previously filed an *Application for Temporary Employment Certification* identifying a one-time occurrence and the prior *Application for Temporary Employment Certification* requested H-2B workers to perform the same services or labor in the same occupation.

For all of the reasons articulated above, we are retaining the standard for a one-time occurrence as proposed.

7. § 655.7 Persons and Entities Authorized To File

In the NPRM, we proposed to designate the persons authorized to file an *H-2B Registration* or an *Application for Temporary Employment Certification* as the employer, or its attorney or agent. The proposed provisions also stressed the requirement that the employer must sign the *H-2B Registration* or *Application for Temporary Employment Certification* and any other required documents, whether or not it is represented by an attorney or agent. We did not receive comments on this proposal. Therefore, the provision is retained as proposed.

8. § 655.8 Requirements for Agents

In the NPRM, we noted that we have long accepted applications from agents acting on behalf of employers in the H-2B program, but that in administering the H-2B program, we have become concerned about the role of agents in the program and whether their presence and participation have contributed to program compliance problems. We proposed that if we were to continue to accept applications from agents, that the agents be required, at a minimum, to provide copies of current agreements defining the scope of their relationships with employers and that where an agent is required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to have a Certificate of Registration, the agent must also provide a current copy of the certificate which identifies the specific farm labor contracting activities that the agent is authorized to perform. The Final Rule adopts this provision as proposed. We also invited the public to provide ideas and suggestions on the appropriate role of agents in the H-2B program. We specifically sought comments on whether we should continue to permit the representation of employers by agents in the H-2B program, and if so, whether any additional requirements should be applied to agents to strengthen program integrity.

Based on the comments we received, we have concluded that agents should be permitted to continue to represent employers in the H-2B process before the Department and file *Applications for Temporary Employment Certification* on their behalf. To assist in verifying the scope of the agent's relationship with the employer, we will also require agents to provide copies of their agreement with the employer as well as the MSPA Certificate of Registration, where applicable. We are collecting the agreements and will be reviewing them as evidence that a bona fide relationship

exists between the agent and the employer and, where the agent is also engaged in international recruitment, to ensure that the agreements include the language required at § 655.20(p) prohibiting the payment of fees by the worker. We do, however, also reserve the right to further review the agreements in the course of an investigation or other integrity measure. We therefore remind the public that a certification of an employer's application that includes such a submitted agreement in no way indicates a general approval of the agreement or the terms therein.

A few commenters suggested that agents be barred from filing applications on behalf of H-2B employers. At least two commenters, both trade organizations, suggested that agents create a problematic level of separation between employers and their obligations under the H-2B program.

An overwhelming number of commenters, however, stated that while disreputable agents may exist, bona fide agents are critical to the employers' ability to maneuver through the H-2B application process and requirements. Many of these commenters reiterated our own statistics for FY 2010, showing that only 14 percent of employers filed applications without an agent and that 38 percent of these cases were denied. These commenters argued that we should continue to allow agents to file applications on behalf of H-2B employers. These same commenters, however, expressed an interest in program integrity and therefore agreed with the proposal to require agents to provide copies of their agreements with employers, to verify the existence of a relationship. Some commenters suggested that the agent(s) should be permitted to redact confidential proprietary business information before providing such agreements. Again, we are requiring agents to supply copies of the agreements defining the scope of their relationship with employers to ensure that there is a bona fide agency relationship and maintain program integrity. The requirement, however, in no way obligates either the agent or the employer to disclose any trade secrets or other proprietary business information. The Final Rule only requires the agent to provide sufficient documentation to clearly demonstrate the scope of the agency relationship. In addition, under this Final Rule, we do not presently plan to post these agreements for public viewing. If, however, we do so in the future, we will continue to follow all applicable legal and internal procedures for complying with Freedom of Information Act (FOIA) requests to

ensure the protection of private data in such circumstances.

One commenter, a trade organization, suggested that the proposed requirement that agents provide a copy of their MSPA Certificate of Registration, if required under MSPA, may be confusing since H-2B is viewed as non-agricultural, in contrast with the H-2A program, which is for agricultural labor and services. This commenter recommended that we provide a list of those businesses to which this additional requirement applies.

Several commenters also suggested that, in addition to receiving agent-employer agreements we should: limit the tasks in which agents can engage to those not involving the unauthorized practice of law or for which no payment is received, in accordance with DHS' regulations; make such agreements publicly available; maintain a public list of the identity of agents who represent employers in the labor certification process; require mandatory registration for agents; hold employers strictly liable for the actions and representations of their agents; and lastly, enhance enforcement mechanisms to combat fraud.

After evaluating all the comments, we have decided to continue to permit agents to participate in the Department's H-2B labor certification program. Their importance to employers, as reflected in numerous comments, outweighs any value gained by their exclusion. We remain interested in furthering program integrity; while we are not prepared to accept any of the specific requirements on agents suggested by commenters at this time, we have clarified in § 655.73(b) that an agent signing ETA Form 9142 may be debarred for its own violation as well as for participating in a violation committed by the employer. Some of the commenters' ideas, such as requiring agents to be registered with the Department to participate in the program would require additional government resources which are currently limited, while other ideas are not deemed necessary at this time, such as making the agreements publicly available. We believe that the Department will be able to preserve program integrity by collecting such agreements to ascertain the validity of and scope of the agency relationship and, where the agent is also engaged in international recruitment, to ensure they include the contractual prohibition against charging fees language required at § 655.20(p) prohibiting the payment of fees by the worker. Such action, in combination with the enforcement mechanisms and compliance-based model adopted by this Final Rule, will

resolve many of the expressed concerns without requiring the expenditure of additional resources. However, as stated under § 655.63, we reserve the right to post any documents received in connection with the *Application For Temporary Employment Certification* and will redact information accordingly.

Lastly, in response to commenters that urged us to hold employers strictly liable for the actions of the agents, we remind both agents and employers that each is responsible for the accuracy and veracity of the information and documentation submitted, as indicated in the ETA Form 9142 and Appendix B.1, both of which must be signed by the employer and its agent. As discussed under § 655.73(b), agents who are signatories to ETA Form 9142 may now be held liable for their own independent violations of the H-2B program. As to the commenter's suggestion that we provide additional examples of H-2B occupations subject to MSPA guidelines, we believe that employers or individuals working in affected industries are already aware of their obligations under MSPA, including the requirement to register.

9. § 655.9 Disclosure of Foreign Worker Recruitment

We proposed to require an employer and its attorney and/or agent to provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers. We also proposed to disclose to the public the names of the agents and recruiters used by employers and their attorneys and/or agents participating in the H-2B program. We received several comments, all of which agreed with the proposal to provide information about the recruiter's identity. We have expanded this section in the Final Rule to better reflect the obligation therein. For example, we revised the Final Rule to specify that the requirement to provide a copy of the written contract applies to agreements between the employer or the employer's attorney or agent and that the written contract must contain the contractual prohibition on charging fees, as set forth in § 655.20(p). Where the contract is not in English and the required contractual prohibition is not readily discernible, we reserve the right to request further information to ensure that the contractual prohibition is included in the agreement.

Several commenters requested that we strengthen the section by requiring the employer to also provide the identity and location of the foreign labor recruiter's sub-recruiters or sub-agents and to expand the provision to include

verbal agreements, as such informal arrangements with foreign recruiters are not uncommon. We agree that in addition to bolstering program integrity by aiding in the enforcement of certain regulatory provisions, collecting the identity and location of persons hired by or working for the recruiter or its agent to recruit or solicit prospective H-2B workers—effectively acting as sub-recruiters, sub-agents, or sub-contractors—will bring a greater level of transparency to the foreign recruitment process that will assist the Department, other agencies, workers, and community and worker advocates in understanding the roles of each participant and the recruitment chain altogether. This requirement advances the Department's mission of ensuring that employers comply with overall H-2B program requirements, and do not engage in practices that adversely affect the wages and working conditions of U.S. workers. See 8 U.S.C. 1184(c)(14).

We have therefore added paragraph (b) of this section in the Final Rule, requiring that employers and their attorneys or agents provide the identity (name) of the persons and entities hired by or working for the recruiter or recruiting agent and any of the agents or employees of those persons and entities, as well as the geographic location in which they are operating. We interpret the term "working for" to encompass any persons or entities engaged in recruiting prospective foreign workers for the H-2B job opportunities offered by the employer, whether they are hired directly by the primary recruiter or are working indirectly for that recruiter as a downstream recruiter in the recruitment chain. We expect employers, and their attorneys or agents, as applicable, to provide these names and geographic locations to the best of their knowledge at the time the application is filed. We expect that, as a normal business practice, when completing the written agreement with the primary recruiting agent or recruiter, the employer/attorney/agent will ask who the recruiter plans to use to recruit workers in foreign countries, and whether those persons or entities plan to hire other persons or entities to conduct such recruitment, throughout the recruitment chain.

As mentioned above, the public disclosure of the names of the foreign labor recruiters used by employers, as well as the identities and locations of persons or entities hired by or working for the primary recruiter in the recruitment of H-2B workers, and the agents or employees of these entities, will provide greater transparency to the H-2B worker recruitment process. By

providing us with this list, which we will make public, the Department will be in a better position to enforce recruitment violations, and workers will be better protected against fraudulent recruiting schemes because they will be able to verify whether a recruiter is in fact recruiting for legitimate H-2B job opportunities in the U.S. We intend to use this list of foreign labor recruiters to facilitate information sharing between the Department and the public, so that where we believe it is appropriate, we can more closely examine applications or certifications involving a particular recruiter or its agent identified by members of the public as having engaged in improper behavior. Additionally, information about the identity of the international recruiters will assist us in more appropriately directing our audits and investigations.

To reiterate the overall requirements of § 655.9 in the Final Rule, § 655.9(a) requires employers or their agents or attorneys, as applicable, to provide us with a copy of all agreements with any foreign labor recruiter, and those written agreements must contain the required contractual prohibition on the collection of fees, as set forth in § 655.20(p). The requirement in § 655.9(b) to disclose to the Department the identities and locations of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit H-2B workers for the job opportunities offered by the employer encompasses all agreements, whether written or verbal, involving the whole recruitment chain that brings an H-2B worker to the employer's certified H-2B job opportunity in the U.S.

Several commenters erroneously assumed the agreements between the employer and the foreign recruiter would be made public. The NPRM provided for obtaining the agreements and sharing with the public the identity of the recruiters, not the full agreements.

As stated above, we intend to collect the submitted agreements for the purpose of maintaining a public list of recruiters involved with H-2B workers. At the time of collection, we will review the agreements to obtain the names of the foreign recruiters and to verify that these agreements include the contractual prohibition against charging fees language required at § 655.20(p) prohibiting the payment of fees by the worker. We may also further review the agreements in the course of an investigation or other integrity measure. We therefore remind the public that a certification of an employer's application that includes such a submitted agreement in no way

indicates a general approval of the agreement or the terms therein.

Several commenters agreed that the disclosure of the identity of the foreign recruiters is helpful and badly needed, but suggested that it is not enough. One commenter, an individual, suggested that if an employer is paying a recruiter to locate foreign workers, that employer should also pay for a U.S. recruiter to locate U.S. workers. We did not impose such a requirement. This Final Rule, as discussed below in further detail, contains several recruitment steps the employer must conduct, aimed at providing U.S. workers ample opportunity to learn about and apply for these jobs.

Other commenters suggested that we should institute a mandatory registration or licensing system, that we should require recruiters to make themselves subject to U.S. jurisdiction, or that employers should be held strictly liable for recruitment violations. While we appreciate these suggestions, we will not implement them because we neither have the resources nor the authority to do so. However, we will continue to implement enforcement and integrity measures to decrease potential fraud in the H-2B program.

B. Prefiling Procedures

1. § 655.10 Prevailing Wage

We proposed a modified process for obtaining a prevailing wage designed to simplify how an employer requests a PWD. The proposed rule required employers to request PWDs from the National Prevailing Wage Center (NPWC) before posting their job orders with the SWA and stated that the PWD must be valid on the day the job orders are posted. We encourage employers to continue to request a PWD in the H-2B program at least 60 days before the date the determination is needed. After reviewing comments on the proposed prevailing wage process, we are adopting the provisions as proposed, with one amendment.

Several labor and worker advocacy groups supported the proposed process for obtaining a PWD. One, while agreeing that we should require employers to test the U.S. labor market using a currently valid PWD, suggested that we should also require employers to pay any increased prevailing wage that is in effect for any time during the certified period of employment. The commenter cited the Court's ruling in *CATA* and the requirement in the H-2A program requirement that an employer pay a higher adverse effect wage rate (AEWR) when a new, higher AEWR becomes effective during the period of

employment as its basis for the suggestion.

Since this concept of paying any increased prevailing wage that is in effect for any time during the certified period of employment was not contained in the NPRM and the public did not have notice and an opportunity to comment, we cannot adopt the commenter's suggestion in this Final Rule.

Some labor and worker advocacy groups suggested that removing the last sentence of proposed paragraph (d), which exempts employers operating under special procedures, would clarify the proposed regulatory language on prevailing wages for multiple worksites. We agree and have removed the sentence in the Final Rule. We issue special procedures through TEGLs which detail the variances permitted for occupations covered by the special procedures.

Some commenters noted that existing special procedures will require updating, given this rule and the Prevailing Wage Final Rule. We agree that we will need to update existing special procedure guidance to reflect organizational and regulatory changes; however, those updates will be issued through new Training and Employment Guidance Letters (TEGLs) rather than within this rule, where appropriate. Until such time as new TEGLs are issued, we will continue to honor the special procedures that were in place before the effective date of the new regulations.

A number of commenters expressed concern about the application of the new prevailing wage methodology to workers in corresponding employment. We address these comments in the larger discussion of corresponding employment at § 655.5.

As discussed in the NPRM, this rulemaking does not address or seek to amend the prevailing wage methodology established under the H-2B Wage Final Rule. Comments related to the new prevailing wage methodology fall outside the scope of this rulemaking.

2. § 655.11 Registration of H-2B Employers

We proposed to bifurcate the current application process into a registration phase, which addresses the employer's temporary need, and an application phase, which addresses the labor market test. We proposed to require employers to submit an *H-2B Registration* and receive an approval before submitting an *Application for Temporary Employment Certification* and conducting the U.S. labor market test. The proposed registration required

employers to document the number of positions the employer desires to fill in the first year of registration; the period of time for which the employer needs the workers; and that the employer's need for the services or labor is non-agricultural, temporary and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by DHS in 8 CFR 214.2(h)(6)(ii)(B) and interpreted in § 655.6. If approved, we proposed that the registration would be valid for a period of up to 3 years, absent a significant change in conditions, enabling an employer to begin the application process at the second phase without having to re-establish temporary need for the second and third years of registration. We have retained the proposed registration process in the Final Rule, with one minor change related to Requests for Information (RFIs) and other clarifying language that if and when the *H-2B Registration* is permitted to be filed electronically, the employer must print and sign it to satisfy the original signature requirement.

a. Method of registration. Many commenters voiced support for the proposal to bifurcate the application process and shift the temporary need and bona fide job opportunity review to the registration process described in the NPRM. Some commenters supported bifurcation believing that the registration process will provide more time for OFLC to thoroughly review an employer's intended use of the program and temporary need. Others supported the registration process, asserting that the 3-year registration validity and removal of employers without legitimate temporary need will result in a more efficient process, better program oversight, better protection for workers, and greater visa availability for employers with legitimate temporary needs. Still other commenters believed that the registration would help prevent visa fraud. These comments were consistent with our reasoning, as articulated in the NPRM.

Other commenters opposed the registration process. Some industry organizations and employers feared that the addition of a registration step will make the application process more cumbersome and time-consuming and some urged us to use increased enforcement activities rather than program restructuring to accomplish our stated goals. We view the proposed separation of the temporary need evaluation process from the labor market test process as an opportunity to fully evaluate an employer's intended use of the H-2B program without

sacrificing overall program efficiency. We have found that evaluating temporary need is a fact-intensive process which, in many cases, can take a considerable amount of time to resolve. Separating the two processes will give OFLC the time to make a considered decision about temporary need without negatively impacting an employer's ability to have the workers it needs in place when needed. In addition, we anticipate that many employers, with 3 years of registration validity, will enjoy a one-step process involving only the labor market test in their second and third years after registration, which will allow the Department to process these applications more efficiently. We disagree that enforcement alone can ensure program integrity; we believe the move from an attestation-based model to a compliance-based model, the bifurcation of application processing into registration and labor market test phases, and enforcement activities all contribute to program integrity. We appreciate and understand stakeholder concerns about transition to a new registration process and will make every effort to ensure that the transition does not adversely impact processing by announcing the procedures by which we will implement the registration process. We have accordingly added a regulatory provision to allow for the transition of the registration process through a future announcement in the **Federal Register**, until which time the CO will adjudicate temporary need through the application process.

One commenter expressed concern that DHS and the Department of State (DOS) each also review temporary need and that the three agencies differ in approach, resulting in inconsistent findings related to temporary need. We understand that, throughout the H-2B process, an employer must interact with multiple government agencies, each with different responsibilities related to the H-2B program. However, while each may perform different functions, the definition of temporary need is consistent across all relevant agencies, and we seek to minimize differences by participating in inter-agency communication designed to align the agencies' H-2B processing efforts.

One specialty bar association asserted that the new registration process is a departure from previous practice and that we are exceeding our authority by adjudicating temporary need in the registration process, effectively removing USCIS from the process and assuming an adjudicatory role that Congress did not intend. We disagree. We have a longstanding practice of

evaluating temporary need as an integral part of the adjudication of the *Application for Temporary Labor Certification*; the bifurcation of the application process into a registration phase and a labor market test phase shifts the timing of, but does not change the nature of, our review. See Matter of Golden Dragon Chinese Restaurant, 19 I. & N. Dec. 238, 239 (Comm'r 1984). Moreover, following lengthy discussions, DHS and the Department both issued companion H-2B final rules in 2008. 73 FR 78020, Dec. 19, 2008; 73 FR 78104, Dec. 19, 2008. These final rules left our evaluation of temporary need in place and shifted administrative review of the *Application for Temporary Labor Certification* from DHS to the Department. The bifurcation of the application process simply represents a timing shift, not a change, in our longstanding review of temporary need and bona fide job opportunity issues.

b. Timing of registration. We proposed to require employers to file an *H-2B Registration* no fewer than 120 and no more than 150 calendar days before the date of initial need for H-2B workers. The Final Rule retains this provision with minor clarification.

Several commenters supported bifurcation of the application process as a means of enabling employers to conduct recruitment in the U.S. labor market closer to the date of need. We agree and anticipate, as these commenters do, that recruitment closer to the date of need should provide a more accurate reflection of actual labor market conditions.

Other commenters feared that the addition of a registration step will make the application process more time-consuming. Commenters expressed concern that, without timelines or deadlines on registration processing, an employer cannot be sure it will have time to complete Department, DHS, and DOS processing and receive the requested workers before its date of need. One commenter alleged that we sought to hide registration processing time outside the application processing time counted against our 60-day processing guideline.

Our timeline for processing applications in the new two-step process is sensitive to these concerns. The proposed registration window (*i.e.*, 120 to 150 days before the employer's anticipated date of need) provides enough time for processing the registration before an employer may submit an *Application for Temporary Employment Certification* (*i.e.*, 75 to 90 days before the employer's anticipated date of need) to assure that the adjudication of the *Application for*

Temporary Employment Certification will not be delayed. In addition, many employers will not have to repeat the registration process for the next 2 years. The registration timeframe also reflects our understanding that some employers may have difficulty accurately predicting their need more than 5 months in advance. The registration window seeks to balance both processing time and accuracy concerns. We anticipate an employer's overall processing time to decrease significantly when the bifurcated process goes into effect.

For consistency with other provisions under the Final Rule and clarification of the process therein, this provision has been slightly revised to add reference to the exception to the filing time requirement of the *H-2B Registration* where it is filed in support of an emergency filing under § 655.17.

c. Registration process. The proposed rule authorized the CO to issue one or more RFIs before issuing a Notice of Decision on the *H-2B Registration* if the CO determined that he or she could not approve the *H-2B Registration* for various reasons, including, but not limited to: An incomplete or inaccurate ETA Form 9155; a job classification and duties that do not qualify as non-agricultural; the failure to demonstrate temporary need; and/or positions that do not constitute bona fide job opportunities. We retained the proposed provisions in the Final Rule, with one amendment.

One employer suggested we remove the word "normally" from paragraph (g) of this section to establish a definitive timeframe for RFI issuance. We agree and have removed "normally" from paragraph (g) of this section in the Final Rule.

Another employer suggested that we should not permit the CO to issue an unlimited number of RFIs. In order to provide the CO with flexibility to work with employers seeking to resolve deficiencies and secure registration approval, we will retain the provision as proposed.

One commenter suggested limiting 3-year registration validity to employers with recurring predictable seasonal and peakload needs, while requiring one-time or intermittent need employers to re-register every year. We find that this concern is sufficiently accommodated in the regulation as written, which provides the CO with discretion over the validity period of registrations approved. The CO may approve a registration for a period up to 3 consecutive years, taking into consideration the standard of need and any other factors in the registration.

d. Registration content. Under the proposed rule, supporting documentation was to accompany the *H-2B Registration*, including documentation showing the number of positions the employer desires to fill in the first year of registration; the period of time for which the employer needs the workers; and that the employer's need for the services or labor is non-agricultural, temporary and justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by DHS in 8 CFR 214.2(h)(6)(ii)(B) and interpreted in § 655.6. We are adopting the proposed provision of the NPRM without change.

One commenter suggested that we include a basic recruitment effort requirement at the time of registration to show need for the program. We do not believe requiring recruitment prior to registration filing is consistent with our purpose in separating the application process into a registration step and a labor market test. Recruitment efforts close to an employer's period of need are most likely to result in an accurate labor market test, while recruitment far in advance of the employer's period of need is unlikely to yield valid recruitment results. The Final Rule retains recruitment requirements during the application process, which is closer to the employer's date of need.

One commenter encouraged us to include a bona fide employer check, in order to eliminate fraud by fictitious employers. The commenter suggested requiring Federal Employer Identification Number (FEIN) documentation and a certificate of good standing from the company's State of formation (in the case of a corporation or a limited liability company) or comparable document for a sole proprietorship (e.g., certified payrolls and confirmation of a bank account form a financial institution) as well as disclosure of beneficial owners. We agree with the importance of allowing only bona fide employers access to the *H-2B* program and will verify business existence at the time of registration to protect program integrity. We will perform the initial business existence verification and, if questions arise, will request additional documentation of bona fide existence through the RFI process already contained in the Final Rule.

Some labor and advocacy groups suggested making registration information available to the public, for both transparency and information purposes, as well as to permit public input on registrations before adjudication. Comments related to

transparency and community interest in publicly available information have been addressed in the larger discussion of public disclosure. While we anticipate continuing to receive information and concerns from the public informally, which OFLC takes under consideration during its review, we cannot permit the public to formally participate in the adjudication process. It would present serious operational burdens, and as a result it would become difficult to complete the registration process in a timely fashion. Finally, we anticipate that the various provisions of this Final Rule will result in improved employer compliance, resolving some of the underlying concerns.

e. Registration documentation retention. We proposed requiring all employers that file an *H-2B Registration* to retain any documents and records not otherwise submitted proving compliance with this subpart for a period of 3 years from the final date of applicability of the *H-2B Registration*, if approved, or the date of denial or withdrawal. We have retained this requirement in the Final Rule.

We received few comments on this provision. One worker advocacy organization expressed support for the registration documentation retention requirement, believing the requirement will improve protections for U.S. workers, while another commenter suggested that a 5-year retention requirement would be better than 3 years in preserving evidence for criminal prosecution. We believe the 3-year retention requirement is sufficient to address our interests in upholding program integrity and, as with any document retention requirement, if an employer is involved in a proceeding in which documents are relevant, the time for retaining the documents is tolled.

One State bar association expressed concern about our discussion in the NPRM about requiring retention of documentation related to an *H-2B Registration* so that we could, potentially, use a prior year's registration, even if withdrawn, as a factor in evaluating current temporary need. The commenter argued that there are many legitimate business reasons why an employer's situation could change following denial or withdrawal of a registration. We understand that, in some situations, circumstances may change and legitimately affect the nature of an employer's need for workers. We also expect that employers who accurately document their need when submitting a registration will be able to articulate the change, if requested. We will not deny an employer's *H-2B*

Registration where the employer documents a change in circumstances and the *H-2B Registration* otherwise complies with program requirements.

f. Registration of job contractors. As discussed in the preamble to § 655.6, we are continuing to permit job contractors to participate in the *H-2B* program where they can demonstrate their own temporary need and not that of their employer-clients, and that this temporary need is seasonal or a one-time occurrence. Accordingly, we have made several edits to reflect the requirement that job contractors provide documentation that establishes their temporary seasonal need or one-time occurrence during the registration process and to make this requirement a factor in the National Processing Center's (NPC's) review of the *H-2B Registration*. While a job contractor must file an *Application for Temporary Employment Certification* jointly with its employer-client, in accordance with § 655.19, a job contractor and its employer-client must each file a separate *H-2B Registration*.

g. Document retention. We proposed that the documents for registration would be retained for a period of 3 years from the date of applicability of the *H-2B Registration*. This meant that all documents retained in connection with an *H-2B Registration* would be retained for 3 years after the last date of validity—for up to 6 years. We have clarified in this Final Rule that the documents to be retained must be retained for 3 years from the date of certification of the last *Application for Temporary Employment Certification* supported by the *H-2B Registration*. We have also added clarifying language in the document retention provision at § 655.56 with respect to the document retention of an *H-2B Registration*.

3. § 655.12 Use of Registration by H-2B Employers

We proposed to permit an employer to file an *Application for Temporary Employment Certification* upon approval of its *H-2B Registration*, and for the duration of the registration's validity period, which may be up to 3 consecutive years from the date of issuance, provided that the employer's need for workers (*i.e.*, dates of need or number of workers) had not changed more than the specified levels. In the NPRM, we proposed that if the employer's need for workers increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers); if the beginning or ending date of need for the job opportunity changed by more than 14 calendar days; if the nature of the job classification and/or

duties materially changed; and/or if the temporary nature of the employer's need for services or labor materially changed, the employer would be required to file a new *H-2B Registration*. We also proposed that the *H-2B Registration* would be non-transferable. In the Final Rule, for the reasons stated below, we have retained this provision as proposed, except for a modification to the variance in the period of need permitted without an employer needing to re-register.

a. Limitation on variances in temporary need. Some commenters contend that, given that business is not static, the limitations on *H-2B Registration* validity make it likely that an employer will have to register each year or at least more than once every 3 years due to fluctuations in the number of workers needed, the dates of need, or the nature of the duties. We recognize that there may be fluctuations from year to year and accordingly have designed the *H-2B Registration* to accommodate minor variations. However, we also have an interest in preserving program integrity, and thus do not believe that it would be appropriate to allow for the same *H-2B Registration* to apply to a substantially different job opportunity.

Commenters suggested other thresholds for variances in the period of need or in the number of workers requested that could trigger re-registration requirements. One commenter supported the requirement that employers be required to re-register when there are significant variances in temporary need as an important fraud reduction mechanism, but suggested we alter the formula from a percentage system to a whole number ratio system (*e.g.*, employer can request an extra 2 workers for every 10 that were sought in the initial registration). As the basis for the suggestion, the commenter identified a scenario in which an employer that initially requested 9 workers could increase its request by 4 workers without having to re-register, while an employer that initially requested 16 could only request 3 workers without having to re-register.

We believe that material changes in the job classification or job duties, material changes in the nature of the employer's temporary need, or changes in the number of workers needed greater than the specified levels, from one year to the next, merit a fresh review through re-registration. We note that the tolerance level for the number of workers requested proposed for the registration process (*i.e.*, 20 percent (or 50 percent for employers requesting fewer than 10 workers)) is the same as the tolerance level in the 2008 *H-2B*

Final Rule, the current *H-2A* regulation, and § 655.35 of this Final Rule for amendments to an *Application for Temporary Employment Certification* before certification. We do not find the difference of one worker, in the scenario provided, sufficient to justify changing our method of calculating minor changes in the number of workers requested.

Another commenter suggested focusing the number of workers limitation on the number of *H-2B* workers actually employed rather than the number requested. We find this suggestion unworkable both for OFLC and employers. Our focus is on an employer's need for workers and openings to be filled during recruitment, not actual visa usage. While we plan to begin collecting data on the number of workers an employer ultimately employs under *H-2B* visas for other purposes, such as gaining a better understanding of program usage, we will base our evaluation of *H-2B Registration* use on the number of workers requested.

We agree, however, that a wider variation in the employer's stated period of need would accommodate reasonable fluctuations in temporary need, without sacrificing program integrity, and would better effectuate our goal of streamlining the process by enabling more employers to use an *H-2B Registration* for more than 1 year. Accordingly, we have changed the limitation on a valid *H-2B Registration* to permit an employer's beginning and/or ending date of need to change by no more than a total of 30 calendar days from the initial year without requiring re-registration.

b. Prohibition on transfer. We proposed to prohibit the transfer of an approved *H-2B Registration*. One commenter agreed with the proposal, finding the approach critical to preventing program abuse. Under the Final Rule, an *H-2B Registration* is non-transferable.

c. Validity of registration. We proposed to issue *H-2B Registration* approvals, valid for up to a period of 3 years. Apart from the concerns discussed earlier, such as business fluctuations requiring an employer to re-register more often than its registration validity required, commenters generally supported the 3-year validity of a registration as a mechanism for potentially streamlining the process for repeat users.

4. § 655.13 Review of Prevailing Wage Determinations

We proposed changing the process for the review of PWDs for purposes of clarity and consistency. Specifically, we

proposed reducing the number of days within which the employer must request review of a PWD by the NPWC Director from 10 calendar days to 7 business days from the date of the PWD. We also proposed revising the language of the 2008 Final Rule to reflect that the NPWC Director will review determinations, and specifying that the employer has 10 business days from the date of the NPWC Director's final determination within which to request review by the BALCA. We adopt this provision of the NPRM without change in the Final Rule.

A labor and worker advocacy organization suggested that U.S. and foreign workers should not be excluded from the PWD appeal process. We cannot permit public participation in the prevailing wage appeal process. The prevailing wage process is an employer-based application process, which often occurs before specific workers are identified. Operationally, doing so would present serious questions as to who could or could not become parties to the process and would make timely resolution of issues difficult. We will continue however, to accept information from the public regarding wage issues, including information concerning appeals.

C. *Application for Temporary Employment Certification Filing Procedures*

1. § 655.15 Application Filing Requirements

Under the proposed rule, we returned to a post-filing recruitment model in order to develop more robust recruitment and to ensure better and more complete compliance by H-2B employers with program requirements. As explained in the proposed rule, our experience in administering the H-2B program since the implementation of the 2008 Final Rule suggests that the lack of oversight by the Department and the SWAs during the pre-filing recruitment process has resulted in failures to comply with program requirements. We believe the recruitment model described in the proposed rule and now adopted in this Final Rule will enhance coordination between OFLC and the SWAs, better serve the public by providing U.S. workers more access to available job opportunities, and assist employers in obtaining the qualified personnel that they require in a timelier manner.

The proposed rule required the employer to file the *Application for Temporary Employment Certification*, with original signature(s), copies of all contracts and agreements with any agent

and/or recruiter executed in connection with the job opportunities, and a copy of the job order with the Chicago NPC at the same time it files the job order with the SWA. The employer must submit this filing no more than 90 days and no fewer than 75 days before its date of need. The proposed process continues to employ the SWAs' significant knowledge of the local labor market and job requirements. In the Final Rule, this provision is slightly revised to clarify that the employer is required to also submit to the NPC any information required under §§ 655.8 and 655.9 (including the identity and location of persons and entities hired by or working with the recruiter or agent or employee of the recruiter to recruit prospective foreign workers for the H-2B job opportunities). The signature portion of this section is also slightly revised to clarify that if and when the *Application for Temporary Employment Certification* is permitted to be filed electronically, the employer must print and sign it after receiving a determination to satisfy the original signature requirement.

For purposes of simultaneous filing, we use the term "job order" when in fact the job order has yet to be created and posted by the SWA. We recognize that this may be confusing to the employer, as what will actually be submitted simultaneously to both agencies is a document which outlines the details of the employer's job opportunity, not the official job order. We expect the employer to provide the Chicago NPC with an exact copy of the draft the employer provides to the SWA for the creation of the SWA job order.

We also proposed to continue to require employers to file separate applications when there are different dates of need for the same job opportunity within an area of intended employment. Lastly, we proposed to continue to require filing of an *Application for Temporary Employment Certification* in a paper format until such time as an electronic system can be fully implemented. We are retaining the provisions as proposed.

A few commenters disagreed with the proposal to allow for the simultaneous filing of the job order with the Department and the SWA, contending that the process would be unwieldy and result in duplicative efforts. In contrast, other commenters supported a return to a post-filing recruitment model. As discussed in the NPRM, by involving the SWA in the job order review, the proposed process directly employs the SWAs' significant knowledge of the local labor market and job requirements. We agree with the commenters who asserted that the resulting job order will

provide accurate, program compliant notification of the job opportunity to U.S. workers. In addition, requiring the employer to simultaneously file the job order with the Chicago NPC and the SWA will enhance coordination between the agencies, resulting in increased U.S. worker access to job opportunities as well as helping employers locate qualified and available U.S. workers.

Some commenters supported the proposed timeframe for submitting the *Application for Temporary Employment Certification*. These commenters thought the requirement that employers file an *Application for Temporary Employment Certification* no more than 90 days and no fewer than 75 days before their date of need, combined with the proposed post-filing recruitment, would allow employers to conduct a more accurate test of the U.S. labor market and the CO to make a more accurate determination about availability of U.S. workers. OIG, in its October 17, 2011 report, found that permitting employers to recruit for job openings up to 120 days prior to the job start makes the recruitment less likely to result in U.S. worker hires than recruitment closer to the start date. OIG identified our proposal to shorten the timeframe between recruitment and job start date as strengthening U.S. worker recruitment. We agree and have retained the proposed timeframe for filing the *Application for Temporary Employment Certification* in the Final Rule.

One worker advocacy group expressed support for requiring separate applications for work occurring at separate worksites, with separate employers, or for different positions that have different job duties or terms and conditions of employment. We also received comments opposing the proposal to continue to require employers to file separate applications when there are different dates of need for the same job opportunity within an area of intended employment. Commenters argued that their business ramps up during the period of need, resulting in a need for some, but not all, of the workers requested on the date of need provided in the *Application for Temporary Employment Certification*. These commenters asserted that they also need flexibility to respond to changes in the market. We acknowledge that business is not static and an employer's need for workers during its period of greatest and least need may not be consistent. However, employers should accurately identify their personnel needs and, for each period within its season, file a separate application containing a different date

of need. An application with an accurate date of need will be more likely to attract qualified U.S. workers to fill those open positions, especially when the employer conducts recruitment closer to the actual date of need. This prohibition against staggered entries based on a single date of need is intended to ensure that employers provide U.S. workers the maximum opportunity to consider the job opportunity and is consistent with USCIS policies. It ensures that U.S. workers are not treated less favorably than H-2B workers who, for example, may be permitted to report for duty 6 weeks after the stated date of need. We recognize that there may be industries whose participation in the H-2B program may be constrained as a result of this revised 90- to 75-day timeframe filing in years in which the statutory cap of for the six-month intervals beginning October 1 and April 1 is at issue. However, this is largely a function of the statutory cap on the available visas over which we have no control. We are, therefore, retaining the provision as proposed and only slightly revising the language to further clarify that an employer must file only one *Application for Temporary Employment Certification* for worksite(s) within one area of intended employment for each job opportunity for each date of need.

We received comments suggesting that we post the *Application for Temporary Employment Certification* to increase transparency. These comments have been addressed in the larger discussion of public disclosure at § 655.63.

We did not receive comments on our proposal to continue to use ETA Form 9142 to collect the necessary information, with slightly modified appendices reflecting changes from the 2008 Final Rule (such as a change of tense to note pre-recruitment filing). As discussed in the NPRM, while we have begun efforts to establish an online format for the submission of an *Application for Temporary Employment Certification*, deployment of the system depends upon the resolution of issues in this rulemaking; we cannot implement it until after this Final Rule is effective. After the rule is effective, there will have to be a period during which entities may only file applications by paper submissions. However, in anticipation of the deployment of an online filing system, we have added language in the regulatory text that clarifies that when an employer submits an *Application for Temporary Employment Certification* electronically, the CO will inform the employer how to fulfill the signature requirement.

2. § 655.16 Filing of the Job Order at the SWA

We proposed to require the employer to submit its job order directly to the SWA at the same time as it files the *Application for Temporary Employment Certification* and a copy of the job order with the Chicago NPC, no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need. As discussed above, we sought to continue to use the SWAs' experience with the local labor market, job requirements, and prevailing practices by requiring the SWA to review the contents of the job order for compliance with § 655.18 and to notify the CO of any deficiencies within 4 business days of its receipt of the job order. The proposed rule differed from the 2008 Final Rule in that it prohibited the SWA from posting the job order before receiving a Notice of Acceptance from the CO directing it to do so. We have retained the provision in the Final Rule as proposed except for a modification to the SWA's job order review timeframe and minor clarifications.

Many commenters supported the return to more direct SWA participation in the U.S. labor market test, including the SWA's simultaneous review of job order content with the Chicago NPC. These commenters agreed that the SWA's local knowledge would be helpful in ensuring that an accurate job order is posted presenting the job opportunity to available workers. In contrast, some commenters opposed the simultaneous job order review process as burdensome for SWAs at current funding levels and duplicative of the Chicago NPC's review. By requiring such concurrent filing and review, the CO can use the knowledge of the SWA, in addition to its own review, in a single Notice of Deficiency before the employer conducts its recruitment. While we are sensitive to SWA budget concerns, SWAs can continue to rely on foreign labor certification grant funding to support those functions. We believe that this continued cooperative relationship between the CO and the SWA will ensure greater program integrity and efficiency.

Despite supporting re-introduction of SWA job order review, some commenters contended that 4 calendar days was insufficient time for the SWA to conduct an adequate compliance review and notify the Chicago NPC of its findings. After reviewing these comments, we have decided to modify the SWA's timeframe for job order review in the Final Rule, from 4 calendar days to 6 business days.

One commenter suggested requiring the employer to submit the job order to all SWAs having jurisdiction over the anticipated worksite(s). We will not accept this suggestion, finding the result potentially burdensome and confusing to SWAs and employers, as well as the Chicago NPC. Limiting the job order submission and review to one SWA and the Chicago NPC and, after acceptance, circulating the job order to other appropriate SWAs, best accomplishes the cooperative relationship and thorough review we seek to implement without increasing confusion or sacrificing efficiency.

A labor organization suggested that we clarify the meaning of intrastate and interstate clearance to ensure that the SWA circulates the job order to all appropriate States. Intrastate clearance refers to placement of the job order within the SWA labor exchange services system of the State to which the employer submitted the job order and to which the NPC sent the Notice of Acceptance, while interstate clearance refers to circulation of the job order to SWAs in other States, including those with jurisdiction over listed worksites and those the CO designates, for placement in their labor exchange services systems. We note that, under § 655.33(b)(4), the CO directs the SWA in the Notice of Acceptance to the States to which the SWA must circulate the job order, ensuring that the employer is also aware of the job order's exposure in the SWAs' labor exchange services systems. However, to further this distinction in the Final Rule, this section has been slightly revised to clarify that the SWA must place the job order in intrastate clearance and must also provide it to other States as directed by the CO.

The same labor organization suggested we require the SWA to post the job at State motor vehicle offices and Web sites. Another commenter suggested we require the job order to be open until the end of the certification period, not only the recruitment period. Still another commenter suggested the SWA be required to keep the job order posted for 30 days. We note that job order posting in the SWA labor exchange system is but one of the SWA and employer recruitment activities contained in the Final Rule, which together are designed to ensure maximum job opportunity exposure for U.S. workers during the recruitment period. Also, in most cases, the job order will be posted for more than 30 days, since the Final Rule requires the employer to file its application no more than 90 calendar days and no less than 75 calendar days before its date of need and the SWA to post the job order upon

receipt of the Notice of Acceptance and to keep the job order posted until 21 days before the date of need, as discussed in the preamble to § 655.20(t). We do not consider it feasible to add further SWA requirements; as stated above, we have to be sensitive to SWA resource concerns. Additionally, the H-2B electronic job registry, for instance, already provides nationwide exposure of the job opportunities, which renders the additional postings suggested by the commenter unnecessary. We have decided to retain the requirement that SWAs post the job order for the duration of the recruitment period, which was revised as discussed in the preamble to § 655.40. This ensures the job order is afforded maximum visibility for the most relevant period of time—the time during which workers are most likely to apply for an imminent job opening, and when employers are most in need of workers.

One commenter suggested we require employers to simultaneously file the *Application for Temporary Employment Certification* rather than the job order with the SWA and Chicago NPC. In addition to citing the lack of a uniform job order form, the commenter contended that the *Application for Temporary Employment Certification* form contains the information necessary to place a job order and provides additional information, thereby enhancing the SWA's review ability. While we acknowledge that there is no uniform job order form available, we note that the SWA labor exchange system is a State, not Federal, system. The existing cooperative Federal-State model under the Wagner-Peyser system is much too decentralized to accommodate the requirement that SWAs use a specific form. Moreover, in deference to concerns about SWA administrative burden, we do not wish to add forms, such as the *Application for Temporary Employment Certification*, outside of a SWA's normal job order placement function. Additionally, the job order contains different reference points than the ETA Form 9141 and collects different information. Therefore, we will retain the provision without change. In an effort to acknowledge the fact that SWAs have different forms and emphasize the employer's need to comply with each State's form and requirements, we have revised this provision to provide that the employer's job order must conform to the State-specific requirements governing job orders as well as the requirements set forth in § 655.18.

3. § 655.17 Emergency Situations

We proposed to permit an employer to file an *H-2B Registration* fewer than 120 days before the date of need and/or an *Application for Temporary Employment Certification* along with the job order fewer than 75 days before the date of need where an employer has good and substantial cause and there is enough time for the employer to undertake an adequate test of the labor market. This was a change from the 2008 regulations, which do not allow for emergency filings, and sought to afford employers flexibility while maintaining the integrity of the application and recruitment processes. To meet the good and substantial cause test, we proposed that the employer must provide to the CO detailed information describing the reason(s) which led to the emergency request. Such cause may, in the Final Rule, include the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic event that is wholly outside the employer's control, unforeseen changes in market conditions, or pandemic health issues. These edits have been made for consistency and clarity so that employers will easily understand those areas in which emergency situations will be permitted. However, the CO's denial of an *H-2B Registration* in accordance with the procedures under § 655.11 does not constitute good and substantial cause for a waiver request.

In the NPRM, apart from permitting an employer to file fewer than 75 days before the start date of need and requiring the employer to show good and substantial cause, we proposed to process an *H-2B Registration* and/or an *Application for Temporary Employment Certification* and job orders in a manner consistent with non-emergency processing. In the Final Rule, we have adopted the proposed provision with a few clarifying edits.

For purposes of simultaneous filing we use the term job order in the NPRM, when in fact the job order has yet to be created and posted by the SWA. We recognize that this may be confusing to the employer, as what will actually be submitted simultaneously with the *Application for Temporary Employment Certification* in such instances is a draft document which outlines the details of the employer's job opportunity, not the official job order. Therefore, we have made such clarification in the Final Rule, indicating that the job order is proposed and not final.

We also received several comments from employers, employer advocacy groups, and trade organizations, requesting that we include man-made

disasters in this provision. While we indicated in the NPRM that the examples listed as good and substantial cause are not exclusive, suggesting that the expansion of the list is in line with the intent of the provision, for clarification we have revised this provision in the Final Rule to specifically include man-made disasters as being circumstances beyond the control of the employer that can result in the need to file an *H-2B Registration* and/or an *Application for Temporary Employment Certification* along with the job order fewer than 75 days before the date of need.

Several commenters expressed concern about the potential for employers to use natural disasters to abuse the program and workers. These commenters urged us to be vigilant when processing emergency applications. We are sensitive to these concerns. We intend to subject emergency applications to a higher level of scrutiny than non-emergency applications. As proposed and as adopted in the Final Rule, an *H-2B Registration* and/or *Application for Temporary Employment Certification* processed under the emergency situation provision is subject to the same recruitment activities, potential to be selected for audit, and enforcement mechanisms as a non-emergency *H-2B Registration* and/or *Application for Temporary Employment Certification*.

A labor organization asserted that in times of disaster, U.S. workers may be interested in assuming these temporary positions after an initial period of securing basic provisions and safety because they have been displaced from their normal jobs. This commenter suggested expanding the recruitment period for emergency situation filings to require the employer to replace H-2B workers with U.S. workers up to 50 percent of the period of need requested. We have decided not to incorporate this suggestion. We believe each emergency situation is unique and must be evaluated on its specific characteristics, both as to whether a qualifying situation exists and whether there is sufficient time to thoroughly test the U.S. labor market. The regulation gives the CO the discretion not to accept the emergency filing if the CO believes there is insufficient time to thoroughly test the U.S. labor market and make a final determination. Moreover, under § 655.46, the CO has the discretion to instruct an employer to conduct additional recruitment. We believe the Final Rule accommodates both the urgency of these situations and the importance of conducting an appropriate test of the U.S. labor market.

A worker advocacy group supported the inclusion of an emergency situation provision, but urged us to permit only late applications, not early applications. As discussed above, it is our intention that the emergency situation provision permit an employer to file fewer than 75 days before the start date of need. This provision in no way expands the earliest date an employer is eligible to submit an *H-2B Registration or Application for Temporary Employment Certification*.

A private citizen suggested limiting an employer to one emergency application per year. We have decided not to accept this suggestion. Given that some employers file multiple applications, each for a different occupation and/or area of intended employment, we believe such an approach is too strict and contrary to the purpose of the provision.

Two labor organizations suggested limiting the subjectivity of the provision. One specifically recommended adding the word reasonably to unforeseen changes in market conditions, while the other recommended limiting emergencies to objectively verifiable events such as those confirmed in Federal, State or local government statements formally certifying a natural or manmade disaster, necessitating extraordinary measures by Federal, State or local government. The CO will adjudicate foreseeability based on the precise circumstances of each situation presented. The burden of proof is on the employer to demonstrate the unforeseeability leading to a request for a filing on an emergency basis. Therefore, we believe the language as proposed strikes an appropriate balance between providing flexibility to employers experiencing emergencies that create a need to submit applications closer to their need than normal processing permits, and limiting the scope of such emergencies so that emergency processing is truly an exception rather than the norm.

4. § 655.18 Job Order Requirements and Contents

The job order is essential for U.S. workers to make informed employment decisions. The Department proposed to require employers to inform applicants in the job order not only of the standard information provided in advertisements, but also several key assurances and obligations to which the employer is committing by filing an *Application for Temporary Employment Certification* for H-2B workers and to which U.S. workers are also entitled. The job order must also be provided to H-2B workers

with its pertinent terms in a language the worker understands.

Several commenters found the organization of this section to be confusing when read in concert with the advertising requirements at § 655.41. The proposed rule at § 655.18 reads: “An employer must ensure that the job order contains the information about the job opportunity as required for the advertisements required in § 655.41 and the following assurances * * *” many of which overlapped with those requirements found in § 655.41. 76 FR 15182, Mar. 18, 2011. In order to dispel confusion and reconcile the sections, the Department has reorganized § 655.18 and imported some requirements from § 655.41 that were implied, but not explicitly required, in the NPRM. Those specific changes are discussed below and in the preamble to § 655.41, and as a result of those changes, this section no longer cross-references § 655.41.

In addition, the Department has reorganized this section in order to ensure that employers include all pertinent information in each job order, regardless of the State in which the job order is being placed. As there is not a single H-2B job order form that is applicable to all States and job opportunities, this change is necessary for the uniform administration of the program requirements. This approach will ensure that workers have a full understanding of the terms and conditions of employment, improve employer compliance, and support program enforcement.

Furthermore, the Department clarifies that the assurances pertaining to the prohibition against preferential treatment and bona fide job requirements in paragraph (a) of this section need not be included in the job order verbatim; rather they are applicable to each job order insofar as they apply to each listed term and condition of employment.

One commenter suggested that the lengthy job orders have the effect of discouraging U.S. workers from pursuing a job opportunity and suggested that the Department adopt an abbreviated form which might be provided to each job applicant by the SWA which summarizes the job order. The Department is not able to accept this suggestion as it is our primary concern in this context that U.S. applicants be provided with all of the terms and conditions of employment and fully apprised of the job opportunity.

a. Prohibition against preferential treatment (proposed rule § 655.18(a); Final Rule § 655.18(a)(1)). The proposed rule required the employer to provide to

U.S. workers at least the same level of benefits, wages, and working conditions that are being or will be offered or paid to H-2B workers, similar to the requirements under § 655.22(a) of the 2008 Final Rule, with the additional requirement that this guarantee must be set forth in the job order to ensure that all workers are aware of their rights to similar benefits, wages, and working conditions. These protections were also reflected in the proposed rule as an employer assurance and obligation under § 655.20(q).

Some commenters may have misunderstood the protections guaranteed to U.S. workers under the proposed section because the last sentence of the proposed section stated that an employer is not relieved from providing H-2B workers the minimum benefits, wages, and working conditions that must be offered to U.S. workers under this section. One commenter expressed support for the proposed changes and elaborated on the importance of preventing disparate treatment of H-2B and U.S. workers that could lead to the creation of substandard jobs and lead to the abuse of vulnerable H-2B workers. To clarify, the purpose of § 655.18(a)(1) is to protect U.S. workers by ensuring that the employers do not understate wages and/or benefits in an attempt to discourage U.S. applicants or to provide preferential treatment to temporary foreign workers. Employers are required to offer and provide H-2B workers at least the minimum wages and benefits outlined in these regulations. So long as the employer offers U.S. workers at least the same level of benefits as will be provided to the H-2B workers, the employer will be in compliance with this provision. Section 655.18(a)(1) does not preclude an employer from offering a higher wage rate or more generous benefits or working conditions to U.S. workers, as long as the employer offers to U.S. workers all the wages, benefits, and working conditions offered to and required for H-2B workers pursuant to the certified *Application for Temporary Employment Certification*.

In addition to commenters who generally supported the expanded protections of H-2B workers, several commenters—a legal network a human rights organization, a labor organization and an alliance of human rights organizations—specifically requested that the Department add an additional provision into the job order which would require the employer to offer to H-2B workers the same fringe benefits as those the employer is offering to U.S. workers in corresponding employment. As discussed above, the Department’s

mandate requires that an employer be permitted to hire H-2B workers only in circumstances where there are no qualified and available U.S. workers, and where the employment of H-2B workers will not have an adverse effect on the wages and working conditions of U.S. workers. To that end, the regulation under § 655.18(a)(1) requires that the job order “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-2B workers.” Any fringe benefits offered or provided by an employer would fall under the category of benefits, and the employer would therefore be required to list them on the job order. However, nothing in this regulation precludes an employer from offering more generous benefits than those required by the regulations to either U.S. workers or H-2B workers, as long as the employer offers to U.S. workers at least the same wages, benefits, and working conditions offered to and required for H-2B workers pursuant to the approved *Application for Temporary Employment Certification*. However, for further clarification, the Department has amended § 655.18(b)(9) to require that the job order specifically list any fringe benefits that will be offered.

The Department received no more comments on this section; the Department is therefore adopting the proposed language in the Final Rule without change.

b. Bona fide job requirements (proposed rule § 655.18(b); Final Rule § 655.18(a)(2)). The Department proposed to require that the job qualifications and requirements listed in the job order be bona fide and consistent with the normal and accepted job qualifications and requirements of employers that do not use H-2B workers for the same or comparable occupations in the same area of intended employment. Several commenters expressed concern about how the Department and the SWAs will determine what qualifications and requirements are bona fide and normal to the job opportunity. The determination of whether job requirements and qualifications are consistent with the normal and accepted job requirements and qualifications of non-H-2B employers is fact-specific. The SWAs have decades of experience reviewing job orders according to these standards. However, the Department recognizes that some confusion exists concerning the distinction between job requirements and qualifications and the application of each. Therefore, this provision of the Final Rule includes a

definition of job requirements and qualifications. As stated in § 655.18(b), a qualification means a characteristic that is necessary for the individual to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. Additionally, the Department added language requiring that any on-the-job training that will be provided to the worker must be disclosed in the job order. This change was made to align with the advertising requirements in § 655.41.

c. Benefits, wages, and working conditions (proposed rule § 655.18(c)–(g); Final Rule § 655.18(b)(1)–(8), (11)). The Department proposed to require that the employer list the following benefits, wages, and working conditions in the job order: The rate of pay, frequency of pay, deductions that will be made, and that the job opportunity is full-time. These requirements are generally consistent with those required in § 655.17 and § 655.22 of the 2008 Final Rule. These disclosures are critical to any applicant’s decision to accept the job opportunity.

Many advocacy groups commented on the importance of including information related to benefits, wages, and working conditions in the job order. These commenters noted that when this information is specifically listed on the job order, workers are better able to make an informed decision regarding the job opportunity prior to accepting a position. As no specific comments were received on proposed §§ 655.18(d), (e), or (g), the Department is adopting those provisions without change in the Final Rule. A full discussion of comments received on § 655.18(f) is below.

In response to the aforementioned confusion caused by discrepancies between proposed § 655.18 (Contents of the job order) and § 655.41 (Advertising requirements), the following sections were reorganized: Proposed § 655.18(d) (Rate of pay) is § 655.18(b)(5) in the Final Rule, proposed § 655.18(e) (Frequency of pay) is § 655.18(b)(9) in the Final Rule, proposed § 655.18(f) (Deductions that will be made) is § 655.18(b)(11) in the Final Rule, proposed § 655.18(g) (Statement that the job opportunity is full-time) is § 655.18(b)(2) in the Final Rule, proposed § 655.18(h) (Three-fourths guarantee) is § 655.18(b)(17) in the Final Rule, proposed § 655.18(i) (Transportation and visa fees) is § 655.18(b)(12) through (15) in the Final Rule, proposed § 655.18(j) (Employer-provided items) is § 655.18(b)(16) in the Final Rule, and proposed § 655.18(k)

(Board, lodging, or facilities) is § 655.18(b)(10) and (11).

d. Deductions (proposed rule § 655.18(f); Final Rule § 655.18(b)(10)). In § 655.18(f), the Department proposed to require that the job order specify that the employer will make all deductions from the worker’s paycheck required by law and specifically list all deductions not required by law that the employer will make from the worker’s paycheck. Numerous commenters—including advocacy organizations, legal networks, and labor organizations—offered unqualified support for this provision. One foreign worker advocacy group noted that workers have expressed concern that the various deductions are unlawful and affect their ability to support family members in their countries of origin.

In addition, a coalition representing agents and employers requested that the Department amend this section in three ways. First, the commenter suggested that the Department define deductions for the purpose of this section as an actual subtraction from earned wages. This commenter contended that such an amendment would prevent an employer from finding itself in violation of this obligation because an employee expended sums without its knowledge, which some treat as deductions. Second, the commenter requested that the Department amend this section to deal with the circumstance where deductions may, but not necessarily will, be made. The commenter asserted that an employer should be able to avoid discouraging a potential applicant by suggesting that a deduction will be made when it might never be, for example, a deduction for damages to employer-owned items, where State law permits such a deduction. Finally, this commenter requested that the Department clarify that required by law includes judicial process, such as child support orders.

The Department reminds the commenter that under the Fair Labor Standards Act (FLSA) there is no legal difference between deducting a cost from a worker’s wages and shifting a cost to an employee to bear directly. As the court stated in *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002):

An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deduction drive wages below the minimum wage. See 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during employment. See *id.* § 531.35; *Ayres v. 127*

Rest. Corp., 12 F.Supp.2d 305, 310 (S.D.N.Y.1998).

Consistent with the FLSA and the Department's obligation to prevent adverse effects on U.S. workers by protecting the integrity of the H-2B offered wage, the Department views the offered wage as the effective minimum wage for H-2B and corresponding U.S. workers.

In response to the second instance mentioned by the commenter, the Department reminds the commenter that deductions for damage to employer-provided items are prohibited under the Final Rule, regardless of State laws permitting such deductions. This prohibition is explained in detail in the preamble to § 655.20(k). However, as a general rule, if an employer reserves the right to make a deduction, the potential that such a deduction could be made must be disclosed in the job order to ensure that employees are fully informed of the terms and conditions of employment. Finally, the Department includes garnishments in deductions required by law; this is made explicit in the Final Rule at § 655.20(c).

No other comments were received on this provision. However, for clarification, the Department has moved this section to § 655.18(b)(10) in the Final Rule and added language, previously contained in proposed § 655.18(k), specifying that the job order must include, "if applicable, any deduction for the reasonable cost of board, lodging, or other facilities." The Department has made another clarifying edit, modifying the provision to require the disclosure of any deductions the employer intends to make rather than those an employer will make. This change is consistent with the intent of the proposed rule. No other changes were made to this provision.

e. Three-fourths guarantee (proposed rule § 655.18(h); Final Rule § 655.18(b)(17)). The NPRM proposed to require that H-2B employers list in the job order the new obligation that the employer would guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period and, if the guarantee was not met, to pay the worker what the worker would have earned if the employer had offered the guaranteed number of days, as required by proposed § 655.20(f). For the reasons discussed in the preamble under § 655.20(f), the Final Rule modifies this provision to lengthen the increment to a 12-week period instead of a 4-week period if the period of employment covered by the job order is 120 days or more, and lengthens the increment to a

6-week period if the employment covered by the job order is less than 120 days. As there were no comments specific to inclusion of this requirement in the job order, the Department adopts this provision without further change in the Final Rule.

f. Transportation and visa fees (proposed rule § 655.18(i); Final Rule § 655.18(b)(12)–(15)). The NPRM proposed to require the job order to disclose that the employer will provide, pay for, or fully reimburse the worker for inbound and outbound transportation and daily subsistence costs for U.S. workers who are not reasonably able to return to their residence within the same workday and H-2B workers when traveling to and from the employer's place of employment. Additionally, the NPRM proposed to require employers to disclose if they will provide daily transportation to the worksite and that the employer will reimburse H-2B workers for visa and related fees. For the reasons discussed in the preamble under § 655.20(j), the Final Rule adopts these obligations with the modification that employers must arrange and pay for the inbound transportation and subsistence directly, advance the reasonable cost, or reimburse the worker's reasonable costs if the worker completes 50 percent of the period of employment covered by the job order, and must provide, pay for, or reimburse outbound transportation and subsistence if the worker completes the job order period or is dismissed early. However, under § 655.18(y), if separation is due to the voluntary abandonment of employment by the H-2B worker or the worker in corresponding employment and the employer provides proper notice to DHS and DOL, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker and that worker is not entitled to the three-fourths guarantee described in § 655.20(f). As there were no comments specific to the disclosure requirements under this section, the Department adopts this provision without further change in the Final Rule.

g. Employer-provided items (proposed § 655.18(j); Final Rule § 655.18 (b)(16)). The proposed rule required the job order to disclose that the employer will provide workers with all tools, supplies, and equipment needed to perform the job at no cost to the employee. This provision, which is consistent with the FLSA regulations at 29 CFR part 531 and current § 655.22(g) requiring all deductions to be reasonable, gives the workers additional protection against

improper deductions from wages for items that primarily benefit the employer, and assures workers that they will not be required to pay for items necessary to perform the job.

Several commenters expressed unqualified support for this provision. However, some commenters noted that this provision could be impractical in industries in which employees customarily prefer to use specialized, custom-made equipment, such as the skis used by some ski instructors. One commenter, a ski industry representative, suggested that the Department amend § 655.18(j) to require that employers offer standard equipment instead of provide * * * all tools, supplies, and equipment required to perform the duties assigned to clarify that employers are not responsible for providing employees with custom-fitted equipment. The Department wishes to clarify that this provision is intended to protect workers against improper deductions by ensuring that they are fully capable of performing their jobs without any personal investment in tools or equipment. Thus, employers must provide standard equipment that allows employees to perform their job fully, but they are not required to provide, for example, equipment such as custom-made skis that may be preferred, but not needed by, ski instructors. It does not prohibit employees from electing to use their own equipment, nor does it penalize employers whose employees voluntarily do so, so long as a bona fide offer of adequate, appropriate equipment has been made.

Another commenter, a worker advocate, suggested further protections, requesting that the provision be revised to include language explicitly prohibiting employers from charging workers for broken, stolen, or lost equipment. Section 3(m) of the FLSA prohibits deductions that are primarily for the benefit of the employer that bring a worker's wage below the applicable minimum wage, including deductions for tools, supplies, or equipment that are incidental to carrying out the employer's business. Consistent with the FLSA, current § 655.22(g) (which requires all deductions to be reasonable), and the Department's obligation to prevent adverse effects on U.S. workers, the Department believes this Final Rule similarly should protect the integrity of the H-2B offered wage by treating it as the effective minimum wage. This gives U.S. and H-2B workers additional protection against improper deductions from the offered wage for items that primarily benefit the employer. Therefore, because

deductions for damaged and lost equipment are encompassed within deductions for equipment needed to perform a job, such deductions that bring a worker's wage below the offered wage are not permissible. The Department believes these principles are sufficiently clear as set forth in the FLSA regulations, 29 CFR part 531, and declines to adopt this commenter's suggestion. No other comments were received on this section. Therefore, the Final Rule retains the requirement as proposed.

h. Board, lodging, or facilities (proposed rule § 655.18(k)); Final Rule § 655.18(b)(9). In § 655.18(k) the Department proposed to require that, if an employer provides the worker with the option of board, lodging, or other facilities or intends to assist workers to secure such lodging, this must be listed in the job order. In addition, if the employer intends to make any wage deductions related to such provision of board, lodging or other facilities, such deductions must be disclosed in the job order. Several commenters offered unqualified support for this provision. However, a coalition representing agents and employers was concerned that the phrase or intends to assist workers to secure such lodging was overly vague and asked the Department to clarify what would qualify as assistance. This commenter also noted that the proposed section did not require that the intention to assist be listed in the job order. The Department does not include as assistance an employer's simple provision of information, such as providing workers coming from remote locations with a list of facilities providing short-term leases, or a list of extended-stay motels. However, in some cases, employers may reserve a block of rooms for employees, negotiate a discounted rate on the workers' behalf, or arrange to have housing provided at cost for its employees and such activities would qualify as assistance. Any such assistance may make it more feasible for a U.S. worker from outside the area of intended employment to accept the job, and therefore it should be included in the job order. In addition, while the requirement to disclose the provision of such assistance was implicit in § 655.18(k) of the NPRM, in response to this commenter's suggestion the Final Rule has been clarified to explicitly require the employer to disclose such offer of assistance. The Final Rule regulatory text now requires the disclosure of: the provision of board, lodging, or other facilities or of assistance in securing such lodging. Finally, this commenter

requested that the Department add a definition of other facilities to the definition section or to this section. The Department declines to make such an addition and refers the commenter to 29 CFR 531.32, which defines the term at length and has been construed and enforced by the Department for several decades. The Department has concluded that it is beneficial for workers, employers, agents, and the Wage and Hour Division to ground its enforcement of H-2B program obligations in its decades of experience enforcing the FLSA, and the decades of court decisions interpreting the regulatory language we are adopting in these regulations. Therefore, the Department notes throughout this preamble where it is relying on FLSA principles to explain the meaning of the requirements of the H-2B program that use similar language. Nevertheless, the Department has clarified the meaning of the term facilities by adding the parenthetical (including fringe benefits) to the Final Rule. This clarification makes this section more parallel with the requirement in § 655.18(a)(1), which requires the job order to offer U.S. workers no less than the same benefits, wages, and working conditions as offered to H-2B workers. Because the term fringe benefits is commonly used and understood, the Department believes this will provide employers with greater clarification about their obligation to disclose on the job order the benefits they will offer or provide to workers.

An advocacy organization requested that the Department impose additional requirements on employers who intend to provide rental housing. This commenter suggested that in such cases, the job order should specifically disclose the following: whether the worker will be sharing the accommodations with other workers or tenants, and if so, how many; the rent and security deposit, if any; a description of the type of accommodations; information about utilities; and any other pertinent information related to room and board. This commenter also requested that the regulations specifically require that all rental housing comply with State and local housing codes. The Department acknowledges this commenter's concern, but declines to implement the suggestion. There is no guarantee that an employer would have secured housing for potential employees at the point of filing the job order, which cannot be done less than 75 days before the date of need. Requiring such disclosures would either result in

speculation that would undermine their purpose, or would force employers to secure housing more than 2 months before workers arrived, potentially resulting in unnecessary and burdensome costs. Furthermore, two of the suggested disclosures—the cost of rent or security deposit and the cost of utilities—are already covered under the Final Rule at § 655.18(b)(10) if the employer will make deductions for them.

Responding to the Department's discussion of the application of this section to employers operating under special procedures, a trade association argues that no DOL regulation has ever suggested that mobile housing is unworthy of deductions. The Department's long-standing position is that facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. See 29 CFR 531.3(d)(1). The Department maintains that housing provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer's benefit and convenience.

One commenter from the reforestation industry wrote that the court cases the Department cites in the proposal have nothing whatsoever to do with the H-2B program or workers on an itinerary being paid wages substantially in excess of the federal minimum wage. As discussed in the preamble to § 655.15(f), the Department has made an exception for the carnival and reforestation industries, which use H-2B workers in itinerant employment over large interstate areas. Without this exception, these industries would be unable to readily comply with the program's established processes. Having made this exception for these industries, the Department asserts that the requirement that the employer provide housing and transportation free of charge to the employees is both reasonable and reflective of the true cost of doing business for this type of work. It should also be noted that without the ability and flexibility to move quickly and use mobile workforces, these industries could not function.

An employer from the reforestation industry suggested that the Final Rule require that housing for itinerant employees be selected by the workers, and that workers be reimbursed at a standard daily housing rate for the area of intended employment. The

Department declines to mandate such a practice. For the reasons stated in this section, the Department's position is that housing for workers in itinerant industries must be provided or paid for by the employer.

The Department has amended this section to require the disclosure of any fringe benefits that will be provided. This change is consistent with proposed § 655.18(a), which required that the job order 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-2B workers. No other comments were received on this section.

i. Other changes. In addition to commenting on the contents of the job order as proposed, several commenters suggested additional content requirements.

An alliance of human rights organizations suggested that the job order contain multiple explicit provisions. Many of the disclosures suggested by the commenter were included in the proposed rule, such as a list of costs charged to the worker (§ 655.18(f)) and educational or experience requirements (§ 655.41(b)(3)). The commenter also suggested that the job order contain information on the visa, a statement prohibiting a foreign labor contractor from assessing fees, a notice that the worker be provided 48 hours to review and consider any changes in terms, a statement that changes to the terms may not be made without specific consent of the worker, and a statement describing worker protections under the Trafficking Victims Protection Act of 2000. The Department maintains that the information which employers are required to include in the job order under § 655.18 of the Final Rule is necessary and sufficient to provide the worker with adequate information to determine whether to accept the job opportunity, and notes that the Department of State provides all H-2B workers with a detailed worker rights card at the visa application stage.⁷ The Department believes that these disclosures will ensure that adequate information is available to H-2B workers and therefore does not accept the commenters' suggestions.

With respect to a proposal that workers be provided notice of the changes to the job order, the Department notes that both the NPRM and the Final Rule require an employer who wishes to change any of the terms and conditions of employment listed in the job order,

to submit such a proposed change to the CO for approval. The employer may not implement changes to the approved terms and conditions listed in the job order without the approval by CO. Additionally, such changes must be disclosed to all U.S. workers hired under the original job order, as required by § 655.35.

Finally, a coalition of worker advocacy organizations and several other worker advocacy organizations suggested that the Department add a provision to the regulations stating that, in the absence of a written contract, the terms and conditions listed in the job order shall be the work contract. The Department does not believe it is necessary to add such a provision, as the courts will determine private parties' contractual rights under state contract law. These commenters were concerned, however, that the Department's reference to *Garcia v. Frog Island Seafood, Inc.* (Frog Island), 644 F. Supp. 2d 696, 716–18 (E.D.N.C. 2009), in its rationale for the three-fourths hours guarantee, 76 FR 15143, Mar. 18, 2011, implied that the Department endorsed that court's view that the terms and conditions of H-2B job orders are not enforceable under state contract law. The Department wishes to clarify that it does not endorse this view, and was simply referencing this decision as an example of one of several ways that courts have viewed the enforceability of an hours guarantee in the H-2B job order absent an explicit regulatory requirement. The Department believes that the *Frog Island* court's holding regarding the enforceability of the H-2B job order is limited to the 2008 Final Rule, as the court's reasoning was based on the explicit lack of an hours guarantee under that rule. See 644 F. Supp. 2d at 718; 73 FR 78024, Dec. 18, 2008 (2008 Final Rule preamble explaining that the definition of full-time did not constitute an actual obligation of the number of hours that must be guaranteed each week). The reference to *Frog Island* in the NPRM should not have been interpreted as the Department's view of the enforceability of the three-fourths guarantee in this Final Rule because this Final Rule explicitly mandates an hours guarantee. Moreover, to the extent the court in *Frog Island* also based its decision on the premise that finding the employer responsible for providing the 40 hours listed in the H-2B job order would effectively negate at-will employment, see 644 F. Supp. 2d at 719, the Department notes that it views the terms and conditions of the job order as

binding, regardless of workers' at-will employment status.

In addition to making the organizational changes discussed above, the Final Rule will require employers to list in the job order the following information that is essential for providing U.S. workers sufficient information about the job opportunity (this information was previously required to be included in the job order by a cross reference to § 655.41): the employer's name and contact information (§ 655.18(b)(1)); a full description of the job opportunity (§ 655.18(b)(3)); the specific geographic area of intended employment (§ 655.18(b)(4)); if applicable, a statement that overtime will be available to the worker and the overtime wage offer(s) (§ 655.18(b)(6)); if applicable, a statement that on-the-job training will be provided to the worker (§ 655.18(b)(7)); a statement that the employer will use a single workweek as its standard for computing wages due (§ 655.18(b)(8)); and instructions for inquiring about the job opportunity or submitting applications, indications of availability, and/or resumes to the appropriate SWA (§ 655.18 (b)(18)). This last addition was included to ensure that applicants who learn of the job opening through the electronic job registry are provided with the opportunity to contact the SWA for more information or referral.

5. § 655.19 Job Contractor Filing Requirements

This Final Rule amends § 655.6 to provide for the limited circumstances under which job contractors may continue to participate in the H-2B program. However, their participation is still be subject to the limitations provided in the *CATA* decision, in which the Court invalidated and vacated 20 CFR 655.22(k) under the 2008 Final Rule insofar as that provision permits the clients of job contractors to hire H-2B workers without submitting an application to the Department. In particular, the Court relied, as a basis for its determination, on the DHS regulation at 8 CFR 214.2(h)(2)(i)(C), which provides that “[i]f the beneficiary [i.e., the temporary, non-immigrant worker] will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with USCIS as provided in the form instructions.” The Court found that this provision, when coupled with the DHS regulation at 8 CFR 214.2(h)(6)(iii)(A), which requires the petitioner to apply for a temporary labor certification with the Department of Labor, prohibited the Department's

⁷ The workers rights card is available at <http://travel.state.gov/pdf/Pamphlet-Order.pdf>.

existing practice of allowing only job contractors to file for labor certifications. See *CATA* 2010 WL 3431761, at *16 (E.D. Pa. Aug. 30, 2010). Rather, the Court found that such provisions

mandate that (1) every employer must file a petition with DHS, and (2) before doing so, the employer must also file a certification application with DOL. By allowing certain employers *not* to file certification applications, DOL's regulations unambiguously contradict this mandate. *Id.* (emphasis added).

As a result of this order, we determined that we could no longer accept H-2B labor certification applications from job contractors if the job contractor's employer-clients did not also submit labor certification applications. However, both the 2008 Final Rule and this Final Rule only permit one H-2B labor certification application to be filed for worksite(s) within one area of intended employment for each job opportunity with an employer. Accordingly, both a job contractor and employer-client each would not be able to file their own application for a single job opportunity.

However, we recognized that it may be possible for a job contractor and its employer-client to file a single application as a joint employer. Joint employment is defined as where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers may be considered to jointly employ that employee. An employer in a joint employment relationship with an employee may be considered a 'joint employer' of that employee. See § 655.4. That approach would be consistent with both the *CATA* decision (which prohibits allowing only the job contractor to file the application) and § 655.20 under the 2008 Final Rule and § 655.15 under this Final Rule (which prohibit the filing of multiple applications for a single job opportunity). Earlier this year, we issued guidance on our Web site which addresses the requirement and procedures for filing and processing applications for joint employers (which could include job contractors and their employer-client(s)) under the H-2B program. See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2b>. While such guidance continues to remain valid, we are incorporating in this section the key procedures and requirements relating to the submission of the *Application for Prevailing Wage Determination*, the filing of the *Application for Temporary Employment Certification*, placement of

the job order and conduct of recruitment, issuance of certification, and submission of certification to USCIS.

In deciding whether to file as joint employers, the job contractor and its employer-client should understand that employers are considered to jointly employ an employee when they each, individually, have sufficient definitional indicia of employment with respect to that employee. As described in the definition of employee in 20 CFR 655.4, some factors relevant to the determination of employment status include, but are not limited to, the following: The right to control the manner and means by which 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; discretion over when and how long to work; and whether the work is part of the regular business of the employer or employers. Whenever a job contractor and its employer client file applications, each employer is responsible for compliance with H-2B program assurances and obligations. In the event a violation is determined to have occurred, either or both employers can be found to be responsible for remedying the violation and attendant penalties.

D. Assurances and Obligations

1. § 655.20 Assurances and Obligations of H-2B Employers

Proposed § 655.20 replaced existing § 655.22 and contained the employer obligations that WHD will enforce. The Department proposed to modify, expand, and clarify current requirements to ensure that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. Requiring compliance with the following conditions of employment is the most effective way to meet this goal. As discussed in the preamble to § 655.5, workers engaged in corresponding employment are entitled to the same protections and benefits, set forth below, that are provided to H-2B workers.

a. Rate of pay (§ 655.20(a)). In proposed § 655.20(a) the Department expanded the current § 655.22(e). In addition to the existing requirements that employers pay the offered wage during the entire certification period and that the offered wage equal or exceed the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and any local minimum wage, the Department

added the requirement that such wages be paid free and clear. The proposed section also added requirements related to productivity standards and payments made on a piece-rate basis, and eliminated the current § 655.22(g)(1) option of paying such wages on a monthly basis. The Department received numerous comments on this section that were deemed out of scope, as they concerned the calculation of the prevailing wage.

The Department's proposed regulation required that the wages offered in the job order must be at least equal to the prevailing wage rate for the occupation in the area of employment, as set forth in § 655.10(b), or the appropriate Federal, State, or local minimum wage, whichever is highest. If, during the course of the period certified in the *Application for Temporary Employment Certification*, the Federal, State or local minimum wage increases to a level higher than the prevailing wage certified in the Application, then the employer is obligated to pay that higher rate for the work performed in that jurisdiction where the higher minimum wage applies.

A State Attorney General's office supported the obligation to pay the State or local minimum wage where one is higher than the prevailing wage or the Federal minimum wage, stating that this provision is particularly important in industries in which employees are often exempt from Federal wage and hour law. We concur with this assessment.

Upon consideration, we have amended the provision with respect to productivity standards (§ 655.20(a)(3)) to reflect that it is incumbent upon the employer to demonstrate that such productivity standards are normal and usual for non-H-2B employers for the occupation and area of intended employment. Unlike in the H-2A program, the Department does not conduct prevailing practice surveys through the SWAs, which would provide such information to enable a CO to make this decision. If an employer wishes to provide productivity standards as a condition of job retention, the burden of proof rests with that employer to show that such productivity standards are normal and usual for employers not employing H-2B workers. We have adopted the rest of the proposed rule with minor clarifying edits for consistency.

b. Wages free and clear (§ 655.20(b)). In § 655.20(b), the Department proposed to require that wages be paid either in cash or negotiable instrument payable at par, and that payment be made finally and unconditionally and free and clear in accordance with WHD regulations at

29 CFR part 531. Numerous commenters, including several advocacy organizations and a state agency, wrote in support of this provision. A foreign worker advocacy organization writing in favor of the provision stated that in its experience employers too often try to impermissibly shift costs of tools, recruiting, travel, and other costs which impermissibly bring employees' wages below the minimum and prevailing wage. This assurance clarifies the pre-existing obligation for both employers and employees.

Only one commenter, a trade organization wrote in opposition to the provision. However, this commenter misunderstood the proposal, writing that the requirement to pay prevailing wages free and clear will expose employers to the costs of local convenience travel (trips to Wal-Mart, Western Union, laundry, *etc.*), uniforms, tools, meals, *etc.* While the employer's obligation to pay for uniforms and tools is covered in the Final Rule at § 655.20(k), reasonable deductions for employer-provided local travel that is for the employees' primary benefit and meals, if disclosed on the job order, would generally be viewed as permissible under § 655.20(c).

c. Deductions (§ 655.20(c)). In proposed § 655.20(c) the Department sought to ensure payment of the offered wage by limiting deductions which reduce wages to below the required rate. The proposed section limited authorized deductions to those required by law, made under a court order, that are for the reasonable cost or fair value of board, lodging, or facilities furnished that primarily benefit the employee, or that are amounts paid to third parties authorized by the employee or a collective bargaining agreement. The proposed section specifically provided that deductions not disclosed in the job order are prohibited. The Department also specified deductions that would never be permissible, including: Those for costs that are primarily for the benefit of the employer; those not specified on the job order; kick backs paid to the employer or an employer representative; and amounts paid to third parties which are unauthorized, unlawful, or from which the employer or its foreign labor contractor, recruiter, agent, or affiliated person benefits to the extent such deductions reduce the actual wage to below the required wage. The proposed section referred to the FLSA and 29 CFR part 531 for further guidance.

Numerous advocacy groups, labor organizations, and individuals commented in favor of the provision. One foreign worker advocacy

organization applauded the Department's proposal, writing the provision's level of specificity is valuable and necessary to prevent employers from taking advantage of vulnerable workers with little understanding of what employers may lawfully deduct from their wages. A labor organization wrote that it regularly finds that immigrant workers are exploited by employers who confuse them as to their rate of pay, overtime, taxes, and other deductions, and therefore enthusiastically supported the provision. Two individuals misunderstood the provision as allowing deductions that are primarily for the benefit of the employer and requested that the Department explicitly prohibit such deductions. The Department clarifies that a deduction for any cost that is primarily for the benefit of the employer is never reasonable and therefore never permitted under the Final Rule. Some examples of costs that Department has long held to be primarily for the benefit of the employer are: Tools of the trade and other materials and services incidental to carrying on the employer's business; the cost of any construction by and for the employer; the cost of uniforms (whether purchased or rented) and of their laundering, where the nature of the business requires the employee to wear a uniform; and transportation charges where such transportation is an incident of and necessary to the employment. This list is not an all-inclusive list of employer business expenses.

A comment from a State Department of Labor expressed concern that the permissibility of a deduction was still subjective and requested that ETA provide SWAs with training and detailed written instructions with criteria to use when evaluating deductions listed on a job order. The Department believes that the guidance provided in this section is sufficient, but will provide additional training and guidance to SWAs as needed.

In addition, concerns were raised by a coalition representing agents and employers and an industry group that the prohibition of deductions constituted an overstepping of the Department's bounds by importing the de facto deduction concept from the FLSA. One of these commenters also cited the decision by the Fifth Circuit Court of Appeals in *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010), contending that this decision definitively resolved whether the FLSA requires H-2B employers to reimburse certain employee pre-employment business expenses, and that the Department is

bound by this decision. However, that decision concerned alleged FLSA violations relating to employees' payment of transportation and visa fees during a time period in which the court found that the Department did not have a clear position as to whether employers were required to reimburse for these fees. *Decatur*, 622 F.3d at 401–02, and n.9. It specifically stated that the Department's subsequent clarification that these expenses primarily benefited the employer and therefore could not bring workers' wages below the FLSA minimum wage, as set forth in Field Assistance Bulletin No. 2009–2 (August 2009, available at <http://www.dol.gov/ebsa/regs/fab2009-2.html>), might be afforded due deference in the future but would not apply retroactively to the allegations at issue in that case. *Id.* at 402. The Department acknowledges that it is bound by the Fifth Circuit's decision with respect to the time period considered in that case, in the jurisdictions covered by the Fifth Circuit, with regard to how such expenses are treated under the FLSA. However, the Department does not interpret this decision to be the ultimate determination on these issues, as suggested by this commenter, and notes that the decision did not address what the proper deduction analysis would be under newly promulgated regulations adopted under the H-2B program. The Department believes that the concept of de facto deductions initially developed under the FLSA is equally applicable to deductions that bring H-2B workers' wages below the required wage, as the payment of the prevailing wage is necessary to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. workers. To allow deductions for business expenses, such as tools of the trade, would undercut the prevailing wage concept and, as a result, harm U.S. workers.

d. Job opportunity is full-time (§ 655.20(d)). In proposed § 655.20(d), the Department required that all job opportunities be full-time temporary positions, consistent with existing language in § 655.22(h), and established full-time employment as at least 35 hours per week, an increase from the current level of 30 hours. Additionally, consistent with the FLSA, the NPRM added the requirement that the workweek be a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods which may start on any day or hour of the day. The Department received no comments regarding the added language

addressing the workweek requirement; however, there were many comments submitted by a variety of commenters expressing opinions about the definition of full-time employment. The Department carefully considered and responded to those comments in its discussion of § 655.5, Definition of Terms.

e. Job qualifications and requirements (§ 655.20(e)). Proposed § 655.20(e) clarified existing § 655.22(h) by stating that each job qualification and requirement listed in the job order must be consistent with normal and accepted qualifications required by non-H-2B employers for similar occupations in the area of intended employment. Under the proposed compliance model, OFLC in collaboration with the SWA would determine what is normal and accepted during the pre-certification process. In addition, we proposed to provide the CO with the authority to require the employer to substantiate any job qualifications specified in the job order. The Department is retaining this provision with amendments, as discussed below.

The Department received one comment on this additional language, in which a coalition representing agents and employers requested that the Department limit the CO's discretion to demand substantiation to those cases in which he or she has objective and reliable documentation showing that a requirement or qualification is unusual or rare. This commenter asserted that this limitation would not place a further burden on the CO and would limit the burden placed on employers. The Department concludes that such a requirement would in fact place a significant burden on the CO, who would have to do substantial research to produce such documentation, while an employer would presumably have documentation of the appropriateness of its own requirement or qualification readily available. The Department therefore declines to make this change.

In addition, the Department received comments raising concerns regarding the Department's standard for what is normal and accepted with respect to the employer's qualifications and requirements. Some commenters expressed confusion between the use of the terms qualification and requirement. These and other comments related to this and related provisions are discussed in the preamble paragraph (r) of this section as well as § 655.18(a)(2). However, in response to these comments, the Department has amended this section to clarify, consistent with a parallel requirement in 655.18(a)(2), that the employer's job

qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. In addition, and in response to the confusion articulated by some commenters, we have clarified that a qualification means a characteristic that is necessary to the individual's ability to perform the job in question. In contrast, a requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity.

This provision, as amended, enables us to continue our current standard of review of the job qualifications and special requirements by looking at what non-H-2B employers determine is normal and accepted to be required to perform the duties of the job opportunity. The purpose of this review is to avoid the consideration (and the subsequent imposition) of requirements on the performance of the job duties that would serve to limit the U.S. worker access to the opportunity. OFLC has significant experience in conducting this review and in making determinations based on a wide range of sources assessing what is normal for a particular job, and employers will continue to be held to an objective standard beyond their mere assertion that a requirement is necessary. We will continue to look at a wide range of available objective sources of such information, including but not limited to O*NET and other job classification materials and the experience of local treatment of requirements at the SWA level. Ultimately, however, it is incumbent upon the employer to provide sufficient justification for any requirement outside the standards for the particular job opportunity.

Therefore, we are retaining this provision with the amendments discussed above.

f. Three-fourths guarantee (§ 655.20(f)). In § 655.20(f), the NPRM proposed to require employers to guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period and, if the guarantee was not met, to pay the worker what the worker would have earned if the employer had offered the guaranteed number of days. The NPRM stated these 4-week periods would begin the first workday after the worker's arrival at the place of employment or the advertised contractual first date of need, whichever is later, and would end on the expiration date specified in the job order or in any extensions. The NPRM provided that a workday would be

based on the workday hours stated in the employer's job order, and the 4-week period would be based on the employer's workweek, with increases for the initial period and decreases for the last period on a pro rata basis, depending on which day of the workweek the worker starts or ceases work.

The NPRM proposed that if a worker failed or refused to work hours offered by the employer, the employer could count any hours offered consistent with the job order that a worker freely and without coercion chose not to work, up to the maximum number of daily hours on the job order, in the calculation of guaranteed hours. The NPRM also allowed the employer to offer the worker more than the specified daily work hours, but stated the employer may not require the employee to work such hours or count them as offered if the employee chose not to work the extra hours. However, the NPRM allowed the employer to include all hours actually worked when determining whether the guarantee had been met. Finally, the NPRM proposed, as detailed in 29 CFR 503.16(g), that the CO can terminate the employer's obligations under the guarantee in the event of fire, weather, or other Act of God that makes the fulfillment of the job order impossible.

The NPRM specifically invited the public to suggest alternative guarantee systems that may better serve the goals of the guarantee. In particular, the Department sought comments on whether a 4-week increment is the best period of time for measuring the three-fourths guarantee or whether a shorter or longer time period would be more appropriate.

Based upon all the comments received, the Department has decided to retain the three-fourths guarantee, but to lengthen the increment over which the guarantee is measured to 12 weeks, rather than just 4 weeks, if the period of employment covered by the job order is 120 days or more, and increase the increment of the guarantee to 6 weeks, if the period of employment covered by the job order is less than 120 days.

The Department received numerous comments, from both employers and employees, addressing whether to include a guarantee and whether a 4-week increment is the appropriate period of time. Many employers expressed concern about the guarantee. They were particularly concerned about the impact of the weather on their ability to meet the guarantee. For example, crab processing companies emphasized that unseasonably cool weather, weather events such as

hurricanes, or unforeseen events like oil spills or health department or conservation closures can make the harvesting and processing of crabs impossible. Other employers—such as those in the forestry industry—similarly emphasized that the 4-week period does not adequately account for the impact of weather because many days can be unworkable (because it is too hot, too dry, too wet, or too cold to plant seedlings) and the hours cannot be made up within 4 weeks. Ski resorts emphasized that they are dependent upon the amount and timing of snowfall as well as temperatures, and golf clubs expressed similar concerns about the impact of the weather. Employers also stated that work hours may be unavailable for many other reasons beyond their control, such as federal money for forestry work is unavailable, landowners change their minds about planting, or the nursery does not make seedlings available; the economy affects consumers' willingness to travel for leisure; or a large group or event sponsor changes the schedule or cancels a booking. Employers also emphasized that it is difficult to predict with precision several months ahead of time exactly what an employer's workforce needs will be throughout the season, and requiring employers to pay wages when no work is performed would cause financial ruin. Some employers focused, in particular, on their difficulty in meeting the guarantee during slow months at the beginning and end of the season.

One commenter presented a survey of 501 employers in which 34 percent of employers responded that the guarantee would severely affect their bottom line, 26 percent were moderately concerned, and 40 percent stated that it would not affect them. The survey showed that, for a plurality of employers, workers consistently work more than 40 hours per week; even those employers that expressed concern stated that the guarantee would not present a problem during the busiest months of the season, but would be a burden during the first and last months of the season when they are ramping up or winding down. Many survey respondents were prepared to guarantee a minimum workload over the season, but not month to month.

Numerous other employer commenters similarly stated that if a guarantee remains in the Final Rule, it should be spread over the entire certification period, as it is in the H-2A regulations. They noted that this would provide flexibility and enhance their ability to meet the guarantee without cost, because often the loss of demand for work in one period is shifted to

another point in the season, but such a guarantee would still deter egregious cases of employers misstating their need for H-2B employees. Employers also suggested, in addition to a clear Act of God exception, that there should be an exception for man-made disasters such as an oil spill or controlled flooding. Some also suggested that the rule should allow the Department to give employers a short period of interim relief from the guarantee, when weather or some other catastrophic event makes work temporarily unavailable, rather than simply authorizing the termination of the job order.

A number of employer commenters suggested that the guarantee should be based upon pay for three-fourths of the hours, rather than three-fourths of the hours, so that employers could take credit for any overtime paid at time-and-a-half. They noted that, because agriculture is exempt from overtime, H-2A employers do not have to pay an overtime premium when employees work extra hours in some weeks. Other commenters stated that the three-fourths guarantee is beyond the Department's statutory authority, noting the differences between the H-2A and H-2B statutory frameworks. Finally, some employers expressed concern about how they could afford to pay the guarantee when the employee does not or cannot work, seeming to suggest that employers are required to pay the guarantee even if an employee voluntarily chooses not to work, or that they were unaware of the alternative of seeking termination of the job order.

Employees, in contrast, uniformly supported the requirement for a guarantee, and many suggested strengthening the proposed guarantee. For example, employee advocates stressed that the three-fourths guarantee is important to prevent foreign workers from being lured into the program with promises of far more hours of work than they will actually receive. When workers do not receive the promised hours, they are forced to resort to work that does not comply with the program in order to survive, and this then impacts the job opportunities available to U.S. workers. Further, where there are excess H-2B workers, employers are able to exploit them out of their desperation for work, resulting in an ability to undercut the wages of U.S. workers. Commenters emphasized that the proposed guarantee would protect workers who traveled in reliance on promises of work, who now may have to wait weeks or months for the work to begin, because it would serve as a barrier preventing employers from artificially increasing their stated need

for H-2B workers. One commenter with experience working with H-2B workers in New Orleans described a situation in which the workers were provided little or no work after traveling from India, and when they complained they were threatened and many were fired. Employee commenters noted that when they get very limited hours because the jobs either do not start on the promised date or finish early, or have fewer hours per week, they would have been better off staying in their home country because they have to spend everything they earn to live on and have nothing left to send home.

Employee advocates stated that applying the guarantee on a 4-week basis (as opposed to over the length of the job order) prevents employers from claiming artificially long seasons, in the hopes that workers will quit prematurely at the end of the season and lose their rights to the guarantee and transportation home, even if the reason was that the employer had very little work available. The shorter increment also protects U.S. workers because it prevents employers from using an unrealistic early start date as a method of encouraging them to abandon the job to seek alternative employment with more hours. The commenters noted that employers could simply apply for fewer H-2B workers and offer all workers more hours to minimize the impact of the requirement.

Although employee advocates uniformly supported the concept of a guarantee, some advocates stressed that the three-fourths guarantee overcompensates for the effects of weather. Employees were particularly concerned about the guarantee being only three-fourths if the definition of full-time remained at 35 hours, which they viewed as double-counting for the effects of weather and which would result in workers only being guaranteed 26 hours per week (105 hours per month). Thus, while some employee commenters believed the three-fourths guarantee to be a reasonable and narrowly-tailored means to prevent abuses, other employee advocates suggested adopting a more protective guarantee—100 percent, or 90 percent, or providing the guarantee on a weekly basis. They emphasized that employees are required to pay 100 percent of their expenses, such as rent and medical fees. They also noted that many H-2B industries are not affected by the weather to the same degree as agricultural work; therefore, some advocates suggested the guarantee should be higher than the three-fourths rule in the H-2A program. At a minimum, they emphasized the

importance of having the guarantee at least every 4 weeks to prevent employees from going through long periods without work or income.

Finally, employee advocates expressed concern about a broad Act of God or impossibility exception to the rule and suggested that the Department play a direct role in assisting in the transfer of temporary foreign workers affected by such a job order termination to other employers, and suggested adopting an additional recordkeeping requirement, similar to the H-2A three-fourths guarantee recordkeeping provision at § 655.122(j)(3)), requiring employers to record the reason a worker declined offered hours of work in order to prevent employers from overstating the number of hours offered.

After carefully considering all the comments received, the Department has decided to retain the three-fourths guarantee, but to lengthen the increment over which the guarantee is measured to 12 weeks, rather than just 4 weeks, if the period of employment covered by the job order is 120 days or more, and increase the increment over which the guarantee is measured to 6 weeks rather than 4 weeks, if the period of employment is less than 120 days. The Department believes that this approach will retain the benefits of having the guarantee, while offering employers the flexibility to spread the required hours over a sufficiently long period of time such that the vagaries of the weather or other events out of their control that affect their need for labor do not prevent employers from fulfilling their guarantee. Moreover, as discussed in detail later with regard to § 655.20(g), the CO may relieve an employer from the three-fourths guarantee requirement for time periods after an unforeseeable event outside the employer's control occurs, such as fire, weather, or other Act of God.

When employers file applications for H-2B labor certifications, they represent that they have a need for full-time workers during the entire certification period. Therefore, it is important to the integrity of the program, which is a capped visa program, to have a methodology for ensuring that employers have fairly and accurately estimated their temporary need. As explained in the NPRM, the guarantee deters employers from misusing the program by overstating their need for full-time, temporary workers, such as by carelessly calculating the starting and ending dates of their temporary need, the hours of work needed per week, or the total number of workers required to do the work available. To the extent that employers more accurately describe the

amount of work available and the periods during which work is available, it gives both U.S. and foreign workers a better chance to realistically evaluate the desirability of the offered job. U.S. workers will not be induced to abandon employment, to seek full-time work elsewhere at the beginning of the season or near the end of the season because the employer overstated the number of employees it actually needed to ramp up or to wind down operations. Nor will U.S. workers be induced to leave employment at the beginning of the season or near the end of the season due to limited hours of work because the employer misstated the months during which it reasonably could expect to perform the particular type of work involved in that geographic area. Not only will the guarantee result in U.S. and H-2B workers actually working most of the hours promised in the job order, but it also will make the capped H-2B visas more available to other employers whose businesses need to use H-2B workers. Therefore, the Department disagrees with those commenters who suggested the Department lacks the authority to impose a guarantee. The guarantee is a necessary element to ensure the integrity of the labor certification process, to ensure that the availability of U.S. workers for full-time employment is appropriately tested, to ensure that there is no adverse effect on U.S. workers from the presence of H-2B workers who are desperate for work because the work that was promised does not exist, and to ensure that H-2B visas are available to employers who truly have a need for temporary labor for the dates and for the numbers of employees stated.

The Department's recent experience in enforcing the H-2B regulations demonstrates that its concerns about employers overstating their need for workers are not unfounded, as do the numerous comments from employees and their advocates who described countless private cases and testimony demonstrating the existence of this problem. The Department's investigations have revealed employers that stated on their H-2B applications that they would provide 40 hours of work per week when, in fact, their workers averaged far fewer hours of work, especially at the beginning and/or end of the season. Indeed, in some weeks the workers have not worked at all. In addition, there has been testimony before Congress involving similar cases in which employers have overstated the period of need and/or the number of hours for which the workers

are needed. For example, as the Department described in the NPRM, H-2B workers testified at a hearing before the Domestic Policy Subcommittee, House Committee on Oversight and Government Reform, on April 23, 2009, that there were several weeks in which they were offered no work; others testified that their actual weekly hours—and hence their weekly earnings—were less than half of the amount they had been promised in the job order. Daniel Angel Castellanos Contreras, a Peruvian engineer, was promised 60 hours per week at \$10–\$15 per hour. According to Mr. Contreras, “[t]he guarantee of 60 hours per week became an average of only 20 to 30 hours per week—sometimes less. With so little work at such low pay [\$6.02 to \$7.79 per hour] it was impossible to even cover our expenses in New Orleans, let alone pay off the debt we incurred to come to work and save money to send home.”⁸ Miguel Angel Jovel Lopez, a plumber and farmer from El Salvador, was recruited to do demolition work in Louisiana with a guaranteed minimum of 40 hours of work per week. Mr. Lopez testified, “[i]nstead of starting work, however, I was dropped off at an apartment and left for two weeks. Then I was told to attend a two week training course. I waited three more weeks before working for one day on a private home and then sitting for three more weeks.”⁹ Testimony at the same hearing by three attorneys who represent H-2B workers stated that these witnesses' experiences were not aberrations but were typical. Hearing on The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers, 111th Cong. (Apr. 23, 2009).

Furthermore, a 2010 report by the American University Washington College of Law International Human Rights Law Clinic and the Centro de los Derechos del Migrante, Inc. documented the prevalence of work shortages for women working on H-2B visas in the Maryland crab industry. The researchers found that several women interviewed spent days and weeks without work when crabs were scarce. During this time most continued to make rent

⁸ Testimony of Daniel Angel Castellanos Contreras before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2, (2009, Apr. 23) <http://oversight.house.gov/images/stories/documents/20090423085101.pdf>.

⁹ Testimony of Miguel Angel Jovel Lopez before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2, (2009, Apr. 23) <http://oversight.house.gov/images/stories/documents/20090423085606.pdf>.

payments, and struggled to send money to family back in Mexico.¹⁰

The Department has not adopted the suggestion of employers to spread the three-fourths guarantee over the entire period covered by the job order. Using the entire period of the job order would not adequately protect the integrity of the program because it would not measure whether an employer has appropriately estimated its need for temporary workers. It would not prevent an employer from overstating the beginning date of need and/or the ending date of need and then making up for the lack of work in those two periods by offering employees 100 percent of the advertised hours in the middle of the certification period. Indeed the employer could offer employees more than 100 percent of the advertised hours in the peak season and, although they would not be required to work the excess hours, most employees could reasonably be expected to do so in an effort to maximize their earnings.

However, in order to meet the legitimate needs of employers for adequate flexibility to respond to changes in climatic conditions (such as too much or too little snow or rain, temperatures too high or too low) as well as the impact of other events beyond the employer's control (such as a major customer who cancels a large contract), the Department has modified the increment of time for measuring the guarantee by tripling it from 4 weeks to 12 weeks (if the period of employment covered by the job order is at least 120 days) and increasing the period by 2 weeks to 6 weeks (if the employment is less than 120 days). The Department believes this provides sufficient flexibility to employers, while continuing to deter employers from requesting workers for 9 months, for example, when they really only have a need for their services for 7 months. If an employer needs fewer workers during the shoulder months than the peak months, it should not attest to an inaccurate statement of need by requesting the full number of workers for all the months. Rather, the proper approach it should follow is to submit two applications with separate dates of need, so that it engages in the required recruitment of U.S. workers at the appropriate time when it actually needs the workers.

Finally, the Department has not adopted the suggestion of some employers for a guarantee tied to pay rather than hours. The employers' attestation relates to their need for a particular number of full-time workers during a set period; thus, the attestation relates to the amount of full-time work, not the amount of pay received. The Department reminds employers that they may count toward the guarantee hours that are offered but that the employee fails to work, up to the maximum number of hours specified in the job order for a workday; thus, they do not have to pay an employee who voluntarily chooses not to work. Similarly, they may count all hours the employee actually works, even if they are in excess of the daily hours specified in the job order. Employers' comments addressing the Act of God exception are addressed in § 655.20(g).

The Department has not adopted the suggestion of many employee advocates to impose a more protective guarantee. The Department does not believe it would be appropriate to impose a 100 percent, 90 percent, or weekly guarantee. The three-fourths guarantee is a reasonable deterrent to potential carelessness and a necessary protection for workers, while still providing employers with flexibility relating to the required hours, given that many common H-2B occupations involve work that can be significantly affected by weather conditions. Moreover, it is not just outdoor jobs such as landscaping that are affected by weather. For example, indoor jobs such as housekeeping and waiting on tables can be affected when a hurricane, flood, unseasonably cool temperatures, or the lack of snow deters customers from traveling to a resort location. The impact on business of such weather effects may last for several weeks, although (as employers recognized) they are likely to be able to make up for them in other weeks of the season. Moreover, the Department understands that it is difficult to predict with precision months in advance exactly how many hours of work will be available, especially as the period of time involved is shortened. Finally, the comment suggesting adding a recordkeeping requirement related to the reason an employee declines offered work is addressed in § 655.20(i).

g. Impossibility of fulfillment (§ 655.20(g)). In proposed § 655.20(g), the Department added language to allow employers to terminate a job order in certain narrowly-prescribed circumstances when approved by the CO. In such an event, the employer would be required to meet the three-

fourths guarantee discussed in paragraph (f) of this section based on the starting date listed in the job offer or first workday after the arrival of the worker, whichever is later, and ending on the job order termination date. The employer would also be required to attempt to transfer the H-2B worker (to the extent permitted by DHS) or worker in corresponding employment to another comparable job. Actions employers could take include reviewing the electronic job registry to locate other H-2B-certified employers in the area and contacting any known H-2B employers, the SWA, or ETA for assistance in placing workers. Absent such placement, the employer would have to comply with the proposed transportation requirements in paragraph (j) of this section.

The Department received numerous comments on this section, from the Small Business Administration (SBA) Office of Advocacy, employers, employer advocacy groups, and trade organizations, requesting that the provision be expanded to cover manmade disasters. Many of these commenters cited the recent Deepwater Horizon oil spill, which forced many businesses to close unexpectedly. The Department views this suggested expansion as wholly in line with the intent of the provision, which acknowledged that circumstances beyond the control of the employer or the worker can result in the need to terminate a worker's employment before the expiration date of a job order. Therefore, the Department has amended this provision in the Final Rule. The first sentence of the paragraph now reads, "If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, other Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control, that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO." No other changes were made to this section.

h. Frequency of pay (§ 655.20(h)). Proposed § 655.20(h) required that the employer indicate the frequency of pay in the job order and that workers be paid at least every two weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Further, it required that wages be paid when due.

Numerous worker advocacy organizations submitted comments supporting this provision. One comment

¹⁰ American University Washington College of Law International Human Rights Law Clinic and Centro de los Derechos del Migrante, Inc. *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry*, 2, July 2010. http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlc_picked_apart.pdf?rd=1.

stated that frequent pay is important for H-2B workers who often arrive in the United States with little money and need prompt payment after beginning work to be able to pay for their expenses without going into debt. Requiring frequent pay also negates the ability of unscrupulous lenders to take advantage of desperate workers who run out of money before payday by extending high interest loans. Another comment stated that this provision would allow regular access to funds and assist workers to avoid being trapped in a work situation because of lack of resources to leave an exploitative working situation.

One employer expressed general opposition to this requirement but gave no reason explaining the opposition. Other employer comments expressed a range of concerns.

One individual commented that the specific language in § 655.20(h), or according to the prevailing practice in the area of intended employment, is ambiguous. The commenter expressed concern that the regulation provides no process for determining what prevailing practice is and that area of intended employment has no rigid tangible boundaries. This commenter did not provide any alternative suggestions. The Department does not consider the regulation text ambiguous. The concept of an area of intended employment is defined in the regulations at § 655.5 and has been used in the program since its inception. While we do not conduct prevailing practice surveys in the H-2B program at this time, we assume employers are aware of prevailing practices for frequency of pay in their area.

One employer suggested that the Department permit employers to use a monthly pay period provided that they give employees the option to draw a percentage of wages earned in the middle of the month, as this would effectively give twice-monthly pay periods to any employee who exercised the option. The Department rejects this suggestion. The requirement that workers be paid at least every 2 weeks was designed to protect financially vulnerable workers. Allowing an employer to pay less frequently than every two weeks would impose an undue burden on workers who traditionally are paid low wages and may lack the means to make their income stretch through a month until they get paid, and it would force these workers to pursue the needless step of requesting their earnings every month in the middle of the pay period.

One commenter suggested that the Department require employers to pay wages in cash or require that wages be

deposited directly into the employee's bank account. The Department notes that the requirement that payments be made either in cash or negotiable instrument payable at par at § 655.20(b) of the Final Rule will ensure that wages are paid free and clear and in an accessible medium.

No other comments were received on this section. As such, the Department adopts the provision as proposed.

i. Earnings statements (§ 655.20(i)). Proposed § 655.20(i) added requirements for the employer to maintain accurate records of worker earnings and provide the worker an appropriate earnings statement on or before each payday. The proposed paragraph also listed the information that the employer must include in such a statement.

The Department received numerous comments in support of § 655.20(i) from community-based organizations and worker advocacy organizations. One comment from a worker advocacy organization stated that earning statements will help workers promptly identify any improper deductions or wage violations. This commenter noted that, armed with such wage information, employees are better able to hold employers accountable to wage requirements.

Some commenters expressed opposition to this provision, arguing that requiring employers to provide earnings statements will create an administrative burden and additional costs resulting from more paperwork and additional recordkeeping. The Department believes that any additional administrative burden resulting from this provision will be outweighed by the importance of providing workers with this crucial information, especially because an earnings statement provides workers with an opportunity to quickly identify and resolve any anomalies with the employer and hold employers accountable for proper payment.

One employer association expressed concern that before in the phrase on or before each payday is vague. The comment proposed no alternative language. The Department finds the language to clearly indicate that so long as the earnings statement is provided no later than the time payment is received there is no violation of this provision.

One comment submitted by a worker advocacy group suggested the Department also require that where a worker declines any offered hours of work, employers record the reason why the hours were declined. Similar to § 655.122(j)(3) in the H-2A program, requiring an employer to record the reasons why a worker declined work

will support the Department's enforcement activities related to the three-fourths guarantee proposed in § 655.20(f). The Department accepts this suggestion and adds the following language to § 655.20(i)(1) and 29 CFR 503.16(i)(1): “* * * if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work;”.

Additionally, the Department has amended §§ 655.16(i)(2)(iv), 655.20(i)(1) and 655.20(i)(2)(v) and 29 CFR 503.16(i)(1) to require employers to maintain records of any additions made to a worker's wages and to include such information in the earnings statements furnished to the worker. Such additions could include performance bonuses, cash advances, or reimbursement for costs incurred by the worker. This requirement is consistent with the recordkeeping requirements under the FLSA in 29 CFR part 516. No other changes were made to this section in the Final Rule.

j. Transportation and visa fees (§ 655.20(j)). The Department proposed changes relating to transportation and visa costs in § 655.20(j). In § 655.20(j)(1)(i), the NPRM proposed to require an employer to provide, pay for, or reimburse the worker in the first workweek the cost of transportation and subsistence from the place from which the worker has come to the place of employment. If the employer advanced or provided transportation and subsistence costs to H-2B workers, or it was the prevailing practice of non-H-2B employers to do so, the NPRM proposed to require the employer to advance such costs or provide the services to workers in corresponding employment traveling to the worksite. The amount of the transportation payment was required to be at least the most economical and reasonable common carrier charge for the trip. Section 655.20(j)(1)(ii) of the NPRM proposed to require the employer, at the end of the employment, to provide or pay for the U.S. or foreign worker's return transportation and daily subsistence from the place of employment to the place from which the worker departed to work for the employer, if the worker has no immediate subsequent approved H-2B employment. If the worker has been contracted to work for a subsequent and certified employer, the last H-2B employer to employ the worker would be required to provide or pay the U.S. or foreign worker's return transportation. Therefore, prior employers would not be obligated to pay for such return transportation costs. The NPRM also proposed that all employer-provided transportation—

including transportation to and from the worksite, if provided—must meet applicable safety, licensure, and insurance standards (§ 655.20(j)(1)(iii)). Furthermore, all transportation and subsistence costs covered by the employer had to be disclosed in the job order (§ 655.20(j)(1)(iv)). Finally, § 655.20(j)(2) of the NPRM proposed that employers would be required to pay or reimburse the worker in the first workweek for the H-2B worker's visa, visa processing, border crossing, and other related fees including those fees mandated by the government (but not for passport expenses or other charges primarily for the benefit of the workers). As discussed below, a significant number of commenters addressed these proposed changes, and the Department has made two changes to the Final Rule as a result.

Employers and their representatives generally opposed at least some aspects of the proposal. For example, some employers asserted that paying such fees would be too costly and that transportation costs should be the responsibility of the employee or paid at the discretion of the employer. In particular, some ski resorts emphasized the costs they face because many of their ski instructors travel a significant distance by air to remote resorts. Many employers were particularly concerned with the requirement to pay transportation and subsistence costs for U.S. workers recruited from outside the local commuting distance, based upon their experience that U.S. workers have high rates of turnover and rarely stay for the entire season. A number of employers recounted their experience with the short periods worked by U.S. applicants. For example, one commenter gave examples from various employers who stated that, *e.g.*, of 25 U.S. workers hired, only four reported for work and only two stayed more than one week; the longest a U.S. worker remained employed was one month; no U.S. worker has stayed more than 2 days in ten to 15 years; in 13 seasons, no worker stayed more than a few weeks; in 5 years, only one U.S. worker reported to work and he lasted less than 2 weeks; and of the U.S. workers who report for work, fewer than 10 percent stay through the season.

Employers expressed particular opposition to reimbursing what a number of them labeled as disingenuous U.S. applicants who could exploit the employer by applying for a job they had no intention of performing simply to get the transportation and subsistence to a new area. Having received a free trip, such employees would quit the job and be able to look for full-time, year-round

work with another employer, because U.S. workers are not bound to work only for the H-2B employer. Such applicants would result in large costs to the employer with no return on their investment, and the employer could do nothing to mitigate its risk. Many such employers and their representatives suggested that it would be more appropriate to tie the reimbursement to either full completion of, or partial completion of, the term of employment. A number of them suggested adoption of the H-2A program provision requiring that workers must complete at least 50 percent of the work contract to be reimbursed for inbound transportation and subsistence expenses; they stated that this would help to minimize the risk that an employee could manipulate the system for free travel and would ensure that the employer benefited from the employment before disbursing the cost.

One commenter stated that the Department lacks the authority to require reimbursement of travel expenses, especially with regard to U.S. workers in corresponding employment, because the Internal Revenue Service does not allow employees to deduct such travel to the job as a business expense. Another commenter asserted that visa fees should be the responsibility of the employee because State Department regulations assign the cost to the foreigner. Finally, an employer suggested requiring employers to reimburse only the amount necessary to protect the FLSA minimum wage, but not the H-2B prevailing wage.

Employee advocates strongly supported the proposal and commended the Department for it. Numerous advocates described why it is essential for the employer to provide, pay for or reimburse transportation, subsistence and visa-related expenses in the first workweek, in order to ensure that workers are not forced to go into debt and borrow money at exorbitant rates. They emphasized that, without timely reimbursement, employees are more likely to tolerate abusive work environments in order to be able to repay their loans, rather than risk retaliatory termination. One commenter's survey of temporary foreign workers indicated that debts from such pre-employment costs are the main reason temporary foreign workers do not come forward to report violations of the law. Another commenter emphasized that employers are the primary beneficiaries of such expenditures, because they directly profit from the mobility of a low-wage workforce. Commenters stated that, if the costs of transportation and visa-

related expenses are not reimbursed, it effectively lowers the employees' wage rates below the required wage, which causes adverse effects because it puts downward pressure on the wages of similarly situated U.S. workers. And they noted that it is important that U.S. workers are provided the same benefit, both because the concept that there should be no preferential treatment for foreign workers is fundamental to the INA, and because it will make it possible for available U.S. workers to take jobs where the transportation costs otherwise would be an insurmountable hurdle. They stated that requiring transportation and subsistence reimbursement also encourages employers to consider more carefully the number of workers actually needed, making it less likely that employers will request more workers than they need and making it more likely that they will make more efforts to recruit U.S. workers.

Thus, these commenters believed that the proposed rule requirements, and even stronger measures, were necessary in order to make progress toward eliminating the history of abuses in the H-2B program. Some employee advocates suggested expanding the proposed regulation to clarify that inbound transportation includes travel between the home community and the consular city as well as between the consular city and the place of employment in the U.S., or to require reimbursement for additional expenses, such as hotels while traveling to the worksite or while waiting in the consular city for visa processing. They suggested requiring employers to bear these expenses up front, rather than reimbursing them, so that workers do not have to borrow money to pay the fees. They also suggested clarifying that the employer must pay for outbound transportation if the employer terminates the employee without cause or the employee is constructively discharged, such as where the employee leaves due to lack of work. A union suggested incorporating an H-2A provision requiring employers to provide free daily transportation to the worksite, noting that H-2B workers often have no means to commute and are forced into dangerous transportation arrangements, such as being packed into the open beds of pick-up trucks or squeezed into vans in excessive numbers. The union also recommended a requirement that such transportation comply with applicable laws. As an alternative, the union suggested that employers be required to state in the job order whether they will voluntarily

choose to provide such daily transportation to the jobsite, noting that such transportation would be applicable to both H-2B workers and domestic workers in corresponding employment. Another commenter specifically supported the requirement to disclose all transportation and subsistence costs in the job order.

After carefully considering the voluminous comments on this issue, the Department has made two changes in the Final Rule. Section 655.120(j)(1)(i) of the Final Rule continues to require employers to provide inbound transportation and subsistence to H-2B employees and to U.S. employees who have traveled to take the position from such a distance that they are not reasonably able to return to their residence each day. However, the Final Rule provides that employers must arrange and pay for the transportation and subsistence directly, advance at a minimum, the most economical and reasonable common carrier cost, or reimburse the worker's reasonable costs if the worker completes 50 percent of the period of employment covered by the job order if the employer has not previously reimbursed such costs. The Final Rule reminds employers that the FLSA imposes independent wage payment obligations, where it applies. Section 655.20(j)(1)(ii) of the Final Rule continues to require employers to provide return transportation and subsistence from the place of employment; however, the obligation attaches only if the worker completes the period of employment covered by the job order or if the worker is dismissed from employment for any reason before the end of the period. An employer is not required to provide return transportation if separation is due to a worker's voluntary abandonment. The Final Rule, like the NPRM, requires employers to reimburse all visa, visa processing, border crossing and other related fees in the first workweek.

The Department continues to believe that under the FLSA the transportation, subsistence, and visa and related expenses for H-2B workers are for the primary benefit of employers, as the Department explained in Wage and Hour's Field Assistance Bulletin No. 2009-2 (Aug 21, 2009). The employer benefits because it obtains foreign workers where the employer has demonstrated that there are not sufficient qualified U.S. workers available to perform the work; the employer has demonstrated that unavailability by engaging in prescribed recruiting activities that do not yield sufficient U.S. workers. The H-2B workers, on the other hand, only receive

the right to work for a particular employer, in a particular location, and for a temporary period of time; if they leave that specific job, they generally must leave the country. Transporting these H-2B workers from remote locations to the workplace thus primarily benefits the employer who has sought authority to fill its workforce needs by bringing in workers from foreign countries. Similarly, because an H-2B worker's visa (including all the related expenses, which vary by country, including the visa processing interview fee and border crossing fee) is an incident of and necessary to employment under the program, the employer is the primary beneficiary of such expenses. The visa does not allow the employee to find work in the U.S. generally, but rather restricts the worker to the employer with an approved labor certification and to the particular approved work described in the employer's application.

Therefore, the Final Rule adds a reminder to employers that the FLSA applies independently of the H-2B requirements. As discussed above, employers covered by the FLSA must pay such expenses to nonexempt employees in the first workweek, to the level necessary to meet the FLSA minimum wage (outside the Fifth Circuit). See, e.g., *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002); *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163 (11th Cir. 2003); *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 2011 WL 806792 (E.D.N.C. 2011); *Teoba v. Trugreen Landcare LLC*, 2011 WL 573572 (W.D.N.Y. 2011); *DeLeon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295 (N.D. Ga. 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. 2008); *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. 2008); contra *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010). Payment sufficient to satisfy the FLSA in the first workweek is also required because § 655.20(z) of the Final Rule, like the current H-2B regulation, specifically requires employers to comply with all applicable Federal, State, and local employment-related laws. Furthermore, because U.S. workers are entitled to receive at least the same terms and conditions of employment as H-2B workers, in order to prevent adverse effects on U.S. workers from the presence of foreign workers, the Final Rule requires the same reimbursement for U.S. workers in corresponding employment who are unable to return to their residence each

workday, such as those from another state who saw the position advertised in a SWA posting or on the Department's electronic job registry. The Department does not believe that the treatment of such expenses by the State Department or the Internal Revenue Service controls how they are categorized for these purposes. Rather, employers must simultaneously comply with all the laws that are applicable, and must do so by complying with the most protective standard. See *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950).

The Final Rule separately requires employers to reimburse these inbound transportation and subsistence expenses, up to the offered wage rate, if the employee completes 50 percent of the period of employment covered by the job order. The Department believes this approach is appropriate and adequately protects the interests of both U.S. and H-2B workers. It takes account of the concerns expressed by numerous employers that they would have to pay the inbound transportation and subsistence costs of U.S. workers recruited pursuant to H-2B job orders who do not remain on the job for more than a very brief period of time.

Additionally, the Final Rule requires reimbursement of outbound transportation and subsistence if the worker completes the job order period or if the employer dismisses the worker before the end of the period of employment in the job order, even if the employee has completed less than 50 percent of the period of employment covered by the job order. This requirement uses language contained in the DHS regulation at 8 CFR. 214.2(h)(6)(vi)(E), which states that employers will be liable for return transportation costs if the employer discharges the worker for any reason. See 8 U.S.C. 1184(c)(5)(A). For example, if there is a constructive discharge, such as the employer's failure to offer any work or sexual harassment that created an untenable working situation, the requirement to pay outbound transportation would apply. However, if separation from employment is due to voluntary abandonment by an H-2B worker or a corresponding worker, and the employer provides appropriate notification specified under § 655.20(y), the employer will not be responsible for providing or paying for return transportation and subsistence expenses of that worker.

This requirement to pay inbound transportation at the 50 percent point and outbound transportation at the completion of the work period is consistent with the rule under the H-2A visa program. Moreover, the Final Rule

fulfills the Department's obligation to protect U.S. workers from adverse effect due to the presence of temporary foreign workers. As discussed above, under the FLSA, numerous courts have held in the context of both H-2B and H-2A workers that the inbound and outbound transportation costs associated with using such workers are an inevitable and inescapable consequence of employers choosing to participate in these visa programs. Moreover, the courts have held that such transportation expenses are not ordinary living expenses, because they have no substantial value to the employee independent of the job and do not ordinarily arise in an employment relationship, unlike normal daily home-to-work commuting costs. Therefore, the courts view employers as the primary beneficiaries of such expenses under the FLSA; in essence the courts have held that inbound and outbound transportation are employer business expenses just like any other tool of the trade. A similar analysis applies to the H-2B required wage. If employers were permitted to shift their business expenses onto H-2B workers, they would effectively be making a de facto deduction and bringing the worker below the H-2B required wage, thereby risking depression of the wages of U.S. workers in corresponding employment. This regulatory requirement, therefore, ensures the integrity of the full H-2B required wage, rather than just the FLSA minimum wage, over the full term of employment; both H-2B workers and U.S. workers in corresponding employment will receive the H-2B required wage they were promised, as well as reimbursement for the reasonable transportation and subsistence expenses that primarily benefit the employer, over the full period of employment. To enhance this protection, the Final Rule contains the additional requirement that, where a worker pays out of pocket for inbound transportation and subsistence, the employer must maintain records of the cost of transportation and subsistence incurred by the worker, the amount reimbursed, and the date(s) of reimbursement.

The Department made two clarifying edits to this section in the Final Rule. Paragraph (1)(ii) of this section has been amended to clarify that the employer is required to provide or pay for the return transportation and daily subsistence of a worker who has completed the period of employment listed on the certified *Application for Temporary Employment Certification*, regardless of any subsequent extensions. The Final Rule

continues to provide that if a worker has contracted with a subsequent employer that has agreed to provide or pay for the worker's transportation to the subsequent employer's worksite, the subsequent employer must provide or pay for such expenses; otherwise, the employer must provide or pay for that transportation and subsistence. Paragraph (2) of this section has been amended to clarify that the employer need not, but may, reimburse workers for expenses that are primarily for the benefit of the employee.

The Department does not believe that any other change to § 655.20(j) is necessary. The regulatory text already clarifies that transportation must be reimbursed from the place from which the worker has come to work for the employer to the place of employment; therefore, the employer must pay for transportation from the employee's home community to the consular city and then on to the worksite. Similarly, the regulatory text already requires the employer to pay for subsistence during that period, so if an overnight stay at a hotel in the consular city is required while the employee is interviewing for and obtaining a visa, that subsistence must be reimbursed. See *Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 WL 2106188 (S.D. Ga. 2007). Finally, if an employer provides daily transportation to the worksite, the regulation already requires both that the transportation must comply with all applicable safety laws and that the employer must disclose the fact that free transportation will be provided in the job order.

k. Employer-provided items (§ 655.20(k)). The Department proposed to add a new requirement under § 655.20(k), consistent with the requirement under the FLSA regulations at 29 CFR part 531, that the employer provide to the worker without charge all tools, supplies, and equipment necessary to perform the assigned duties. The employer may not shift to the employee the burden to pay for damage to, loss of, or normal wear and tear of, such items. This proposed provision gives workers additional protections against improper deductions for the employer's business expenses from required wages.

The Department received numerous comments on this provision, the majority of which were supportive. Discussing the importance of the requirement, one employee advocacy organization cited a worker testimonial in which a former H-2B crab picker said the boss doesn't give tools to use on the job. Instead, he sells the workers knives to pick the crabmeat. He sold a worker

a knife for \$30, but they don't have an option to not use it. They deduct this amount from the paychecks.

Another organization referred to a study of H-2B crab pickers working on Maryland's Eastern Shore which found that 54 percent of workers interviewed had had deductions for tools taken from their weekly paychecks. Numerous employers and employer organizations signed on to a report, jointly published by two large industry groups, that characterized the requirement as seeming unlikely to cause major problems for employers enrolled in the program.

However, some commenters had objections to the proposed requirement. One trade organization expressed unqualified opposition to the proposal. Several employers and industry representatives expressed concern that the provision was incompatible with those industries in which employees customarily supply their own tools. Several of these commenters noted that in certain industries employees have personal preferences for their equipment and as a matter of course bring it with them to the job site. One employer requested that the Department simply state that any tools or equipment provided to domestic workers should be provided to similarly-employed H-2B workers, and argued that the requirement would unfairly favor H-2B workers by offering them a benefit that was not legally extended to U.S. workers. This commenter overlooked the fact that, like all of the provisions in § 655.20, this requirement applies to both H-2B workers and U.S. workers in corresponding employment, and would therefore not disadvantage domestic workers. As discussed above with respect to the disclosure requirement in § 655.18(g), section 3(m) of the FLSA prohibits employers from making deductions for items that are primarily for the benefit of the employer if such deductions reduce the employee's wage below the Federal minimum wage. Therefore an employer that does not provide tools but requires its employees to bring their own would already be required under the FLSA to reimburse its employees for the difference between the weekly wage minus the cost of equipment and the weekly minimum wage. The proposed provision simply extends this protection to cover the required H-2B offered wage, in order to protect the integrity of the required H-2B wage rate and thereby avoid adverse effects on the wages of U.S. workers. However, as discussed above with regard to proposed § 655.18(j), this requirement does not prohibit employees from voluntarily choosing to

use their own specialized equipment; it simply requires employers to make available to employees adequate and appropriate equipment.

No other substantive comments were received on this provision; the Final Rule therefore retains the requirement as proposed.

I. Disclosure of the job order (§ 655.20(l)). Proposed § 655.20(l) required that the employer provide a copy of the job order to H-2B workers no later than the time of application for a visa and to workers in corresponding employment no later than the first day of work. The job order would contain information about the terms and conditions of employment and employer obligations as provided in proposed § 655.18 and would have to be in a language understandable to the workers. The Department received numerous comments in support of this provision, and none in opposition to it.

One advocacy organization used the experience of an H-2B worker, Yolanda, to illustrate the importance of proposed § 655.20(l):

When Yolanda went to the Eastern Shore for what would be her final year, she found that her wages were much different than what the recruiter promised. Yolanda was promised \$7 per hour, but earned \$5 instead. She was promised overtime, but never received it.

This commenter concluded:

Had Yolanda, or someone in a similar position, known about the actual terms and conditions of employment, she could make an informed decision as to whether employment in the U.S. was worthwhile.

Yet many employee advocates urged the Department to go further in the Final Rule. Several advocacy groups suggested that the Department require written disclosure of the job order at the time of recruitment, as required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), rather than when the worker applies for a visa or, in the case of U.S. workers in corresponding employment, on the first day of work. These commenters asserted that earlier disclosure would allow potential H-2B workers to more fully consider their options before committing to a U.S. employer. The Department notes that H-2B employers that are subject to MSPA are bound by the requirements of that Act, including disclosure of the appropriate job order at the time of recruitment. The H-2B and MSPA programs are not analogous, however. MSPA workers are often recruited domestically shortly before the start date of the job order, making the provision of the job order at the time of recruitment both logical and practical.

In the H-2B program, as in the H-2A program, recruitment is often less directly related to the work start date, making immediate disclosure of the job order less necessary. It thus is more practical to require disclosure of the job order at the time the worker applies for a visa, to be sure that workers fully understand the terms and condition of their job offer before they make a commitment to come to the United States. To clarify, the time at which the worker applies for the visa means before the worker has made any payment, whether to a recruiter or directly to the consulate, to initiate the visa application process. The Department maintains that worker notification is a vital component of worker protection and program compliance, and believes that the proposed requirement provides workers with sufficient notice of the terms and conditions of the job so that they can make an informed decision.

Some of the same commenters requested that the Department amend § 655.20(l) to require that the job order be provided to workers in their primary language, removing the qualifying phrase as necessary or reasonable. The Department agrees that providing the terms and conditions of employment to each worker in a language that she understands is a key element of much-needed worker protection. However, as the Department intends to broadly interpret the necessary or reasonable qualification and apply the exemption only in those situations where having the job order translated into a particular language would place an undue burden on an employer without significantly disadvantaging an H-2B or corresponding worker, it declines to remove the qualifying language.

An industry group argued that this section was designed to transform the job order into an employment contract. The purpose of the disclosure is to provide workers with the terms and conditions of employment and of employer obligations to strengthen worker protection and promote program compliance. Furthermore, as discussed in the preamble to § 655.18, the Department views the terms and conditions of the job order as binding, and requires employers to attest that they will abide by the terms and conditions of the H-2B program. However, the Department leaves it to the courts to determine private parties' contractual rights under state contract law.

No other substantive comments were received on this provision; the Final Rule therefore retains § 655.20(l) as proposed.

m. Notice of worker rights (§ 655.20(m)). Proposed § 655.20(m) required that the employer post a notice in English of worker rights and protections in a conspicuous location and post the notice in other appropriate languages if such translations are provided by the Department. While the Department received numerous comments in support of this provision, several commenters suggested amendments that they felt would strengthen worker protections. Several advocacy groups requested that the Department specify that the notice of worker rights must instruct workers how to file a complaint with WHD. The poster, which will be printed and provided by the Department, will state that workers who believe their rights under the program have been violated may file confidential complaints and will display the number for WHD's toll-free help line.

Another advocacy organization suggested that the provision be amended to require the employer to post the poster in the language of any worker who is not fluent in English. The Department acknowledges that the purpose of this section would be undermined if workers cannot read the notice. However, the Department cannot guarantee that it will have available translations of the notice in any given language, and cannot require employers to display a translation that may not exist. Translations will be made in response to demand; employers and organizations that work with H-2B workers are encouraged to inform the Department about the language needs of the H-2B worker population.

n. No unfair treatment (§ 655.20(n)). Proposed § 655.20(n) added new language on nondiscrimination and nonretaliation protections that are fundamental to statutes that the Department enforces. Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person's attempt to report or correct perceived violations of the H-2B provisions. As provided in proposed 29 CFR 503.20, make-whole relief would be available to victims of discrimination and retaliation under this paragraph.

The Department received numerous comments in support of § 655.20(n); among them were comments from worker advocacy organizations, labor organizations, and a State Attorney General's office. One comment, submitted by a coalition of human rights organizations, stated support for § 655.20(n) and noted that the provision will contribute to the nation's battle against human rights abuses, abroad and

at home. Another comment, submitted by a worker advocacy organization, reinforced the importance of anti-retaliatory protections, stating that over 100 workers surveyed in April 2009 reported across the board that they would not come forward to report abuse—even when facing severe labor exploitation. Ignacio Zaragoza, an H-2B temporary foreign worker from Mexico, explained the following, “Guestworkers are afraid to report abuse. I’ve known people in Mississippi that have even been assaulted and didn’t report it because they were so afraid of losing everything—their job, their visa, everything. Guestworkers are really afraid of retaliation.”

Multiple comments suggested adding language to § 655.20(n)(4), which proposed providing protection from retaliation based on contact or consultation with an employee of a legal assistance organization or an attorney, to include contact with labor unions, worker centers, and worker advocacy organizations. These commenters maintain that labor unions, worker centers, and community organizations are often the first point of contact for H-2B workers who have experienced violations and who may be isolated or lack familiarity with the local community and how to obtain redress or legal assistance. In support of the above argument, one commenter cited to the NPRM where the Department stated that because H-2B workers are not eligible for services from federally-funded legal aid programs, most H-2B workers have no access to lawyers or information about their legal rights. 76 FR 15143, Mar. 18, 2011. In addition, a temporary foreign worker advocacy organization noted that employers frequently retaliated against H-2B workers upon learning that the H-2B workers had spoken with that organization regarding their rights under the H-2B program. The Department agrees with these commenters that proposed § 655.20(n) fails to cover the majority of first contacts between temporary foreign workers and those who are regularly communicating directly with foreign workers helping them to correct and/or report perceived violations of the H-2B provisions. The commenters’ suggested additions to § 655.20(n) are fully consistent with the intent of this anti-retaliation provision. The Department recognizes that workers should be just as protected from retaliation if they contact or consult with worker centers, community organizations, or labor unions as they are if they contact or consult with attorneys or legal assistance organizations. Changes to

§ 655.20(n)(4) will be reflected in the Final Rule as follows: “Consulted with a workers’ center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder;”.

One comment submitted by a coalition of human rights organizations suggested that the right to federally-funded legal services be explicitly provided for H-2B workers. However, providing the right to federally-funded legal services is beyond the Department’s jurisdiction. In addition, some comments referred to § 655.20(n) as protecting against retaliation from engaging in acts of worker organizing. To clarify, the provision protects against discrimination and retaliation for asserting rights specific to the H-2B program. Workers’ rights to join together, with or without a union, to improve their wages and working conditions are protected under the National Labor Relations Act and other similar State laws.

A labor union suggested that the Department provide an avenue for H-2B workers to file oral complaints with the Department by telephone or electronically regarding H-2B violations and all other federal labor rights granted temporary workers. The Department already accepts complaints through these means. Section 655.20(m) requires all H-2B employers to display a notice of worker rights, which sets out the rights and protections for H-2B workers and workers in corresponding employment and informs workers how to file a complaint with WHD.

A similar comment suggested the Department create a mechanism for H-2B workers who have returned to their home country or family members who are currently in the home country and hearing about ongoing worker abuse to file a complaint with DOL from their country of origin. To clarify, any person may contact the WHD by phone at 1-866-4-USWAGE or online at www.wagehour.dol.gov to request information about the H-2B program or to file a complaint.

One comment, submitted by a State Attorney General’s office, suggested the Department clarify that § 655.20(n) provides protection to U.S. workers and H-2B workers alike. This commenter and a temporary foreign worker advocacy group stressed the importance of providing workers, especially H-2B workers who are particularly vulnerable to retaliation, protection against employer retaliatory acts, as well as the importance of encouraging workers to

come forward when there is a potential workplace violation. The Department recognizes that H-2B workers can be particularly vulnerable to retaliation and acknowledges the importance of assuring that H-2B workers are protected against any unfair treatment and retaliation. The Department therefore clarifies that § 655.20(n) will apply equally to H-2B workers and workers in corresponding employment.

The State Attorney General’s office also sought clarification of the phrase “related to 8 U.S.C. 1184(c)” found in § 655.20(n)(1). The commenter suggested the Department state that related complaints need not specify any specific provision of law, and would also include complaints of violations of related state and local laws. The Department rejects this suggestion, as the anti-retaliation provision applies only to the H-2B program. However, the Department notes that § 655.20(z) requires employers to abide by all other Federal, State, and local employment-related laws, including any anti-retaliation provisions therein.

Another comment submitted by a worker advocacy group encouraged the Department to clarify that legal assistance sought in relation to the terms and conditions of employment includes legal assistance relating to employer-provided housing. If a worker sought legal assistance after an employer charged for housing that was listed as free of charge in the job order, this would be a protected act; however, a routine landlord-tenant dispute may not fall under the protections of this section.

o. Comply with the prohibitions against employees paying fees (§ 655.20(o)). Proposed § 655.20(o) prohibited employers and their attorneys, agents, or employees from seeking or receiving payment of any kind from workers for any activity related to obtaining H-2B labor certification or employment. The Department received numerous comments in support of this section from advocacy groups, labor organizations, and an independent policy institute. However, a number of these commenters took issue with the provision allowing employers and their agents to receive reimbursement for passport fees. These commenters argued that passport fees are not always for the primary benefit of the employee, particularly where H-2B workers receive passports that expire within 1 year of their issue date, and urged the Department to qualify the exception to take such circumstances into account. The Department is unaware of passports with such extremely short validity

periods and with restrictions which would not allow the worker to use the passport in ways unrelated to the H-2B employment. As such, the Department declines to make the suggested change.

The Department also received comments from a legal network and an independent policy institute expressing concern that the proposed section did not protect workers from coercion by recruiters tenuously affiliated with an employer or an employer's designated agent. These commenters requested that the Department go beyond the requirement at § 655.20(p), which obligates employers to execute a written contract with any third-party agents or recruiters prohibiting them from seeking or receiving payment from prospective employees, and amend § 655.20(o) to make H-2B employers strictly liable for any recruitment or placement fees charged by third parties. The Department recognizes these commenters' concerns but must reject this request for the reasons stated in the preamble under 29 CFR 503.20, Sanctions and remedies, Liability for prohibited fees collected by foreign labor recruiters and sub-contractors.

No other comments were received on this section, which is adopted as proposed in the Final Rule.

p. Contracts with third parties to comply with prohibitions (§ 655.20(p)). In § 655.20(p), the Department proposed to amend existing § 655.22(g)(2) to require that an employer that engages any agent or recruiter must prohibit in a written contract the agent or recruiter from seeking or receiving payments from prospective employees.

The Department received numerous comments in support of this proposal. However, some commenters requested that the Department go further: One commenter requested that the contract include the full contact information for the agent or recruiter. The Department declines to require such information in the contract, but notes that the new requirements at § 655.9 of this Final Rule require disclosure of the employer's agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers, as well as the identity and geographic location of any persons or entities hired by or working for the recruiter and the agents or employees of those persons and entities. The difference between § 655.9, which requires the employer to provide copies of such agreements to the Department when an employer files its *Application for Temporary Employment Certification*, and this provision's requirements is that the requirements in this provision are of an ongoing nature.

The employer must always prohibit the seeking or collection of fees from prospective employees in any contract with third parties whom the employer engages to recruit international workers, and is required to provide a copy of such existing agreements when the employer files its *Application for Temporary Employment Certification*. For employers' convenience, and to facilitate the processing of applications, the Final Rule contains the exact language of the required contractual prohibition that must appear in such agreements. Further guidance on how the Department interprets the employer obligations in § 655.20(o) and (p) regarding prohibited fees can be found in Field Assistance Bulletin No. 2011-2 (May 2011, available at http://www.dol.gov/whd/FieldBulletins/fab2011_2.htm).

One comment submitted by an advocacy group informed the Department that many recruiters engage local intermediaries in the recruitment process and these recruiting subcontractors in turn charge fees. The commenter suggested that in addition to stating that the recruiter will not charge a fee, the contract must insist that the recruiter will ensure that no subcontractor will charge fees and that no workers will pay fees. The Department recognizes the complexities of recruiters using subcontractor recruiters and has accounted for this in § 655.20(p) by including the following language: "The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly * * *".

The specific language covers subcontractors. In addition, the required contractual prohibition applies to the agents and employees of the recruiting agent, and encompasses both direct and indirect fees. As these requirements should sufficiently address the commenter's concerns, the Department declines to adopt this suggestion.

A Member of Congress urged the Department to require that employers publicly disclose all recruiters and sub-recruiters. In another comment submitted by a community-based organization, an H-2B worker described his experience with recruiters and lack of information regarding the recruiter, citing having to pay very large fees to the recruiters in his community, just for the opportunity to apply for a work visa and later work in the United States. He explained that they generally do not even know who the recruiter is working for.

Another comment provided the following example of common recruitment violations: In January 2011, a group of 25 Mexican nationals in the state of Guanajuato had been promised visas and six months of work by a recruiter. The recruiter charged each of the workers 2000 pesos to process the visa application. Unaware of the legitimacy of the job offer, who the recruiter was, or whom he was representing, the 25 Mexicans sent the money and their passports to the address the "recruiter" provided. After several weeks of no response, the workers inquired at the address given, but were told by the person living there that the recruiter had died. The workers lost both their money and their passports.

The Department agrees that such public disclosure is necessary and has addressed the issue under § 655.9. The Department will maintain a publicly available list of agents and recruiters who are party to such recruitment contracts, as well as a list of the identity and location of any persons or entities hired by or working for the recruiters to recruit H-2B workers for the H-2B job opportunities offered by the employer.

q. Prohibition against preferential treatment of H-2B workers (§ 655.20(q)). In § 655.20(q) the Department proposed to prohibit employers from providing better terms and conditions of employment to H-2B workers than to U.S. workers. This provision is identical to that found at § 655.18(a)(1) of this Final Rule; a discussion of comments received in response to the proposal can be found in the preamble to that section. The Final Rule adopts the proposal as written.

r. Non-discriminatory hiring practices § 655.20(r). In § 655.20(r) the Department proposed to retain the non-discriminatory hiring provision contained in § 655.22(c) of the 2008 Final Rule and to clarify that the employer's obligation to hire U.S. workers continues throughout the period described in proposed § 655.20(t). Under this provision, rejections of U.S. workers continue to be permitted only for lawful, job-related reasons. An advocacy organization representing low wage workers commented in support of the proposed provision, stating that the provision helps the Department fulfill its obligation to ensure that U.S. workers are not adversely affected by the H-2B program. This commenter also advised the Department to be aware of job order terms that may appear to be non-discriminatory but have a discriminatory impact on U.S. workers, such as requiring drug testing or

criminal background checks as a condition for employment. The Department acknowledges the potential problem and directs the commenter to § 655.20(q), which specifies that job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. Thus, where an employer requires drug tests or criminal background checks for U.S. workers and does not require the same tests and background checks for H-2B workers, the employer has violated this provision. Additionally, where an employer conducts criminal background checks on prospective U.S. employees, in order to be lawful and job-related, the employer's consideration of any arrest or conviction history must be consistent with guidance from the Equal Employment Opportunity Commission on employer consideration of arrest and conviction history under Title VII of the Civil Rights Act of 1964. See <http://www.eeoc.gov/policy/docs/convict1.html>; http://www.eeoc.gov/policy/docs/arrest_records.html; http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm. Thus, employers may reject U.S. workers solely for lawful, job-related reasons, and they must also comply with all applicable employment-related laws, pursuant to § 655.20(z). The Final Rule adopts the NPRM provision as proposed.

s. Recruitment requirements (§ 655.20(s)). The NPRM proposed that the employer conduct required recruitment as described in proposed §§ 655.40–46. No substantive comments were received concerning employers' obligation to comply with recruitment requirements, and the section is adopted in the Final Rule as proposed.

t. Continuing obligation to hire U.S. workers § 655.20(t). In proposed § 655.20(t), the Department extended the period during which the employer must hire qualified U.S. workers referred by the SWA or who respond to recruitment to 3 days before the date of need or the date the last H-2B worker departs for the workplace for the certified job opportunity, whichever is later. In order to determine the appropriate cutoff date for SWA referrals, the Department proposed that the employer notify the SWA in writing if the last H-2B worker has not departed by 3 days before the date of need and of the new departure date as soon as available. The Department characterized as inadequate the existing requirements under which an employer is under no obligation to hire U.S. workers after submitting the

recruitment report, which could occur as early as 120 days before the first date of need. U.S. applicants—particularly unemployed workers—applying for the kinds of temporary positions typically offered by H-2B employers are often unable to make informed decisions about jobs several months in advance; it is far more likely that they are in need of a job beginning far sooner. In fact, many of these applicants may not even be searching for work as early as several months in advance and are therefore unlikely to see SWA job orders in the 10 days they are posted or the newspaper advertisements on the 2 days they are published in accordance with the existing minimum recruitment requirements. This segment of the labor force cannot afford to make plans around the possibility of a temporary job several months in the future. The current recruitment and hiring structure simply cannot be reconciled with the Department's obligation to protect U.S. workers and ensure that qualified U.S. applicants are unavailable for a job opportunity before H-2B workers are hired.

The Department received many comments on this proposed requirement—predominantly from the SBA Office of Advocacy, employers, their advocates, and employer associations—asserting that accepting U.S. applicants until 3 days before the date of need would be unworkable for employers. Some of these commenters described this as the most troubling provision in the NPRM. Some of these commenters suggested that the Department instead modify existing § 655.15(e) to require the SWA to keep the job order posted for 30 days, while others recommended changing the closing date from 3 days to 30 days or 60 days before the date of need.

The Department also received numerous comments in support of the proposed provision from advocacy groups, policy institutes, and labor organizations. However, some of these commenters felt that the provision did not go far enough to protect the interests of U.S. workers. Some commenters, including a labor organization, a legal network, and a legal policy institute, requested that the Department extend the obligation to hire qualified U.S. workers into the certification period, either until 50 percent of the period has elapsed, as in the H-2A program, or until only 2 weeks remain.

After extensive consideration of all comments and mindful of its responsibilities to ensure that qualified, available U.S. workers are not precluded from job opportunities, the Department has decided to change the day through

which employers must accept SWA referrals of qualified U.S. applicants until 21 days before the date of need, irrespective of the date of departure of the last H-2B worker. The Department believes this reduction in the priority hiring period to 21 days before from 3 days before the date of need will allay a number of employer concerns, and it takes into consideration the USCIS requirement that H-2B workers not enter the United States until 10 days before the date of need. Whereas employers expressed concern that the proposed 3-day priority hiring cutoff opened up the possibility that a U.S. applicant could displace an H-2B worker who has been recruited, traveled to the consular's office, obtained a visa, or even begun inbound transportation to the worksite, the 21-day provision gives employers more certainty regarding the timing of and need for their efforts to recruit H-2B workers. At the same time, the Department believes that the 21-day requirement, which increases the priority hiring period by as much as 3 months compared to the current rule, is sufficient to protect the interests of U.S. workers. Further, the Department notes that the extended recruitment period is not the only provision of this Final Rule enhancing U.S. applicants' access to vacancies: The number and breadth of recruitment vehicles in place (*i.e.*, contact of previous workers, a national job registry, a 15-day job posting at worksites, among others) have also greatly expanded.

A number of employers, trade associations, and professional associations expressed concern that a continuing obligation to accept U.S. applicants could burden employers with additional expenses. They argued that if an employer is compelled to hire a U.S. worker close to the date of need, the employer might have to absorb the cost of recruitment, travel, and housing that it had already arranged for foreign workers. Employers are encouraged to delay recruitment of foreign workers until it becomes evident that it will be necessary to hire such workers. With regard to travel expenses, the Department asserts that the additional time granted to employers in the Final Rule will be sufficient to allow for the arrangement of inbound transportation without employers having to bear any risk of last-minute cancellations, pay premiums for refundable fares, or pay visa expenses that are ultimately not needed. Housing arrangements should not present an issue, as § 655.20(q) requires an employer to offer U.S. workers the same benefits that it is

offering, intends to offer, or will provide to H-2B workers. If an employer intends to offer housing to H-2B workers, such housing must also be offered to all U.S. applicants who live outside the area of intended employment. Housing secured for workers can just as easily be occupied by U.S. workers as by H-2B workers, or some combination of U.S. and H-2B workers.

Many of the same commenters also worried that foreign workers no longer needed would have wasted their time in committing to the job opportunity and traveling to the United States, and that some might sue for breach of contract. As discussed above, the new 21-day provision will prevent H-2B workers from being dismissed after beginning travel from their home to the consular office or even to the United States as the obligation to hire U.S. workers now ends 11 days before USCIS permits H-2B workers to be admitted to the country. Additionally, in order to create appropriate expectations for potential H-2B workers, when an employer recruits foreign workers, it should put them on notice that the job opportunity will be available to U.S. workers until 21 days before the date of need; therefore, the job offer is conditional upon there being no qualified and available U.S. workers to fill the positions.

A number of employers, trade associations, and professional associations commented about what they called disingenuous applicants, *e.g.*, U.S. workers who would be referred shortly before the date of need, triggering an employer's obligation to hire them, but who would then shirk their responsibilities or potentially abandon the job altogether, leaving the employer with an unmet business need. These commenters expressed concern that employers would be forced to reject recruited foreign workers in favor of SWA-referred U.S. workers who would quickly abandon employment, leaving employers understaffed and unable to find replacement workers; several commenters asserted the U.S. workers never show up for seasonal employment. The Department believes the worker protections contained in this Final Rule will encourage U.S. applicants hired to remain on the job. In addition, provisions such as that found at § 655.20(y) (Abandonment/termination of employment) offer protection to employers from workers who might accept the offer of employment but who subsequently abandon the job, as § 655.20(y) relieves the employer, under certain circumstances, of the responsibilities to

provide transportation and to fulfill the three-quarter guarantee obligation.

Some employers, trade associations, and professional associations expressed concern that the proposed structure would inhibit their ability to plan for their seasons and commit to contracts. The Department notes that regardless of the obligation to hire cutoff, the H-2B employer has a high degree of certainty that it will have access to workers, whether from within or outside the United States. Further, the Final Rule's 21-day obligation to hire cutoff should provide employers with ample time to identify foreign workers if they are, in fact, needed and to initiate their travel without substantial uncertainty. The purpose of this provision is to ensure that available U.S. workers have a viable opportunity to apply for H-2B job opportunities and to facilitate the employment of these workers. The Department believes that the proposed provisions do not pose a disadvantage to employers in terms of having certainty that positions will be filled.

One employer noted that State laws requiring employers in some industries to submit requests for background checks or drug testing for their employees 30 to 45 days before the date of need would preclude the hiring of U.S. workers 21 days before the date of need. A background check or drug test required for employment in a State, if listed in the job order, would be considered a bona fide job requirement, as long as it was clearly disclosed in the job order and recruitment materials. An applicant who submitted an application for employment after a State-established deadline and was therefore unable to undergo such an evaluation would be considered not qualified for employment in that State. However, consistent with §§ 655.18(a)(2) and 655.20(e), such a requirement must be disclosed in the job order, and the employer would bear the responsibility of demonstrating that it is bona fide and consistent with the normal and accepted requirements imposed by non-H-2B employers in the same occupation and area of intended employment. Furthermore, employers cannot treat U.S. workers less favorably than foreign workers with regard to start date; employers may not conduct such screening for H-2B workers at a later date if the employer does not provide the same late screening for U.S. workers who submit an application after a State-established deadline.

Due to the modification of this provision in the Final Rule allowing for a fixed, 21-day cut-off date for the priority hiring rights of U.S. workers, and with the knowledge (as reported in

the comments discussed under § 655.20(f) (three-fourths guarantee)) that many employers' workforce needs vary throughout the season and they require fewer workers in slow months at the beginning and end of the season, the Department wishes to remind employers about the requirements of the three-fourths guarantee. Specifically, the guarantee begins on the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later. An employer cannot delay the three-fourths guarantee by telling workers not to come to work on or after the advertised first date of need because the employer does not have a need for them at that time. Particularly for U.S. workers who are not traveling to the place of employment, this means that when they present themselves at the place of employment on the advertised first date of need, the three-fourths guarantee is triggered, whether or not the employer has sufficient full-time work for all of them to perform.

u. No strike or lockout (§ 655.20(u)). The Department proposed in § 655.20(u) to modify the no strike or lockout language in the current rule to require employers to assure the Department that there is no strike or lockout at the worksite for which the employer is requesting H-2B certification, rather than solely in the positions being filled by H-2B workers, which is the requirement under the current regulations. If there is a strike or lockout at the worksite when the employer requests H-2B workers, the CO may deny the H-2B certification.

The Department received several comments from advocacy groups and labor organizations in support of the proposed change. These groups suggested that the change would provide a needed protection for U.S. workers whose employers seek to circumvent the current regulatory provisions by transferring workers to fill positions vacated by striking workers. One labor organization that generally supported the proposed regulation indicated that it believed the Department did not go far enough because employers could still transfer U.S. workers from one worksite to a second to fill positions vacated by striking workers, then use H-2B workers to fill the vacancies at the first worksite. This commenter suggested that if the Department would not extend the strike/layoff prohibition to all employer worksites it should at least consider expanding the prohibition to worksites operated by the employer within a particular region or geographic proximity, for example within a 500-

mile radius. The Department acknowledges the commenter's concern, and while the Department rejects the proposal to expand the provision to all employer locations and rejects the proposal to extend the prohibition to all employer facilities within a 500-mile radius, the Department has concluded that, in order to effectuate its intent in expanding the no strike or lockout provision as proposed in the NPRM, it will expand the provision to include all employer worksites within the area of intended employment. Thus, the proposed language has been modified in the Final Rule to further decrease the chances that an unscrupulous employer will circumvent the regulatory requirement by transferring U.S. workers to fill positions vacated by striking workers and employing H-2B workers in the positions those U.S. workers vacated. The Department believes that this extension will provide added protection for workers whose employers have multiple locations within a commuting distance where transferring employees among locations would be relatively easy.

Several trade associations commented that the prohibition on strikes/lockouts was too broad. One of these commenters was concerned that the Department did not specify that the provision was not intended to encompass annual layoffs that occur due to the end of the peak season. The Department did not intend for § 655.20(u) to include employer layoffs; section § 655.20(v) addresses employer layoffs. Other commenters were concerned that a work stoppage as a result of labor disputes could refer to commonly-occurring minor disagreements and would effectively mean no employer in the country could use the program. The Department maintains that the definition of strike is sufficiently clear, and contends that this provision will not inhibit the use of the program by a large number of employers.

Another commenter indicated that the ability of a CO to deny an application due to a strike or a lockout might complicate the application process and increase delays, unsuccessful applications, and last-minute refusals of H-2B workers. The Department does not anticipate that this will be a problem as long as employers do not seek approval of an *Application for Temporary Employment Certification* while there is a strike or lockout at the worksite.

v. No recent or future layoffs (§ 655.20(v)). Proposed § 655.20(v) modified the dates of impermissible layoffs of U.S. workers, extending the period during which an H-2B employer must not lay off any similarly employed

U.S. workers from 120 days after the date of need to the end of the certification period. The Department also proposed adding the requirement that H-2B workers must be laid off before any U.S. worker in corresponding employment.

The Department received several comments that expressed support for this revision. The Department received two comments that suggested the period be extended to 180 days prior to the date of need, instead of the current provision of 120 days prior to the date of need. One commenter, a labor organization, suggested the 180-day period in order to be consistent with one of its other proposed regulatory changes, discussed in the preamble to § 655.20(w). The Department did not adopt the relevant portion of that suggested change, and therefore declines to change this provision. One commenter asserted that this change would correspond with a U.S. worker's eligibility for unemployment benefits. Unemployment insurance eligibility varies by State and can change due to economic conditions, while the 120-day period in the layoff provision is tied to the seasonal nature of the program. The Department maintains the 120-day period in this Final Rule.

Several employers commented that the regulations should specify that this provision is not intended to address annual layoffs that occur due to the end of the peak season. The Department notes that the provision specifically permits layoffs due to lawful, job-related reasons provided that the employer performs all required recruitment and contacts all former U.S. employees as indicated in § 655.20(w). Similarly, one commenter indicated that this provision would not allow an employer who laid off workers due to a natural or manmade disaster to request H-2B workers when cleanup work begins and the employer is unable to find U.S. workers. The Department concludes that these commenters' concerns are unfounded, as the provision specifically permits layoffs due to lawful, job-related reasons such as the end of the peak season or a natural or manmade disaster, as long as, if applicable, the employer lays off H-2B workers first.

w. Contact with former U.S. employees (§ 655.20(w)). The Department proposed to require employers to contact former U.S. employees who worked for the employer in the occupation and at the place of employment listed on the *Application for Temporary Employment Certification* within the last year, including any U.S. employees who were laid off within 120 days before the date

of need. This expanded the existing requirement that employers contact only former employees who were laid off during the 120 days preceding the date of need. The employer is not required to contact those who were dismissed for cause or who abandoned the worksite. Note, however, that voluntary abandonment is different from a constructive discharge, which occurs when the "working conditions have become so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004).

All comments addressing this issue supported the change. One advocacy organization that supported the change also expressed concern about employers determining which workers they have terminated for cause because there is no requirement that employers keep records of the reasons why a person was dismissed. Though the regulations do not specify a requirement to keep records of reasons for termination, many employers keep such records as a matter of general business practice. Moreover, such a record would be useful if there were an investigation to show that the termination was in fact for cause and not a layoff.

A labor organization proposed that the Department require employers to contact those employees who quit after having their hours reduced by 25 percent or more during the 180-day period preceding the submission of the *Application for Temporary Employment Certification*. The Department reminds employers if qualified former employees apply during the recruitment period they, like all qualified U.S. applicants, must be offered employment. However, there is no definitive way to determine the motivation behind an employee's resignation. The suggested requirement would place an unnecessary burden on both employers seeking to comply with the provision and Departmental employees seeking to verify compliance. The Department therefore declines to make the suggested change and maintains the proposed language in the Final Rule.

x. Area of intended employment and job opportunity (§ 655.20(x)). Proposed § 655.20(x) modified existing § 655.22(l) by additionally prohibiting the employer from placing a worker in a job opportunity not specified on the *Application for Temporary Employment Certification*, clarifying that an H-2B worker is only permitted to work in the job and in the location that OFLC approves unless the employer obtains a new labor certification. No comments were received on this section, and the

provision is adopted in the Final Rule without change.

y. Abandonment/termination of employment (§ 655.20(y)). Proposed § 655.20(y), which is largely consistent with the existing notification requirement in § 655.22(f), described the requirement that employers notify OFLC and DHS within 2 days of the separation of an H-2B worker or worker in corresponding employment if the separation occurs before the end date certified on the *Application for Temporary Employment Certification*. The section also deemed that an abandonment or abscondment begins after a worker fails to report for work for 5 consecutive working days, and added language relieving the employer of its outbound transportation requirements introduced in the NPRM under § 655.22(j) and 29 CFR 503.16(j) if separation is due to a worker's voluntary abandonment. Additionally, the proposed section clarified that if a worker voluntarily abandons employment or is terminated for cause, an employer will not be required to guarantee three-quarters of the work in the worker's final partial 6- or 12-week period, as described in proposed § 655.22(f) and 29 CFR 503.16(f).

A professional association asserted that an employer that fails to provide notice as required should be relieved of its three-quarter guarantee obligation if its notification was innocently or mistakenly late. Similarly, a coalition representing agents and employers and a trade association expressed concern that the Department's 2-day window implies that an employer who waits until the third day to provide notification would be in violation. It is not the Department's intention in this preamble to determine whether hypothetical situations would ultimately be charged as violations of this rule. Instead, the Department reminds the public that WHD will determine violations of this and other employer requirements after appropriate investigative actions, using the clear criteria defining what constitutes a violation found in 29 CFR 503.19.

A coalition representing agents and employers commented that the Department should define precisely which day of a separation triggers the start of the 2-day window; articulate what happens if the second day falls on a Federal holiday; articulate what happens in the event that the notification is sent within 2 days but transmission failures delay the Department's receipt; provide specific notification procedures including email addresses employers should use; and reduce its fines to conform with those

of DHS. The Department asserts that its language in the proposed section provides employers clear guidance regarding their notification obligations. This assertion is backed up by the Department's enforcement experience of the almost identical provision at existing § 655.22(f); neither WHD nor employers have expressed confusion regarding the notification requirements or articulated concerns similar to the commenter's since the introduction of the requirement in the 2008 Final Rule. Furthermore, the Department notes that an identical provision in its H-2A regulations has not resulted in confusion for H-2A employers, many of whom also participate in the H-2B program. The Department advises employers to send notification, either in hard copy or via email, using the contact information they used to submit their *Application for Temporary Employment Certification*, and to retain records in accordance with documentation retention requirements outlined at 29 CFR 503.17. Finally, the commenter is correct that the Department's penalties for this violation are different from DHS fines. The notification requirement serves different purposes for DHS and the Department, and the Department believes it is fair and consistent to treat this violation in the same way it treats other violations of employers' H-2B obligations.

The same commenter also claimed that the proposed language is unclear and that the Department should clarify that an employer is relieved of its obligations under the three-quarter guarantee not only in the event of a voluntary abandonment but also of a lawful termination. The Department cites its final sentence in § 655.20(y) and 29 CFR 503.16(y) as unambiguous in relieving an employer from the guarantee for both a voluntary abandonment and a termination for cause.

Two worker advocacy groups claimed that unscrupulous employers could misuse the DHS notification as a threat to coerce workers, whose immigration status is tied inextricably to the job, to endure abusive work conditions. The Department emphasizes that the notification requirements in § 655.20(y) are not intended to be used as threats against vulnerable foreign workers to keep them in abusive work situations. Further, the Department cautions that coercing workers into performing labor by threatening potential deportation or immigration enforcement may violate anti-trafficking laws such as the William Wilberforce Trafficking Victims Protection Act of 2008 (TVPPA), 18 U.S.C. 1584, 1589, among other laws.

While the worker advocates argue that the Final Rule should eliminate the DHS portion of the notification and replace it with a requirement to notify WHD, the Department reminds the public that DHS regulations already compel employers to notify DHS of early separations by assisting the agency in keeping track of foreign nationals in the United States. Both OFLC's (which may share information with WHD) and DHS's awareness of early separations are critical to program integrity, allowing the agencies to appropriately monitor and audit employer actions. If not for proper notification, employers with histories of frequent and unjustified early dismissals of workers could continue to have an *Application for Temporary Employment Certification* certified and an *H-2B Petition* approved. In addition, the same two worker advocacy groups stated that WHD should investigate and confirm the veracity of purported terminations for cause to ensure that employers do not misuse this provision to escape their outbound travel obligations and the three-quarter guarantee. One worker advocacy group argued that retaliation for workers asserting their rights should not be considered legitimate cause for termination and suggested the Department require employers to inform workers that they can quit abusive conditions and work for another employer, provided the new employment is authorized. The Department reminds the public that WHD, as part of its enforcement practices, may in fact investigate conditions behind the early termination of foreign workers to ensure that the dismissals were not effected merely to relieve an employer of its outbound transportation and three-quarter guarantee obligations. Further, § 655.20(n) already protects workers from a dismissal in retaliation for protected activities.

Several comments related to the Department's language describing abscondment. A private citizen and a coalition representing agents and employers claimed there is an inconsistency between the proposed rule, which considers abscondment to occur after 5 days, and some employer personnel rules that purportedly set the threshold at 3 days. A worker advocacy group argued that workers who fail to report for work due to legitimate injury or illness should not be considered to have abandoned employment. The Department maintains that the proposed language does not intrude upon or supersede employer attendance policies. The proposed requirement that an

employer provide appropriate notification if a worker fails to report for 5 consecutive working days does not preclude an employer from establishing a different standard for dismissing its workers. Further, the Department did not intend the H-2B regulations to provide job protection to workers in the case of illness or injury and considers such determinations beyond its authority. The proposed rule leaves it largely to employers to determine the worker behaviors that trigger a dismissal for cause, beyond the protected activities described in § 655.20(n) and the requirement in § 655.20(z) that the employer comply with all applicable employment-related laws.

z. Compliance with applicable laws (§ 655.20(z)). In proposed § 655.20(z), which requires H-2B employers to comply with all other applicable Federal, State, and local employment laws, the Department retained much of the language from the existing provision at § 655.22(d) and added an explicit reference to the TVPRA. The Department received comments from several worker advocacy organizations expressing general support for referencing the Act, which prohibits employers from holding or confiscating workers' immigration documents such as passports or visas under certain circumstances. One worker advocacy organization suggested the Department broaden the proposed section in two ways: By including employers' attorneys and agents in the prohibition and by expanding the documents employers are barred from holding to incorporate deeds to a worker's auto, land and home. The Department does not have the authority to include documents not specified in the TVPRA at 18 U.S.C. 1592(a), such as the deeds to an H-2B worker's auto, land, or home. However, the Department agrees that the prohibition must include attorneys and agents in order to achieve the intended worker protection. The Department has added appropriate language to § 655.20(z) of this Final Rule to reflect the change.

aa. Disclosure of foreign worker recruitment (§ 655.20(aa)). The NPRM proposed to require the employer and its attorney and/or agents to provide a copy of any agreements with an agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers under this *Application for Temporary Employment Certification* (proposed § 655.9), at the time of filing the application (proposed § 655.15(a)). As explained in the preamble under § 655.9, this Final Rule adopts that provision as modified to also include disclosure of persons and

entities hired by or working for the recruiter or agent, and any of their agents or employees, to recruit prospective foreign workers for the H-2B job opportunities offered by the employer. Therefore, the Department is adding this obligation to the list of Assurances and Obligations in this Final Rule, as it as a critical obligation that will significantly enhance the recruitment process.

E. Processing of an Application for Temporary Employment Certification

1. § 655.30 Processing of an Application and Job Order

In the NPRM, we proposed that, upon receipt of an *Application for Temporary Employment Certification* and copy of the job order, the CO will promptly conduct a comprehensive review. The CO's review of the *Application for Temporary Employment Certification*, in most cases,¹¹ will no longer entail a determination of temporary need following *H-2B Registration*. Instead, as proposed, this aspect of the CO's review is limited to verifying that the employer previously submitted a request for and was granted *H-2B Registration*, and that the terms of the *Application for Temporary Employment Certification* have not significantly changed from those approved under the *H-2B Registration*.

The proposed rule also required the use of next day delivery methods, including electronic mail, for any notice or request sent by the CO requiring a response from the employer and the employer's response to such a notice or request. This proposed section also contained a long-standing program requirement that the employer's response to the CO's notice or request must be sent by the due date or the next business day if the due date falls on a Saturday, Sunday, or a Federal holiday. The Final Rule adopts the language of the NPRM without change.

One labor organization urged us to strictly scrutinize applications requesting 10 or more workers to perform construction or construction-type work to guard against unscrupulous employers' applications. While we appreciate the commenter's concern, we do not believe that it is

necessary to strictly scrutinize only certain types of applications but rather will continue to thoroughly review all applications.

Some commenters expressed concern that the H-2B program would be more efficient and predictable if we were subject to more deadlines governing our decision-making. We have set timeframes throughout these regulations for our decision-making (e.g., the CO's issuance of Notices of Deficiency and Notices of Acceptance) that are designed to ensure application processing progresses efficiently without sacrificing program integrity. Different applications require different periods of time for review, depending on the quality and completeness of the application. While we cannot set more specific timeframes that would ensure appropriate adjudication of all applications, we will process each application as quickly as possible.

2. § 655.31 Notice of Deficiency

We proposed to require the CO to issue a formal Notice of Deficiency where the CO determines that the *Application for Temporary Employment Certification* and/or job order contains errors or inaccuracies, or fails to comply with applicable regulatory and program requirements. The proposed provision required the CO to issue the Notice of Deficiency within 7 business days from the date on which the Chicago NPC receives the employer's *Application for Temporary Employment Certification* and job order.

As proposed, once the CO issues a Notice of Deficiency to the employer, the CO will provide the SWA and the employer's attorney or agent, if applicable, a copy of the notice. The Notice of Deficiency would include the specific reason(s) why the *Application for Temporary Employment Certification* and/or job order is deficient, identify the type of modification necessary for the CO to issue a Notice of Acceptance, and provide the employer with an opportunity to submit a modified *Application for Temporary Employment Certification* and/or job order within 10 business days from the date of the Notice of Deficiency. The Notice of Deficiency would also inform the employer that it may, alternatively, request administrative review before an Administrative Law Judge (ALJ) within 10 business days of the date of the Notice of Deficiency and instruct the employer how to file a request for such review in accordance with the administrative review provision under this subpart. Finally, the Notice of Deficiency would inform the employer

¹¹ As provided in the discussion of § 655.11, each employer filing an *Application for Temporary Employment Certification* is required under the Final Rule to establish temporary need through the registration process. However, in limited circumstances where the employer has applied for a temporary labor certification on an emergency basis under emergency procedures in § 655.17 without an approved *H-2B Registration*, the CO may be required to also make a determination of temporary need.

that failing to timely submit a modified *Application for Temporary Employment Certification* and/or job order, or request administrative review, will cause the CO to deny that employer's *Application for Temporary Employment Certification*. In the Final Rule, we have adopted the proposed provisions without change.

Some commenters suggested limiting the CO to one Notice of Deficiency, covering all deficiencies, while another suggested limiting an employer to a certain number of Notices of Deficiency received before restricting it from using the program in the future. We understand that these commenters are interested in processing efficiency, as are we. However, we have decided to retain the CO's ability to issue multiple Notices of Deficiency, if necessary, to provide the CO with the needed flexibility to work with employers seeking to resolve deficiencies that are preventing acceptance of their *Application for Temporary Employment Certification*. For example, there are situations in which a response to a Notice of Deficiency raises other issues that must be resolved, requiring the CO to request more information. The CO must have the ability to address these situations. Additionally, we do not believe that it would be appropriate to restrict an employer from participating in the program in the future based on its receipt of multiple Notices of Deficiency, as this result would be unduly harsh, especially if the employer is new to the program or committed unintentional errors when submitting its *Application for Temporary Employment Certification* or job order.

3. § 655.32 Submission of a Modified Application or Job Order

In the NPRM, we proposed to permit the CO to deny any *Application for Temporary Employment Certification* where the employer neither submits a modification nor requests a timely administrative review, and that such a denial cannot be appealed. The proposed rule also required the CO to deny an *Application for Temporary Employment Certification* if the modification(s) made by the employer do not comply with the requirements for certification in § 655.50. A denial of a modified *Application for Temporary Employment Certification* may be appealed.

Under the proposed rule, if the CO deems a modified application acceptable, the CO issues a Notice of Acceptance and requires the SWA to modify the job order in accordance with the accepted modification(s), as necessary. In addition to requiring

modification before the acceptance of an *Application for Temporary Employment Certification*, we proposed to permit the CO to require the employer to modify a job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the job order does not contain all the applicable minimum benefits, wages, and working conditions. The proposed rule required the CO to update the electronic job registry to reflect the necessary modification(s) and to direct the SWA(s) in possession of the job order to replace the job order in their active files with the modified job order. The proposed rule also required the employer to disclose the modified job order to all workers who were recruited under the original job order or *Application for Temporary Employment Certification*. The Final Rule adopts these provisions.

One commenter suggested that, if we decide to retain the CO's ability to require post-acceptance modifications, we should provide employers with an opportunity for immediate de novo hearings. As discussed further in the larger discussion of administrative review process contained in the Final Rule, we decline to add de novo hearings in this post-acceptance certification model. Since the application will be denied under § 655.53, an employer will have the right of appeal. We decline, however, to provide for a de novo hearing.

Some commenters opposed the CO having the ability to require modifications post-acceptance, arguing the CO's ability to issue unlimited modifications at any point in the process is inefficient for both the CO and the employer and is contrary to the employer's interest in finality. We have determined it is contrary to the integrity of the H-2B program to limit the CO's ability to require modification(s) of a job order, even after acceptance. In some cases, information may come to the CO's attention after acceptance indicating that the job order does not contain all the applicable minimum benefits, wages, and working conditions that are required for certification. This provision enables the CO to ensure that the job order meets all regulatory requirements.

4. § 655.33 Notice of Acceptance

We proposed to require the CO to issue a formal notice accepting the employer's *Application for Temporary Employment Certification* for processing. Specifically, we proposed that the CO would send a Notice of Acceptance to the employer (and the employer's attorney or agent, if

applicable), with a copy to the SWA, within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification* or modification, provided that the *Application for Temporary Employment Certification* and job order meet all the program and regulatory requirements.

As proposed, the Notice of Acceptance directs the SWA: (1) To place the job order in intra- and interstate clearance, including (i) circulating the job order to the SWAs in all other States listed on the employer's *Application for Temporary Employment Certification* and job order as anticipated worksites and (ii) to any States to which the CO directs the SWA to circulate the job order; (2) to keep the job order on its active file and continue to refer U.S. workers to the employer until the end of the recruitment period defined in § 655.40(c), as well as transmit those instructions to all other SWAs to which it circulates the job order; and (3) to circulate a copy of the job order to certain labor organizations, where the job classification is traditionally or customarily unionized.

As proposed, the Notice of Acceptance also directs the employer to recruit U.S. workers in accordance with employer-conducted recruitment provisions in §§ 655.40–655.47, as well as to conduct any additional recruitment the CO directs, consistent with § 655.46, within 14 calendar days from the date of the notice. The Notice of Acceptance would inform the employer that such employer-conducted recruitment is required in addition to SWA circulation of the job order in intrastate and interstate clearance under § 655.16. In addition, the Notice of Acceptance would require the employer to submit a written report of its recruitment efforts as specified in § 655.48.

Under the proposed rule, the Notice of Acceptance would have also advised the employer of its obligation to notify the SWA with which it placed its job order if the last H-2B worker has not departed for the place of employment by the third day preceding the employer's date of need. This would have indicated to the SWA when to stop referring potential U.S. workers to the employer.

We are adopting the proposed provisions on the Notice of Acceptance content, with one modification. For consistency with an amendment made to the employer's obligation to continue hiring qualified U.S. workers in § 655.20 until 21 days before the date of need, we have deleted proposed paragraph (b)(3) of this section, which would have notified the employer that it must inform the SWA(s) handling the job

order in writing if the last H-2B worker has not departed for the place of employment by the third day preceding the employer's date of need. Further discussion of this modified position may be found in the discussion of an employer's assurances and obligations under § 655.20.

Comments about the content of the Notice of Acceptance focused on the recruitment instructions contained in the Notice. One commenter suggested that we permit SWAs to circulate job orders nationwide and put the job order on the Internet to broaden the reach of U.S. labor market recruitment. In contrast, another commenter suggested that the requirement for a SWA to place the job order in interstate clearance is both unnecessary and burdensome, given the introduction of the electronic job registry, the absence of supply States for non-agricultural work, and the difficulty of coordinating processing among multiple SWAs. We believe both the electronic job registry and the interstate clearance process serve important, but distinct, purposes in testing the U.S. labor market. The electronic job registry, available to anyone with Internet access, accomplishes the objective of disseminating job opportunity information to the widest U.S. audience possible. Adding nationwide circulation to the SWAs' responsibilities would duplicate the function of the electronic job registry, unnecessarily burdening the SWAs. The interstate clearance process, however, targets local labor markets that are most likely to have available U.S. workers, so that those SWAs can make the job opportunity information available to the interested, available, and qualified U.S. workers in that particular local labor market. While there are not traditional supply States for non-agricultural work, the CO may identify States in which circulating the job order is likely to target additional local markets with potentially available U.S. workers (e.g., designated areas of substantial unemployment or areas where mass layoffs have occurred).

Some commenters discussed the community-based organization contact requirement. While the Notice of Acceptance notifies the employer when the CO has determined that such contact is appropriate to the occupation and areas of intended employment, the community-based organization contact requirement is an employer recruitment activity, when appropriate, appearing in § 655.45. Accordingly, we have addressed these comments in the discussion of § 655.45.

We received many comments on the proposals in this section that the SWA

circulate the job order to the applicable labor organizations and in § 655.44 that the employer contact the local union. While some opposed the proposal that employers not party to a collective bargaining agreement would be required to contact a labor organization, others supported the return to this historic practice. Many commenters expressed concern about an employer's ability to discern when and what type of labor organization contact was required, finding the phrase, where the occupation or industry is traditionally or customarily unionized, vague. These commenters feared that using this language meant employers and the CO would disagree about when labor organization contact was required. Some suggested changing or removing this language.

After reviewing the comments, we have decided to remove this requirement from the employer's recruitment steps in § 655.44, and to retain the requirement that the SWA circulate the job order to the applicable labor organizations under this section. We believe this modification will eliminate duplicative efforts and resolve concerns about an employer's ability to determine when and what type of labor organization contact is required. The CO, in consultation with the SWA, will make a determination about whether labor organization contact is required and include specific directions to the SWA in the Notice of Acceptance, as specified in paragraph (b)(6) of this section. Under the Final Rule, an employer will neither have to determine when such contact is required nor have to contact the local union; rather, the Notice of Acceptance will notify the employer whether the CO has directed the SWA to initiate such contact.

While the standard used for labor organization contact is based on historical knowledge and practice,¹² we are mindful of the fluidity of unionized occupations and will gauge trends accordingly. As discussed in the NPRM, unions have traditionally been recognized as a reliable source of referrals of U.S. workers. Because the SWAs have greater knowledge of the local labor markets, including labor organizations, and have traditionally included labor organizations in their efforts to match workers with job

opportunities, the SWAs are in the best position to identify whether there are local labor organizations which cover the occupation and which local labor organizations are most likely to refer qualified and available U.S. workers for the job opportunity.

In addition to commenting on the return to this long-standing program requirement, some commenters responded to our request for suggestions on how to best determine the circumstances which would trigger the requirement for contacting labor organizations. Some commenters suggested we specifically identify certain industries and/or occupations as customarily unionized and require contact with organizations which represent workers in those occupations/industries. Other commenters suggested that we and/or the SWAs work together with labor organizations to develop a list of organizations and/or an email listserve to be publicized for purposes of ensuring appropriate and consistent application of the contact requirement. We appreciate the suggestions for the circumstances or criteria for contacting labor organizations. Specifically, we have taken under advisement the suggestion that we develop a list of organizations for the uniform application of the contact requirement. Some commenters noted the fluidity of unionized occupations over time. We are also mindful that unionization within industries, occupations, and areas of intended employment is not uniform. Because of this lack of uniformity, we do not think it is appropriate to base the contact requirement on a specified industry or occupation. Rather than create a general rule in the regulation, we think that a list of labor organizations to be contacted must focus on specific occupations in specific areas of intended employment and must be responsive to trends in the marketplace. Therefore, we believe retaining the labor organization contact requirement as proposed in paragraph (b)(5) of this section will most appropriately include labor organizations in the U.S. labor market test. We will notify the public when such a list is devised. We will work closely with the SWAs to ensure a complete and appropriate test of the labor market, including contacting the applicable labor organizations, is made before approving an *Application for Temporary Employment Certification*.

Some commenters offered suggestions about the particular entities that should be contacted with respect to this requirement. These suggestions included requiring contact with a specific federation of labor

¹² See, Employment and Training Guidance Letter 21-06, Change 1: Procedures for H-2B Certification of Temporary Non-Agricultural Occupations. Attachment A at 7. <http://wdr.doleta.gov/directives/attach/TEGL/TEGL21-06c1a1.pdf>. See also, General Administration Letter 1-95: Procedures for Temporary Labor Certification in Non-agricultural Occupations (December 31, 1999). http://wdr.doleta.gov/directives/attach/GAL1-95_attach.pdf.

organizations, requiring contact with all unions within a State or with jurisdiction over the area of intended employment or within an equivalent geographic distance, or requiring contact with all unions representing workers of a specific skill and wage level. As discussed above, we think the contact requirement should be based on the situation in the local labor market, not on an absolute rule about which labor organizations to contact. We will work with the SWAs to develop a flexible list tailored to local circumstances.

Finally, some commenters proposed that we require employers to prove contact with labor organizations. As this Final Rule requires the SWA, not the employer, to initiate contact with labor organizations as a component of testing the U.S. labor market, the proof suggested by these commenters is not necessary.

One labor and worker advocacy organization expressed general support for the application process described in the proposed rule and agreed with the provisions ensuring that only the final job order is used and an employer may not commence recruitment until the CO accepts the modified job order. Like the commenter, we believe the final, approved version of the job order, containing the applicable minimum benefits, wages, and working conditions, is essential to an appropriate test of the U.S. labor market.

Some commenters expressed support for the regulations requiring employers to submit a recruitment report, asserting that the requirement makes it more difficult for unscrupulous employers to bypass U.S. workers in favor of more vulnerable foreign workers. We agree that the requirement adds accountability and supports program integrity. Further discussion of the recruitment report provision can be found in the discussion of § 655.48.

5. § 655.34 Electronic Job Registry

In the NPRM, we proposed posting employers' H-2B job orders, including modifications and/or amendments approved by the CO, on an electronic job registry to disseminate the job opportunities to the widest audience possible. The electronic job registry was initially created to accommodate the posting of H-2A job orders, but we proposed to expand the electronic job registry to include H-2B job orders. As proposed, the CO would post the job orders on the electronic job registry after accepting an *Application for Temporary Employment Certification* for the duration of the recruitment period, as provided in § 655.40(c). At the

conclusion of the recruitment period, we would maintain the job order on the electronic job registry in inactive status, making the information available for a variety of purposes. In the Final Rule, we have adopted the proposed provisions without change.

Many commenters supported the introduction of the electronic job registry, viewing it as a means to increase the program's transparency and improve U.S. worker awareness of and access to nonagricultural jobs. Some also contended that the electronic job registry will facilitate earlier and more frequent detection of program abuse.

Commenters supporting the introduction of the electronic job registry suggested expanding electronic job registry postings to the *Application for Temporary Employment Certification*, other job-offer-related documents, and contracts between employers and foreign recruiters to further improve transparency. However, other commenters expressed concern about the volume and nature of information potentially exposed in the job order posted on the electronic job registry. These commenters contended that since employment contracts typically incorporate employee handbooks and other documents by reference, it would be difficult, if not impossible, to draft a document that contains all material terms and conditions and that would be appropriate to disclose, in its entirety, on the Internet. The commenters argued that while an employer could submit detailed information to the CO for review (e.g., employee contracts or handbooks), making such information available for public viewing would infringe on an employer's legitimate business interest in maintaining the confidentiality of employment terms. Comments about transparency and exposure concerns have been addressed in the larger discussion of public disclosure of information under § 655.63. Also, as outlined further in the discussion of the job order content requirements, the Final Rule details specific minimum content requirement for job orders, sensitive to these concerns, which in turn affect the job order content to be posted on the electronic job registry.

One commenter suggested that the job opportunity appear in the electronic job registry until the end of the certification period, rather than just the recruitment period. As articulated in the NPRM, the purpose of posting job orders on the electronic job registry is to serve as an effective, useable tool for alerting U.S. workers to jobs for which employers are recruiting H-2B workers. These jobs are

accessible to the public through the Department's resources, including its One-Stop Career Centers, and through a link to the electronic job registry on the OFLC's Web site <http://www.foreignlaborcert.doleta.gov/>. As a recruitment tool, we believe it is appropriate for the job order to appear as active during the recruitment period and to be placed in inactive status, but still accessible, on the electronic job registry after the recruitment period ends.

One commenter suggested we give H-2B workers access to the electronic job registry so that they can find other H-2B employment, if they are displaced (e.g., replaced by a U.S. worker) or experiencing improper treatment. While our purpose in introducing the electronic job registry is to alert U.S. workers of job opportunities, the electronic job registry will be accessible via the Internet to anyone seeking employment.

One commenter asserted that an *Application for Temporary Employment Certification* involving two or more SWAs would result in the CO posting the job order of each of the States on the electronic job registry, potentially confusing applicants about the location of work sites and terms and conditions of employment, such as requirements to withhold or pay State income taxes. While a job order may be circulated among multiple SWAs, only the job order placed with the initial SWA, which identifies all work locations, will be posted on the electronic job registry.

We also received a suggestion that we create a simple mechanism, such as an email listserve, for notifying interested parties, such as labor organizations who may have unemployed members seeking employment in new areas, of job opportunities. While the Final Rule adopts the electronic job registry provisions as proposed, we will also work with the SWAs to devise procedures to further publicize the electronic job registry.

6. § 655.35 Amendments to an Application or Job Order

We proposed to permit an employer to request to amend its *Application for Temporary Employment Certification* and/or job order to increase the number of workers, to change the period of employment, or to make other changes to the application, before the CO makes a final determination to grant or deny the *Application for Temporary Employment Certification*. The proposed rule would permit an employer to seek such amendments only before certification, not after certification. As discussed in the NPRM,

these provisions were proposed to provide clarity to employers and workers alike of the limitations on and processes for amending an *Application for Temporary Employment Certification* and the need to inform any U.S. workers already recruited of the changed job opportunity. We recognized that business is not static and employers can face changed circumstances from varying sources—from climatic conditions to cancelled contracts; we included these provisions to provide some flexibility to enable employers to assess and respond to such changes.

At the same time, we proposed certain limitations to ensure that these job opportunities are not misrepresented or materially changed as a result of such amendments. Specifically, as proposed, the employer may request an amendment of the *Application for Temporary Employment Certification* and/or job order to increase the number of workers initially requested. However, we proposed limiting such amendments to increase the number of workers to no more than 20 percent (50 percent for employers requesting fewer than 10 workers) above the number specified in the *H-2B Registration*.

In addition, we proposed to permit minor changes to the period of employment at any time before the CO's final determination. However, the NPRM stated such amendments to the period of employment may not exceed 14 days and may not cause the total period to exceed 9 months, except in the event of a demonstrated one-time occurrence. This limitation to 14 days was designed to ensure that the employer had a legitimate need before commencing the registration process and accurately estimated its dates of need.

As proposed, the employer must request any amendment(s) to the *Application for Temporary Employment Certification* and/or job order in writing and any such amendment(s) will not be effective until approved by the CO. After reviewing an employer's request to amend its *Application for Temporary Employment Certification* and/or job order, the CO will approve these changes if the CO determines the proposed amendment(s) are justified and will not negatively affect the CO's ability to make a timely labor certification determination, including the ability to thoroughly test the labor market. Changes will not be approved which affect the underlying job registration. Once the CO approves an amendment to the *Application for Temporary Employment Certification* and/or job order, the CO will submit to the SWA any necessary change(s) to the

job order and update the electronic job registry to reflect the approved amendment(s). We have decided to adopt this provision in the Final Rule, with the modifications discussed below.

We received a few comments on this proposed provision. One commenter noted that the following sentence appeared in the proposed rule at paragraph (c) of this section, but not at paragraphs (a) or (b) of this section: "In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity." The commenter expressed concern that employers requesting one type of amendment would be required to justify their request to the satisfaction of the CO, while employers requesting the other types of amendments would not be required to justify their requests. We had no intention of applying different standards and have modified the language of paragraphs (a) and (b) of this section to include the sentence that appears in paragraph (c) of this section.

Some commenters were suspicious of post-acceptance modification requests, fearing that employers will use this provision as an opportunity to move from their approved *H-2B Registration* period of need or number of workers. We do not intend this provision to allow employers to amend their applications beyond the parameters contained in § 655.12; rather, part of the CO's review will involve comparing the requested amendments to the content of the approved *H-2B Registration*. However, the Final Rule provision has been slightly revised to clarify that an employer may not request a post-filing amendment that would modify the number of workers beyond that which would have been acceptable at the time of filing under § 655.12. Similarly, an employer will not be permitted to expand the period of employment beyond 9 months. We expect the stated parameters, which limit the extent of the change in number of workers or period of need permitted, and the CO review process to control the frequency with which post-acceptance and pre-certification job order amendments are requested or approved and maintain the integrity of the *H-2B Registration* process. One commenter expressed concern about the resources used to update both the SWA's labor exchange system and the electronic job registry to replace obsolete versions of the job order, if the CO approves amendments. As discussed above, we believe the job order posting on both the SWA's labor exchange system and electronic job

registry serve valuable purposes and must accurately reflect the final job order contents, validating the use of resources.

We have not amended the provision to reflect the corresponding change made to the registration provision that allows an employer to adjust its date of need by up to 30 days without having to re-register. Registration covers the entire period of need for up to 3 years. This provision, by contrast, allows an employer to request a deviance of up to 14 days from the previous year, allowing for up to 2 such deviations from the initial dates provided in the registration, as long as the deviations do not result in a total period of need exceeding 9 months.

F. Recruitment Requirements

We proposed to maintain and expand some of the requirements relating to the recruitment of U.S. workers under the 2008 Final Rule. These efforts included a requirement that the employer contact its former U.S. workers; a requirement to contact labor organizations as well as community-based organizations, if appropriate to the occupation and area of intended employment; and a requirement to conduct additional recruitment at the discretion of the CO.

We received a number of comments from individuals, labor organizations, worker advocacy organizations, and coalitions expressing support for the additional recruitment efforts as imperative to ensuring the appropriate test of the labor market and providing U.S. workers with appropriate access to these job opportunities. In addition, we received comments from employers and industry organizations expressing opposition to or concerns about the specific recruitment efforts required in the NPRM. As discussed in more detail below, except for the requirement under § 655.44 that the employer contact labor organizations where the occupation or industry is customarily unionized, the Final Rule retains these recruitment requirements as proposed or with amendments where noted.

1. § 655.40 Employer-Conducted Recruitment

Unlike under the 2008 Final Rule, in the NPRM we proposed that the employer conduct recruitment of U.S. workers after its *Application for Temporary Employment Certification* is accepted for processing by the CO. We received a number of comments on this proposal, most of them in support.

Several commenters suggested that we take this requirement further by requiring employers to conduct recruitment efforts comparable to ones

that they normally use to recruit workers in corresponding employment for the job opportunity. Although the Department's Final Rule includes requirements which are aimed at approximating the recruitment efforts typically used by employers outside the H-2B program, we are not able to adopt this suggestion because we have no mechanism for ascertaining those efforts or ensuring compliance. In addition, we believe that the existing regulatory language gives the CO sufficient authority to order any appropriate recruitment which will ensure that U.S. workers get adequate access to these job opportunities.

We proposed that the employer conduct recruitment of U.S. workers within 14 calendar days from the date of the Notice of Acceptance, unless the CO provides different instructions to the employer in the Notice of Acceptance, and that the employer must accept all qualified U.S. applicants referred by the SWA until the third day before the employer's date of need or the date the last H-2B worker departs for employment, whichever is later. We are amending this requirement, as described below.

We received a number of comments and alternatives for the duration of the recruitment period. For example, several labor organizations and worker advocates proposed that we extend the recruitment period until 3 days before the date of need, while one other labor organization proposed to instead extend the duration for the posting of the job order. Employers and industry commenters generally opposed a longer recruitment period, but expressed willingness to accept a recruitment period of either 30 days or ending 30 days before the date of need.

Most of these comments demonstrate a misunderstanding of the proposal and the difference between the 14-day employer-conducted recruitment period and the SWA referral period. As indicated above, we proposed to require that employers complete specific recruitment steps outlined in §§ 655.42 through 655.46 within 14 days from the date of the Notice of Acceptance. Separate from the employer-conducted recruitment, the NPRM proposed to require the SWA, upon acceptance of the job order and *Application for Temporary Employment Certification* by the CO, to place the job order in interstate clearance and indicated that we would post the job order to the electronic job registry. Thereafter, we proposed to require employers to continue to accept all qualified U.S. applicants referred for employment by the SWA or who apply for the position

directly with the employer until the third day preceding the employer's date of need or the date the last H-2B worker departs for employment, whichever is later. In order to further the effectiveness of the longer referral period and ensure that U.S. workers are notified of the job opportunities, we proposed that the job order remain posted with the SWA for the duration of the referral period or until the employer notifies the SWA that the last H-2B worker has departed. This aspect of the proposal balanced the need to ensure an adequate test of the labor market without requiring the employer to incur any additional costs in conducting independent recruitment efforts beyond the sources and the 14 days specified in the Notice of Acceptance. As discussed more fully below, the Final Rule retains the 14-day recruitment period. After considering comments on this issue, we have determined that the 14-day recruitment period provides an appropriate timeframe for the employer to conduct the recruitment described in §§ 655.42 through 655.46, especially when combined with the longer referral period discussed further below.

In addition, we proposed to require employers to report to the SWA the actual date of departure of H-2B workers, if different from the date that is 3 days before the date of need. However, for the reasons discussion at § 655.20(t), in the Final Rule employers will only be required to hire qualified and available U.S. workers until 21 days before the date of need. Employers are therefore relieved of the obligation to report this information to the SWAs.

In the context of the proposal requiring employers to report to the SWA the date of last departure of the last H-2B worker, we specifically solicited comments on whether it should also require employers to inform the Department of the actual number of H-2B workers hired under the approved *Application for Temporary Employment Certification*, as well as whether the H-2B workers were hired from a foreign country or were already present in the U.S. We have determined to adopt a modified version of this proposal. Based on comments received, we have determined that the best approach to collecting this type of information is to request the employer's information for the prior year on the *Application for Temporary Employment Certification*. However, we are not requiring that the employer engage in such reporting in the context of conducting its recruitment efforts.

We received several comments supporting this proposal. One worker advocacy organization espoused the

importance of such a collection based on its value to program integrity. Another commenter supporting this proposal suggested that we implement a reporting requirement that would be triggered at three specific points beginning during the referral period and ending during the period of certified employment (the first report would be at 30 days before the date of need, the second 30 days into the period of employment and the third 30 days before the end of the period of employment). This commenter expressed a concern that we certify more H-2B positions than the employer ultimately fills. Another commenter suggested that we should collect the information about both the number of H-2B and the number of U.S. workers actually hired. Another commenter, a worker advocacy organization, suggested that we should collect the age and gender of H-2B workers who are hired.

Our role in the H-2B program is to certify that the employer has a need to fill a specific number of temporary positions for which the employer is unable to find qualified and available U.S. workers. We do not, however, have control over how many of those positions are ultimately filled with H-2B workers nor the identity of those workers; the names of alien beneficiaries are not captured on ETA Form 9142 since in most cases the identity of the workers is not known at that time. We agree, however, that requiring employers to report the number of H-2B and U.S. workers actually hired, and whether the H-2B workers are hired from within the U.S. or from abroad, is in the interest of overall H-2B program integrity and will assist the Department and other Federal agencies with ascertaining the actual use of the program. This is especially so given the limited number of visas available, because an employer who significantly overstates its need for temporary workers may preclude another employer with a bona fide temporary need from getting visas for workers it equally needs. With respect to comments that we should collect both the number of H-2B and the number of U.S. workers actually hired, our regulations under § 655.48 already require the employer to report the disposition of each U.S. worker who was referred or self-referred to the employer for employment. With respect to the other commenters' suggestion that we collect the age and gender of H-2B workers who are hired by the employer, the Paperwork Reduction Act requires the Department to collect only such

information as is reasonably related to the administration of our program; at this time we feel that requiring employers to report such information would not be reasonably related to our administration of the H-2B program. As discussed above, we have adopted the proposal to collect the number of H-2B workers actually hired during the previous year on the *Application for Temporary Employment Certification*.

The NPRM provided that employers are not required to conduct employment interviews but that where the employer wishes to conduct interviews with U.S. workers, it must do so by telephone or at a location where workers can participate at little or no cost to the workers. The Final Rule retains this requirement.

We received several comments supporting this proposal. One commenter also suggested that we prohibit employers from interviewing U.S. workers unless it also conducts interviews of H-2B workers. Another commenter proposed that we require employers to promise to be available for interviews during normal business hours throughout the referral period. As indicated in the NPRM and retained in the Final Rule, we have explicitly prohibited employers from offering preferential treatment to H-2B workers, including any requirement to interview for the job opportunity. In addition, both the NPRM and the Final Rule seek to ensure that employers conduct a fair labor market test by requiring employers that require interviews to conduct them by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. With respect to the commenters' suggestion that the employer be required to be available to conduct interviews during normal business hours, we are declining to adopt this suggestion as it may unnecessarily infringe on the employer's business operations. However, an employer who requires a U.S. worker to undergo an interview must provide such worker with a reasonable opportunity to meet such a requirement. The purpose of these requirements is to ensure that the employer does not use the interview process to the disadvantage of U.S. workers. For all the reasons articulated above, we are retaining this provision as proposed.

2. § 655.41 Advertising Requirements

We proposed to retain the 2008 Final Rule requirement that all employer advertisements contain terms and conditions of employment no less

favorable than those offered to the H-2B workers and reflect, at a minimum, the terms and conditions contained in the job order. The NPRM also required that all advertisements direct applicants to apply for the job opportunity through the SWA. We have made revisions to this provision to clarify which terms and conditions of employment contained in job orders must be included in advertisements, and to clarify that the employer must comply with but need not actually include the job order assurances in advertisements.

We received a number of comments on this proposal. The majority of commenters expressed strong support for extending job order requirements to all recruitment, including the requirement to identify when the employer is offering board, lodging or facilities. Other commenters expressed concern that including all of the job order requirements in advertisements may prove to be costly and burdensome, particularly where it would result in lengthy and expensive newspaper advertisements. Another commenter, referring to the H-2A program, although supporting full disclosure, suggested that the job order requirements often serve to discourage rather than encourage applicants from pursuing the job opportunity due to the sheer length and complexity of information required to be included. This commenter suggested that we should require that a summary form be provided to the applicants.

In considering the issues raised by commenters, we have amended this section to ensure that all advertisements include, at a minimum, the terms and conditions of employment necessary to apprise U.S. workers of the job opportunity and have clarified that those terms and conditions must conform to the job order assurances, required by the amended § 655.18(a), but need not contain those assurances.

Based on the commenter's suggestions and in order to ensure that all recruitment complies with the requirements applicable to job orders, we have amended the language of this section to clarify that advertisements need not include the text of assurances applicable to job orders, but that they must include the minimum terms and conditions of employment. These minimum terms and conditions of employment include a requirement that the employer make the appropriate disclosure when it is offering or providing board, lodging or facilities, as well as identify any deductions, if applicable, that will be applied to the employee's pay for the provision of such accommodations. These minimum

content requirements will address industry concerns about the cost inherent in placing potentially lengthy advertisements, while also ensuring that entities disclose all necessary information to all potential applicants. In addition, as a continuing practice in the program, employers will be able to use abbreviations in the advertisements so long as the abbreviation clearly and accurately captures the underlying content requirement.

In order to assist employers to comply with these requirements, we provide below specific language which is minimally sufficient to apprise U.S. applicants of required items in the advertisement, and which is intended to assist the employer in complying with such requirements. In response to industry concerns over the potential length and cost of advertising, the employer may also abbreviate some of this language so long as the underlying guarantee can be clearly understood by a prospective applicant. The employer may include the following statements in its advertisements: 1. Transportation: Transportation (including meals and, to the extent necessary, lodging) to the place of employment will be provided, or its cost to workers reimbursed, if the worker completes half the employment period. Return transportation will be provided if the worker completes the employment period or is dismissed early by the employer. 2. Three-fourths guarantee: For certified periods of employment lasting fewer than 120 days: The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 6-week period of the total employment period. For certified periods of employment lasting 120 days or more: The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 12-week period of the total employment period. 3. Tools, equipment and supplies: The employer will provide workers at no charge all tools, supplies, and equipment required to perform the job.

Another commenter expressed concern that some employers have a legitimate need to keep the terms and conditions of employment confidential. Although we recognize that some employers may wish for more discretion in recruitment, our statutory mandate requires that the employer be permitted to hire H-2B workers only in circumstances where there are no qualified and available U.S. workers, and where the employment of those H-2B workers does not have an adverse effect on the wages and working conditions of U.S. workers. Therefore, in the context of the H-2B program, an

employer must forego some of its preferences for its usual recruitment practices in order to comply with our regulations.

As indicated above, we retained the requirement that all recruitment conducted under this section and §§ 655.42–655.46 comply with the prohibition on preferential treatment and also that each job opportunity be bona fide as required by § 655.18. Some commenters objected to the bona fide job opportunity requirement because it permits the CO to require the employer to substantiate any job qualification or requirement contained in the job order. In particular, one commenter was concerned that this requirement may preclude the employers from conducting background checks.

Our longstanding policy on job qualifications and requirements has been that they must be customary; *i.e.*, they may not be used to discourage applicants from applying for the job opportunity. Including requirements that do not meet this standard would undermine a true test of the labor market. The standard for employment of H–2B workers in the U.S. is that there are no U.S. workers capable of performing such service or labor who are available for employment. In accordance with this standard, the regulations require as a condition of certification that no qualified persons who are available to perform the job can be found. For purposes of complying with this requirement, we have clarified in § 655.20(e) the meaning of qualifications and requirements. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. Such characteristics include but are not limited to, the ability to use specific equipment or any education or experience required for performing a certain job task. A requirement on the other hand, means a term or condition of employment which a worker is required to accept to obtain or retain the job opportunity, *e.g.*, the willingness to complete the full period of employment or commute to and from the worksite.

This interpretation is consistent with program history, primarily under the General Administration Letter 1–95,¹³ where the State Employment Security Agencies (now SWAs) were specifically directed to reject any restrictive job requirements. To the extent an employer has requirements that are related to the U.S. workers' qualifications or

availability we will examine those in consultation with the SWAs to determine whether they are normal. We recognize that background checks are legitimately used in private industry and it is not our intent here to preclude the employer from conducting such checks to the extent that the employer applies the same criteria to both H–2B and U.S. workers. However, where such job requirements are included in the recruitment materials, we reserve the right to inquire further as to whether such requirements are normal and accepted.

Some comments addressed the proposal that employer-conducted recruitment must direct all applicants to the SWA. Most commenters supported this proposal, indicating that this requirement will enhance the likelihood that workers will be fully apprised of the job opportunities. A SWA expressed concern over the availability of funding to perform the additional referral functions. We have retained this requirement because we believe that allowing SWAs to apprise job applicants of the terms and conditions of employment is an essential aspect of ensuring an appropriate labor market test. However, notwithstanding the many benefits of being referred to the job opportunity by the SWA, U.S. workers may contact the employer directly and the Final Rule requires that employers include their contact information to enable such direct contact. With respect to the SWAs' concerns regarding the availability of sufficient funding, we anticipate that the enhanced role of the SWA and the additional duties inherent in that role will be offset through the elimination of the requirement to conduct employment verification activities.

3. § 655.42 Newspaper Advertisements

We proposed to continue to require the employer to place two advertisements in a newspaper of general circulation for the area of intended employment that is appropriate to the occupation and the workers likely to apply for the job opportunity and to permit the employer to place the advertisement(s) in a language other than English where the CO determines it appropriate. However, we proposed to eliminate an employer's option to replace one of the newspaper advertisements with an advertisement in a professional, trade, or ethnic newspaper. Instead, we proposed to allow the CO the discretion to require an employer to place such an advertisement in addition to the required newspaper advertisements where such an advertisement is

appropriate for the particular occupation and area of employment. We are retaining this provision as proposed with minor clarifying edits.

Several commenters agreed that we should continue to require newspaper advertisements. Others disagreed. One commenter indicated that newspaper advertisements are outdated as a recruitment source and are increasingly unavailable due to an overall reduction in newspapers with print editions. This commenter expressed regret that we did not use this rulemaking as an opportunity to replace this requirement with recruitment efforts that are more reflective of the current labor market realities and the decline in newspaper subscriptions and readership. A worker advocacy group suggested that eliminating newspaper advertising will have a minimal impact on domestic worker recruitment because very few U.S. workers search for jobs through newspapers. This commenter recommended that the regulations instead incorporate innovations which are now widely used by employers of domestic workers to recruit new employees, such as web-based advertising on job search sites and participation in job fairs. Another commenter offered as an alternative to newspaper advertising the use of road signs as more apt to appeal to workers typically employed in the H–2B program. Industry commenters also noted the expense of placing newspaper advertisements.

While several other commenters offered suggestions for disseminating information about the job opportunity, they did not indicate whether these alternatives should be considered in addition to newspaper advertisements or instead of them. Consequently, these suggestions are further discussed under § 655.46. It is worth noting, however, in response to commenters who suggested web-based advertisements, this Final Rule requires the CO to post H–2B job orders on the electronic job registry maintained by the Department in order to widely disseminate the job opportunities.

After due consideration, we continue to believe that newspapers of general circulation remain an important source for recruiting U.S. workers because they are among the means most likely to reach the broadest audiences, particularly those interested in positions typically found in the H–2B program. Newspaper advertisements are also recognized as information sources likely to generate informal, word of mouth referrals. Although we do not dispute that available statistics on subscriptions and readership favor a view that these

¹³ General Administration Letter 1–95, Procedures for H–2B Temporary Labor Certification in Nonagricultural Occupations (December 31, 1995).

publications are in decline, we are not aware of any reliable means for tracking how many persons have access to a single printed newspaper before it is discarded, particularly due to their availability through community organizations, centers, public libraries, and other venues which provide important access to information for those seeking jobs. As to one commenter's proposal to require the use of road signs, we note that such a requirement would not offer appropriate substitution for newspaper advertisements, would be costly to the employer, and would be difficult to administer and enforce.

We received no comments on the proposal to prohibit substitution of ads between newspapers and trade and ethnic publications. Therefore, after considering alternatives to newspaper advertisements proposed by commenters, we have determined that no single alternative method of advertising uniformly applies to the variety of H-2B job opportunities or is likely to reach as broad a potential audience. For that reason, the Final Rule retains the proposed section in its entirety with a clarifying edit that requires the employer that placed any advertisement in a language other than English to retain the translations of such advertisements, as required by § 655.56.

4. § 655.43 Contact With Former U.S. Employees

The NPRM proposed to require the employer to contact by mail or other effective means its former U.S. workers who were employed by the employer in the same occupation and the place of employment during the previous year before the date of need listed in the *Application for Temporary Employment Certification*. This proposal expanded the 2008 Final Rule requirement for contact with former U.S. workers who have been laid off within 120 days of the employer's date of need. Under the proposal, employers are not required to contact U.S. workers who abandoned the worksite or who were terminated for cause. We have retained the proposed requirement.

We received a number of comments from labor organizations and worker advocates supporting the expanded requirement contained in the proposal. Most of the comments focused on the importance of offering access to these job opportunities to the greatest number of U.S. workers, particularly during times of high unemployment. One commenter endorsed the expanded requirement but indicated that the INA includes a preference for U.S. workers which is unlimited. According to this

commenter, U.S. workers quit their jobs for a variety of reasons and should not be disqualified in this fashion.

We agree with this commenter and for that reason the NPRM proposed to limit the exception to the contact requirement only to workers who were dismissed for cause or who abandoned the worksite. For purposes of this provision, abandonment has the same meaning as it does in § 655.20(y), *i.e.*, a worker who fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

The same commenter raised further concerns about an employer being released from contact requirements where an employee was terminated for cause, noting experience in the program where employers use termination for cause or threat of termination as a means for retaliating against workers who were dissatisfied with illegal treatment. Under the NPRM, as well as this Final Rule, each employer must affirmatively attest that it has not engaged in unfair treatment as defined in § 655.20(n), *i.e.*, that it has not retaliated against complaining employees. Although this commenter proposes to require the employer to contact all former workers regardless of why they left employment with the employer, we have determined that such a requirement is overbroad and not necessary to ensure an appropriate test of the labor market.

Another commenter suggested that we expand the window for contacting former U.S. workers who have been laid off within 120 days before the date of need to layoffs within 180 days before the date of need. Because the provision as proposed and retained in the Final Rule requires the employer to contact all its former U.S. workers who were employed by the employer in the occupation at the place of employment in the last year, expanding the requirement to contact those laid off within 180 days will not have any effect, as those workers are already included in the provision. Therefore, we are not accepting this proposal.

A few commenters addressed the issue of protecting workers whose hours have been reduced by the employer. One commenter suggested that we redefine layoff to include a separation following a 25 percent reduction in hours in a 180-day period preceding the employer's date of need in order to expand the exposure of U.S. workers to the job opportunity. As discussed in the preamble to § 655.20(w), there is no definitive way to determine whether a worker quit because of a reduction in hours. The suggested requirement

would place an unnecessary burden both on employers seeking to comply with the provision and Departmental employees seeking to verify compliance, and we therefore do not accept this recommendation.

Finally, other commenters proposed that we require the employer to contact laid off employees in accordance with the terms governing recall for the duration of the recall period provided in the collective bargaining agreement that covers the employees in the occupation and area of intended employment. We have addressed this commenter's concerns by proposing a requirement that the employer contact former employees employed by the employer during the prior year. In addition, the employer is separately obligated to comply with the terms and conditions of the bargaining agreement, to the extent that the recall provisions cover workers employed by the employer beyond the prior year, pursuant to both the agreement and the requirement at § 655.20(z).

Therefore, the Final Rule retains this provision as proposed.

5. § 655.44 Contact With Labor Organizations

We proposed to require employers to formally contact local labor organizations to inquire about the availability of U.S. workers to fill the job opportunities for which the employer seeks to hire H-2B workers where union representation is customary in the occupation or industry. We have decided to remove this requirement.

We received a number of comments on the proposal to expand the contact requirement with labor organizations beyond those employers who are party to a collective bargaining agreement (CBA). Most labor organizations and worker advocates expressed support for the proposed requirement and offered suggestions to enhance it, *i.e.*, by clarifying when union contact is required. In addition, we received comments from industry representatives and employers objecting to this requirement as burdensome and unlikely to result in a greater number of legitimate applicants who will meet the employers' temporary need for workers. Many commenters strongly objected to overall enhanced recruitment requirements, as costly, burdensome, and unlikely to result in legitimate applicants or ultimately meet the employers' need for temporary labor. Some industry commenters indicated that the customarily unionized standard was vague or ambiguous, and requested clarification. Others objected to the application of the requirement to

employers who were not party to a CBA or who did not otherwise employ unionized workers. One commenter also requested that we eliminate this section in its entirety.

We agree that the provision should be deleted. We realize that this requirement is duplicative of the activity undertaken by the SWAs in § 655.33, where the Notice of Acceptance will direct the SWAs to circulate a copy of the job order to both the State Federation of Labor in the States(s) in which work will be performed and to the local unions representing employees in the same or substantially equivalent job classification in the area of intended employment, where the occupation or industry is traditionally or customarily unionized. For this reason, we have decided to remove this requirement, but retain in this Final Rule a mechanism by which labor organizations are still contacted, increasing the exposure of such job opportunities to U.S. workers while reducing the burden on the employer. For a more detailed discussion about contacting labor organizations and the Department's request for suggestions on how to best determine the circumstances which would trigger the requirement for contacting labor organizations, please see § 655.33 above.

6. § 655.45 Contact With Bargaining Representative and Posting Requirements and Other Contact Requirements

The NPRM proposed to require employers that are party to a CBA to provide written notice to the bargaining representative(s) of the employer's employees in the job classification in the area of intended employment. Where there is no bargaining representative of the employer's employees, we proposed to require the employer to post a notice to its employees of the job opportunities for at least 10 consecutive business days in at least two conspicuous locations at the place of intended employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which work will be performed by the H-2B workers. We requested comments on the likelihood this requirement will result in finding qualified and available applicants.

The majority of comments supported this proposal. Most of the commenters indicated that keeping the bargaining representative apprised of these job opportunities will likely result in the job opportunities being available to U.S. workers. Most commenters specifically

supported the new alternative requirement that the employer post notice of the job opportunity. A few commenters offered suggestions for enhancing the requirement, one of them proposing that the notice of the job opportunity be posted at each facility owned and operated by the employer. A few commenters suggested that we extend the duration of the posting. These suggestions ranged from requiring a posting through the duration of the referral period to a recommendation to increase the posting duration from 10 days to 14 days, or 30 days in some instances.

After thorough consideration of these comments, we are unable to accept the proposal which would require the posting of the notice at each facility owned and operated by the employer, as this requirement is overbroad both with respect to the burden on the employer and with respect to the administrative feasibility of oversight and enforcement. We have, however, adopted the other commenters' suggestion to extend the duration of the posting from 10 to 15 consecutive business days. This increase in duration will provide greater opportunity for the employer's workers to learn of the job opportunity and enhance the likelihood that unemployed U.S. workers will learn of the job opportunity.

We also received comments opposing this proposal. Most of these comments generally objected to the requirement to contact the bargaining representative and indicated that the contacts will not result in meaningful candidates for the job opportunities, some indicating that most referred U.S. workers cannot be relied upon to complete the duration of the certified period of employment. Other commenters specifically objected to the posting requirement. One employer association whose members are subject to special procedures indicated infeasibility of complying with the requirement due to the itinerant nature of their work.

The requirement to contact the bargaining representative(s) is intended to ensure that each employer's existing U.S. workers receive timely notice of the job opportunities, thereby increasing the likelihood that those workers will apply for the available positions for the subsequent temporary period of need and that other U.S. workers, possibly including former workers, will be more likely to learn of the job opportunities as well. The posting of the notice at the employer's worksite, in lieu of formal contact with a representative when one does not exist, is intended to ensure that all of the employer's U.S. workers are afforded the same access to the job

opportunities for which the employer intends to hire H-2B workers. In addition, the posting of the notice may result in the sharing of information between the employer's unionized and nonunionized workers and therefore result in more referrals and a greater pool of qualified U.S. workers. With respect to one commenter's concern regarding the ability of an itinerant employer to comply with the posting requirement, we included in the NPRM and have retained in the Final Rule a degree of flexibility for complying with this requirement; specifically, the regulation includes the language "or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers." This permits the employer to devise an alternative method for disseminating this information to the employer's employees, such as posting the notice in the same manner and location as for other notices, such as safety and health occupational notices, that the employer is required by law to post. The Final Rule includes such flexibility and provides that electronic posting, such as displaying the notice prominently on any internal or external Web site that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. However, under this Final Rule, employers who are subject to special procedures under the program will continue to conduct recruitment activities in accordance with those procedures unless or until such a time when these procedures are modified or withdrawn by the Administrator, OFLC in accordance with the regulatory requirements under § 655.4, except to the extent that such procedures are in direct conflict with these regulations.

For all of the reasons discussed above, we are retaining the requirement that the employer contact the bargaining representative or post a notice of the job opportunity and are extending the duration for such posting from 10 to 15 business days.

In addition to requiring the employer to contact the bargaining representative or post a notice of the job opportunity, the NPRM included a proposal to, where appropriate, require the employer to contact community-based organizations to disseminate the notice of the job opportunity. Community-based organizations are an effective means of reaching out to domestic workers interested in specific

occupations. ETA administers our nation's public exchange workforce system through a series of One-Stop Career Centers. These One-Stop Centers provide a wide range of employment and training services for workers through job training and outreach programs such as job search assistance, job referral and job placement services, and also provide recruitment services to businesses seeking workers. Community-based organizations with employment programs including workers who might be interested in H-2B job opportunities have established relationships with the One-Stop Career Center network. The One-Stop Center in or closest to the area of intended employment will be, in most cases, the designated point of contact the CO will give employers to use to provide notice of the job opportunity. This provides the employer with access not only to the community-based organization, but to a wider range of services of assistance to its goal of meeting its workforce needs. This contact is to be made when designated specifically by the CO in the Notice of Acceptance, as appropriate to the job opportunity and the area of intended employment. We have decided to retain this provision as proposed with minor revisions.

We received several comments on this proposal. The majority of commenters expressed strong support for the requirement that the employer contact community-based organizations, indicating that these organizations in many cases possess specialized knowledge of local labor market conditions and practices, and are in the position to assist with recruitment efforts, thus ensuring a complete test of the labor market as well as assist the CO with identifying potential problems with the offered terms and conditions of employment.

Commenters opposing this proposed requirement suggested that it will not result in meaningful applicants for the job opportunity. We note that, not unlike additional recruitment, contact with community-based organizations is intended to broaden the pool of potential applicants and assist the many unemployed U.S. workers with finding meaningful job opportunities. These organizations are especially valuable because they are likely to serve those workers in greatest need of assistance in finding work, particularly with respect to H-2B occupations that require little or no specialized knowledge. Although we will not require each employer to make this type of contact, we have determined that keeping this provision in the Final Rule will assist with fulfilling the intent of the H-2B program

and enhancing the integrity of the labor market test. Therefore the Final Rule retains the requirement that the employer, where ordered by the CO, contact community-based organizations.

7. § 655.46 Additional Employer-Conducted Recruitment

Where the CO determines that the employer-conducted recruitment, described in §§ 655.42 through 655.45, is not sufficient to attract qualified U.S. workers, the proposed rule authorized the CO to require the employer to engage in additional recruitment activities. In addition to proposing that the CO require additional recruitment, we solicited suggestions from the public on the recruitment means most suitable for the CO to require. We also proposed that the CO would specify the documentation or evidence that the employer must maintain as proof it met the additional recruitment step(s). We are retaining this provision as proposed with minor clarifying edits.

We received many comments on this proposal. The majority of commenters expressed strong support for the proposal and indicated that the additional recruitment requirement is particularly welcome in times of high unemployment because it will ensure that U.S. workers have the broadest exposure to these job opportunities. In contrast, several other commenters objected to the proposal on the ground that it provides the CO with potentially unfettered discretion to impose additional requirements on employers; some requested clarification of when the additional recruitment will take place.

We also invited comments on the proposed additional recruitment methods, including examples of the types of recruitment typically conducted in specific industries, occupations, or job classifications. Several commenters provided suggestions for potential recruitment sources such as the use of the employer's Web site, job search Web sites (such as Craig's List or Monster.com), staffing agencies, and other outreach efforts. Some commenters also suggested recruitment efforts they use or have used in the past to recruit U.S. workers. However, none of the commenters provided information about the types of recruitment that are typically conducted in specific industries. We thank the commenters for their input. Where appropriate, the CO will draw upon these suggestions when making a determination about what types of additional recruitment are appropriate. We have made a clarifying edit in this section, adding the word additional to indicate that CO-ordered

efforts to contact community-based organizations and/or One-Stop Career Centers are in addition to the requirements in §§ 655.16 and 655.45.

A few comments reflected confusion over the requirement, and encouraged us to expand it beyond areas of substantial unemployment. Others commenters requested that we revisit the requirement and proposed alternatives for redefining an area of substantial unemployment.

Our intention in requiring additional recruitment including, where appropriate, in areas of substantial unemployment, is predicated on the belief that more recruitment will result in more opportunities for U.S. workers. In addition, we recognize that the increased rate of innovation in the arena of technology, including its implications for communication of information about job opportunities, is changing the way many U.S. workers search for and find jobs. In part due to these changes, the inclusion of this requirement is intended to allow the CO flexibility to keep apace with the ever-changing labor market trends.

In response to comments about not limiting additional recruitment only to job opportunities located in areas of substantial unemployment, we agree that the recruitment sources the CO uses should go beyond just the areas of substantial unemployment, which is why we only listed areas of substantial unemployment as one example of an additional source and why we solicited information about other available sources. The requirement as proposed and retained is intended to provide the CO with discretion to order additional positive recruitment whenever the CO deems it to be appropriate. This discretion is also not an absolute requirement but permits us to ensure the appropriateness and integrity of the labor market test and determine the appropriate level of recruitment based on the specific situation. The COs, with advice from the SWAs which are familiar with local employment patterns and real-time market conditions, are well-positioned to judge where additional recruitment may or may not be required as well as the sources that should be used by the employer to conduct such additional recruitment.

For example, it may be reasonable to require additional recruitment for a job that requires little training or experience in an area of substantial unemployment, since a larger group of available workers would be qualified for the job. While the employer will be required to conduct all the recruitment efforts required under this section and §§ 655.42–655.46 in certain circumstances, in other

circumstances, the CO may determine that such additional efforts are unlikely to result in meaningful applications for the job opportunity. In each instance, the CO, often in consultation with the SWAs, will carefully weigh the projected benefits of additional recruitment to potential U.S. applicants against the benefit the employer is seeking through certification.

We also note that OIG's October 17, 2011 report recommended the Department reassess the existing recruitment provisions that require employers with itinerant positions subject to special procedures to actively recruit only in the State of initial employment. While recruitment requirements prior to this Final Rule did not necessarily limit recruitment of workers to just one State, neither did those provisions require recruitment outside the area of intended employment, in most cases. This Final Rule expands required recruitment activity, when appropriate for labor market test quality, to additional areas and sources likely to result in U.S. worker applicants.

Although we recognize that some commenters may be concerned over the discretion the CO has to order additional positive recruitment, as discussed above, such discretion is necessary to permit the CO the flexibility to ensure an adequate test of the labor market. However, any additional positive recruitment will be conducted in addition to, and occur within the same time period as the circulation of the job order and the other mandatory employer-conducted recruitment described above, and will not result in any delay in certification. While we may not endorse a specific commercially-available publication or Web site, the sources used by the CO will include, but will not be limited to: additional print advertising; advertising on the employer's Web site or another Web site; contact with additional community-based organizations that have contact with potential worker populations; additional contact with labor unions; contact with faith-based organizations; and radio advertisements. When assessing the appropriateness of a particular recruitment method, the CO will take into consideration all options at her/his disposal, including relying on the SWA experience and expertise with local labor markets, and where appropriate, will opt for the least burdensome and costly method(s).

8. § 655.47 Referrals of U.S. Workers

We proposed to require SWAs to refer for employment individuals who have been informed of the details of the job

opportunity and indicate that they are qualified and will be available for employment. We also eliminated the requirement that the SWAs conduct employment (I-9) eligibility verification. We are retaining the provision as proposed in part and revising the proposed provision in other part.

We received three comments on this proposal to eliminate the requirement that the SWAs conduct employment (I-9) eligibility verification. One commenter indicated a preference that the SWAs continue to conduct employment eligibility verification, while another supported its elimination. None of these commenters provided a rationale for its opinion.

In light of limited resources, we have determined that the requirement that SWAs conduct employment eligibility verification of job applicants is duplicative of the employer's responsibility under the INA. In addition, the INA provides that SWAs may, but are not required to, conduct such verification for those job applicants they refer to employers. DHS regulations permit employers to rely on the employment eligibility verification voluntarily performed by a State employment agency in certain limited circumstances.

We also received several comments regarding the proposal to require SWAs to refer for employment individuals who have been informed of the details of the job opportunity and who indicate that they are qualified and will be available for employment. Some commenters, primarily worker advocates and labor organizations, commended the Department for ensuring that U.S. workers are provided with the opportunity to be fully apprised of the job opportunity prior to being referred to the employer. These commenters indicated that this will lead to greater opportunities for U.S. workers as well as curb program abuse.

Other commenters focused more on the proposed role of the SWAs in referring U.S. applicants to the employer. One commenter understood the provision as proposed to require SWAs to inform prospective U.S. workers of the details of the job opportunity and to screen them for qualifications and availability. Other commenters, namely employer associations and employers, expressed concern regarding this provision, particularly in the context of the referral period proposed in the NPRM, indicating that it will result in an increase of disingenuous applicants or unqualified workers replacing available and qualified H-2B workers that the

employer already secured under an arduous process. Two State agencies expressed some uncertainty over the scope of their duties in the context of this proposal and their hope that we will provide them with resources to conduct additional employee screenings and referrals resulting from the new recruitment requirements.

As stated in the NPRM, it is our intention that the elimination of the employment eligibility requirement will allow the SWAs to focus their staff and resources on ensuring that U.S. workers who come to them are apprised of job opportunities for which the employer seeks to hire H-2B workers, which is one of the basic functions of the SWAs under their foreign labor certification grants, and to ensure such workers are qualified and available for the job opportunities. This does not mean that every referral must be assisted by SWA staff to be apprised of the job opportunity. To the contrary, many H-2B referrals are not staff-assisted but are instead self-referrals and we have no intention of interfering with the current processes established by most SWAs to handle these job orders. However, to the extent that staff are directly involved in a referral, we expect that the referrals made would be only of qualified workers. We do not expect this to be an additional burden on SWA staff.

Moreover, we do not presume that the judgment of the SWAs as to an applicant's qualifications is irrebuttable or a complete substitute for the employer's business judgment with respect to any candidate's suitability for employment. However, to the extent that the employer does not hire a SWA referral who was screened and assessed as qualified, the employer will have a heightened burden to demonstrate to us that the applicant was rejected only for lawful, job-related reasons.

With respect to the comments expressing concerns over the ability of the employer to rely on U.S. workers completing the duration of the certified period of employment, the SWAs will be required to, as part of the screening process, ascertain that the unemployed U.S. applicants who request referral to the job opportunity are sufficiently informed about the job opportunity, including the start and end dates of employment and that they commit to accepting the job offer if extended by the employer. However, as discussed under § 655.57, in recognition that some employers may nonetheless require relief in the form of replacing U.S. workers who fail to show up or complete the certified period of employment, we have developed a

redetermination process to accommodate these employers.

9. § 655.48 Recruitment Report

Consistent with the requirements of the 2008 Final Rule, we proposed to continue to require the employer to submit to the Chicago NPC a signed recruitment report. Unlike the 2008 Final Rule, however, we also proposed to require the employer to send the recruitment report on a date specified by the CO in the Notice of Acceptance instead of at the time of filing its *Application for Temporary Employment Certification*. This change accommodates the proposed recruitment model under which the employer does not begin its recruitment until directed by the CO in the Notice of Acceptance. The proposed rule detailed the information the employer is required to include in the recruitment report, such as the recruitment steps undertaken and their results, as well as other pertinent information. In addition, we proposed to require the employer to update the recruitment report throughout the referral period to ensure that the employer accounts for contact with each prospective U.S. worker. The proposed rule does not require the employer to submit the updated recruitment report but does require the employer to retain it and make it available in the event of a post-certification audit, a WHD or other Federal agency investigation, or upon request by the CO. We are retaining the provision as proposed with minor clarifying edits.

We received a number of comments offering strong support for the requirement that employers document that they have conducted the required recruitment efforts. One commenter suggested that we expand the recruitment report and require the employer to list all U.S. and foreign-born applicants for the job opportunity. The provision, as proposed and retained, requires the employer to provide the name and contact information of each U.S. worker who applied or was referred for the job opportunity. This reporting allows us to ensure the employer has met its obligation and to meet our responsibility to determine whether there were insufficient U.S. workers who are qualified and available to perform the job for which the employer seeks certification. In addition, when WHD conducts an investigation, WHD may contact U.S. workers listed in the report to verify the reasons given by the employer as to why they were not hired, where applicable. While we do not foreclose the possibility of expanding

the content of the recruitment report in the future, requiring that employers identify all applicants, including foreign workers, would impose a heavy burden on employers and is not necessary for carrying out our responsibilities under the H-2B program.

Some commenters objected to the record-keeping requirements, generally and as included in the proposed rule. Because these objections are not specific to the recruitment report, we address them in the discussion of document retention requirements. Other commenters suggested that the recruitment report be made available to the public so they may provide input to the CO on the contents before a Final Determination is made on the *Application for Temporary Employment Certification*. For the reasons discussed under § 655.63, we are not accepting this suggestion at this time. However, we continue to reserve the right to post any documents received in connection with the *Application for Temporary Employment Certification* and will redact information accordingly. Therefore we are retaining this provision as proposed with a minor clarifying edit that is consistent with requirements under § 655.43, indicating that, where applicable, the employer's recruitment report must contain confirmation the employer posted the job availability to all employees in the job classification and area in which the work will be performed by the H-2B workers.

G. Labor Certification Determinations

1. § 655.50 Determinations

We proposed to retain the same requirements under this provision as proposed in the 2008 Final Rule. We are retaining this provision as proposed with minor clarifying edits.

We received no comments on the substance of this provision. However, we received a number of comments critical of our failure to provide processing timeliness or a deadline for issuing a final determination. One commenter referred to our past performance before the attestation-based model in the 2008 Final Rule and argued that the processing of applications under the pre-2008 Final Rule system involved delays and that we have fallen short of our processing targets even under the 2008 Final Rule. This commenter, along with others, proposed that we commit to a deadline such as a return to the 60 days discussed in the preamble of the 2008 Final Rule or 30 days.

Unlike the other programs we administer, the INA does not provide a

statutory deadline for processing H-2B applications. In order to maximize integrity in the H-2B program it is imperative that we take the time necessary to carefully review each application and to make certain that each application we review represents a legitimate need for temporary workers. We will be implementing a completely reengineered program with a new registration process, new recruitment requirements, and new obligations that must be reviewed. OFLC has no baseline for these processes and therefore cannot predict at this time the likely processing time parameters. While we anticipate that registration, with its emphasis on the determination of temporary need, will decrease application adjudication times, we cannot know to what extent that additional process will streamline processing times. However, as is our practice, we will make every effort to timely process each application and to keep employers and other program users apprised of current processing times.

In addition, we received a few comments requesting that third parties be allowed to participate in the adjudication of a particular *Application for Temporary Employment Certification* or the job order. Some of these comments are related to the public availability of the *Application for Temporary Employment Certification* and are discussed elsewhere in this Final Rule.

Responsibility for the adjudication of each *Application of Temporary Employment Certification* rests with the Secretary, who has delegated that responsibility to OFLC. Historically, we have never permitted third parties to participate in the adjudication of labor certification decisions. Such involvement would create operational difficulties that would make it impossible to process these applications in a timely fashion. For that reason, we do not adopt the commenters' suggestion. However, we would certainly accept, as we do now, any information bearing on the application from any interested party.

For the reasons discussed above, we are retaining this provision as proposed with a minor clarifying edit to paragraph (b) of the regulation that replaces "grant, partially grant or deny" with "certify or deny." This clarification was based on our determination that the word certify encompasses both determinations to certify or partially certify an *Application for Temporary Employment Certification*.

2. § 655.51 Criteria for Certification

In the majority of cases, the certification determination will rest on

a finding that the employer has a valid *H-2B Registration* and has demonstrated full compliance with the requirements of this subpart. As under the 2008 Final Rule, in ensuring that the employer meets its recruitment obligations with respect to U.S. workers, the CO will treat as available all those individuals who were rejected by the employer for any reason other than a lawful, job-related reason. We are retaining this provision as proposed with a minor clarifying edit.

We received only one comment specific to the proposed regulatory provision. This commenter encouraged us to add a clause to the certification criteria indicating that lawful job-related reasons for rejecting U.S. workers do not include requirements which are applied to U.S. workers but not to H-2B workers.

As discussed elsewhere in this Final Rule, these regulations expressly prohibit an employer from offering preferential treatment to H-2B workers. That obligation extends to all aspects of the H-2B program, including recruitment and consideration of U.S. workers. Although an employer may not reject U.S. workers based on requirements that would not otherwise disqualify an H-2B worker, we do not believe that a change in this particular provision is needed to clarify this requirement.

Additionally, we proposed to clarify that we will not grant certifications to employers that have failed to comply with one or more sanctions or remedies imposed by final agency actions under the H-2B program. We did not receive any comments on this proposal. Accordingly, we are retaining this section as proposed except that we have clarified that the employer must comply with criteria necessary to grant the certification, rather than all program criteria. This clarification was necessary, as the criteria for certification cannot reasonably encompass the employer's future compliance, as contemplated by some of the program requirements. Such compliance is addressed through post-certification audits, integrity measures and enforcement activities.

3. § 655.52 Approved Certification

We proposed that the CO use next day delivery methods, and preferably, electronic mail, to send the Final Determination letter to the employer. We are doing so in an effort to expedite the transmittal of information and introduce efficiency and cost savings into the application determination process. The proposed rule also provided that the CO will send the

approved certification to the employer, with a copy to the employer's attorney or agent, if applicable. This is a departure from the 2008 Final Rule. This change in procedure has resulted from years of OFLC program experience evidencing complications in the relationship between employers and their agents or attorneys. Because the employer must attest to the assurances and obligations contained in the *Application for Temporary Employment Certification* and be ultimately responsible for upholding those assurances and obligations, the employer should receive and maintain the original approved certification. We are retaining this regulatory provision, as proposed with one minor clarification.

We received only one comment of general approval about the proposal to use next day delivery and no comments addressing the proposal to send the approved certification to the employer.

For the reasons above, we are retaining the provisions as proposed with one minor edit clarifying that when and if the *Application for Temporary Employment Certification* is permitted to be filed electronically, the employer must print, sign and retain the approved temporary labor certification.

4. § 655.53 Denied Certification

The NPRM proposed to retain the general provisions on denying certifications from the 2008 Final Rule, except that we proposed that the CO will send the Final Determination letter by means guaranteeing next day delivery to the employer, with a copy to the employer's attorney or agent. Under the proposal, the Final Determination letter will continue to state the reason(s) that the certification was denied, cite the relevant regulatory provisions and/or special procedures that govern, and provide the applicant with information sufficient to appeal the determination. We received no comments on this proposal and retain the provision as proposed with a minor clarifying edit that electronic mail is encompassed in means normally assuring next day delivery.

5. § 655.54 Partial Certification

The NPRM proposed to retain the 2008 Final Rule provision explicitly providing that the CO may issue a partial certification, reducing either the period of need or the number of H-2B workers requested, or both. The proposed rule clarified that the CO may reduce the number of workers certified by subtracting the number of qualified and available U.S. workers who have not been rejected for lawful job-related

reasons from the total number of workers requested. The Final Rule retains this provision as proposed.

We received few comments on this proposal. The majority of commenters supported the requirement that the employer not be permitted to hire H-2B workers unless it has demonstrated that no qualified U.S. workers are available. In addition, most commenters supported the proposal that an employer must consider for employment and hire all qualified and available U.S. workers who are referred to the employer within the referral period.

Many industry commenters expressed concern over the need to have a stable workforce throughout their certified period of need. One commenter requested that we provide a re-certification process to allow employers to hire H-2B workers when U.S. workers become unavailable. These commenters expressed significant concerns over the viability of their businesses if, after expending significant resources to hire H-2B workers, those workers are displaced or not hired due to the requirement that the employer hire each U.S. worker who is qualified and available for employment and the U.S. workers hired do not report for work or fail to complete the work contract period. We agree with these commenters and have added a new § 655.57 to address this issue.

6. § 655.55 Validity of Temporary Employment Certification

We proposed to retain the provision in the 2008 Final Rule that an approved temporary labor certification is only valid for the period, the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed as provided on the *Application for Temporary Employment Certification*. While the proposed rule continued to prohibit the employer from transferring the labor certification to another employer, we proposed to allow the employer to transfer the approved labor certification to a successor in interest in case of a merger or acquisition where the new employer is willing to continue to employ the workers certified and take on all of the legal obligations associated with the labor certification. We are retaining this provision as proposed, with minor clarifying edits.

Most commenters supported the proposal to limit the validity of the labor certification as proposed. We received one comment suggesting that the transfer to a successor in interest be limited to legally documented mergers

or acquisitions. Another commenter indicated that the prohibition on transfers will promote appropriate recruitment of U.S. workers and prohibit employers from skirting program requirements.

Similar to the prohibition on transfers of an *H-2B Registration*, we believe that limiting the validity of each certification to the employer to which it was issued is essential to ensuring program integrity. As we have stated elsewhere, we consider it our obligation to protect a labor certification against being treated as a commodity; limiting its use to the employer who applied for it achieves that protection. Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity; Final Rule, 72 FR 27904, 27918, May 17, 2007. As discussed in the preamble to the proposed rule, we intend to limit transfers to the successor in interest solely to legally documented business transactions such as mergers or acquisitions, whereby the new owner assumes all obligations and liabilities of the employer who originally obtained the certification.

Therefore, we are retaining this provision as proposed except that we have clarified that each temporary labor certification is valid for the period approved on the *Application for Temporary Employment Certification*, including any approved modifications.

7. § 655.56 Document Retention Requirements of H-2B Employers

We proposed to add a section that delineates all of the document retention requirements, including the period of time during which documents must be retained. These retention requirements were included solely under their individual sections under the 2008 Final Rule. The document retention requirements apply to all employers who file an *Application for Temporary Employment Certification*, regardless of whether such applications have been certified, denied, or withdrawn. The proposed provision outlines the documents that an employer must retain. We are keeping this portion of the provision as proposed, with a minor expansion to include any documents that must be retained by the employer resulting from revisions in the Final Rule, as well as other minor clarifying edits, including expressing what the NPRM already implied, *i.e.*, that the documents and records retained under this section must be made available to the Department as well as other Federal agencies in the event of an audit or investigation.

In addition, we proposed to require employers to make these documents and records available to the Administrator, OFLC within 72 hours following a request. In response to comments, we have made certain clarifying edits to this provision, but are retaining most of the substantive aspects as proposed.

The majority of commenters supported this proposal because it requires employers to document, rather than merely attest to, compliance. One commenter expressed strong support for this requirement and suggested that we expand it to include records on the amounts spent by the employer for transportation, subsistence, visa fees, and other costs which the employer is prohibited from shifting to its workers. Another commenter requested the record keeping requirement be expanded to include records about recruiting fees, including amounts and recipients.

Some commenters objected to the requirement, as generally unnecessary or burdensome in terms of cost and effort required by the employer, while other commenters offered suggestions for enhancing or curbing the requirements related to specific records such as payroll/earning records. Where the substance of those comments is specific to a particular provision in the proposed rule, we will address it there.

We agree with commenters supporting this proposal. The records that the employer is required to retain are invaluable to ensuring program integrity. We use them both in making current determinations, where needed, and in evaluating any future *Application for Temporary Employment Certification*. These records permit us to ensure that the employer complied with the assurances and obligations of the H-2B labor certification program. We believe that the proposed recordkeeping requirement already encompasses the commenters' request to expand that requirement to information about costs for subsistence, transportation, visa fees, or recruiting fees. For example, under § 655.20(i), an employer is required to keep accurate and adequate records with respect to the workers' earnings. This obligation encompasses records of the amount of any and all deductions taken from the workers' wages and additional payments to the worker. For clarity, as described below, we added a new paragraph (c)(6) specifically addressing transportation and subsistence. Furthermore, this section in paragraph (c)(9) requires the employer to retain copies of all contracts with agents or recruiters, which will provide additional information regarding payments involved in these contracts.

These records, which may be maintained electronically, together with the requirement to keep accurate earning statements, will assist us in determining whether the employer has paid or provided for all other costs required in the H-2B employment. Requiring additional documentation is unnecessary.

We disagree with the commenters who opposed the document retention requirement. Document retention has been an integral part of the H-2B program, and the proposed regulation is substantively similar to the existing requirement under the 2008 Final Rule. Moreover, it is essential to the performance of program integrity activities.

One commenter objected to the requirement that the employer make such records available within a 72-hour period, indicating that the requirement is burdensome, or impossible to comply with based on the nature of the employer's business. This commenter further requested clarification of when the timeframe starts and asked us to indicate whether electronic records may be maintained. Other commenters offered suggestions for the timeframe for document retention, one suggesting that all records should be retained for a year after any *H-2B Registration* expires and others proposing a period of time based on the end of the job opportunity.

We revised paragraph (d) of this section to clarify that the requirement to produce records within a 72-hour period is to produce such records to the Administrator, WHD for enforcement purposes, rather than Administrator, OFLC. When the Administrator, OFLC makes a request to make records available, an employer must comply with the timeframes in the provision governing the request, *e.g.*, Request for Information, Notice of Deficiency, Revocation or Debarment. Additionally, OFLC will continue to include in the correspondence requesting records the deadline by which they must be produced. This timeframe will correspond to the regulatory requirement for the type of request. For example, in an audit letter under § 655.70, the CO will specify a date, not to exceed 30 calendar days from the date of the audit letter, to provide a response, including any documents which are requested in the audit letter.

Finally, we received several comments addressing the 3-year requirement for document retention. One commenter expressed support for the 3-year retention requirement noting that the familiar requirement will make compliance easy for employers. Another commenter opposed the 3-year retention

requirement for applications that have been withdrawn or denied. One commenter indicated that the retention period should be 1 year after the expiration of the H-2B registration, while another expressed concerns that the 3-year retention requirement may permit an employer with a 3-year certification to destroy records before the completion of the job; this commenter suggested that employers be required to maintain records and documents for at least 1 year after the completion of the job. Finally a commenter suggested a longer retention requirement of 5 years.

In response to these comments, we wish to clarify that employers must maintain all records required in this section for the period of 3 years after the *Application for Temporary Employment Certification* is adjudicated or from the date the CO receives a letter of withdrawal. The Final Rule also includes a separate requirement in § 655.11(i) that the employer retain documents pertaining to the *H-2B Registration* for a 3-year period after the end of the validity of the *H-2B Registration*. We have concluded that the two document retention requirements taken together adequately address the need to document compliance with program requirements. In addition, the regulatory scheme does not allow that records be destroyed until the certified period of employment has concluded. Although we recognize that the employer may have a temporary need based on a one-time occurrence which lasts up to 3 years, the Department will not grant a 3-year certification but will require the employer to file additional *Applications for Temporary Employment Certification* and conduct a labor market test where the period of employment exceeds 9 months. Each application filed by the employer will trigger a new document retention requirement and therefore ensure that records are available to assist the Department in ascertaining compliance with all program requirements. The Department believes, however, that a longer requirement such as the suggested 5 years is not necessary to ensure program integrity and would be inconsistent with document retention requirements in other labor certification programs. Finally, the Department disagrees with a commenter who opposed the 3-year retention requirement for withdrawn or denied applications. Based on our program experience, we have concluded that requiring all employers to retain this information will bolster program integrity and aid in the enforcement of

program obligations, particularly since many employers are repeat filers in the H-2B program. For these reasons we are retaining the 3-year retention period, as proposed.

To reflect changes made to § 655.20, we have added a new subparagraph (c)(6) to this section to require employers to retain records of reimbursement of transportation and subsistence costs incurred by the worker. Additionally, in response to comments and changes made to § 655.9, we have made edits to subparagraph (c)(9) of this section to indicate that the retention of written contracts with agents or recruiters must also include the list of the identities and locations of persons hired by or working for the recruiter and their agents or employees.

Finally, the provision in the Final Rule also reminds the employer that if and when the *Application for Temporary Employment Certification* and the *H-2B Registration* are permitted to be filed electronically, the employer must print, sign, and retain each adjudicated *Application for Temporary Employment Certification* and the *H-2B Registration* including any approved modifications, amendments, or extensions.

8. § 655.57 Determinations Based on the Unavailability of U.S. Workers

As discussed earlier in this preamble, several commenters expressed significant concerns over the viability of their businesses if, after expending significant resources to hire H-2B workers, those workers are displaced or not hired due to the requirement that the employer hire each U.S. worker who is qualified and available for employment and the U.S. workers hired do not report for work or fail to complete the work contract period. Specifically, one commenter requested that we provide a re-certification process to allow employers to hire H-2B workers when U.S. workers become unavailable. We agree with these commenters and have added this provision to provide an option to employers to address their workforce needs in the continuing absence of U.S. workers.

Under the Final Rule, as under the NPRM, an employer is required to hire all qualified and available U.S. workers who are referred to it by the SWA during the referral period specified in § 655.40(c). Where the employer's request for H-2B workers is reduced by the number of qualified and available U.S. workers or denied because the employer has hired U.S. workers for all of the positions it seeks to fill and the U.S. worker(s) subsequently become

unavailable, the employer has the option to voluntarily contact the SWA for additional referrals of U.S. workers. While this is not a requirement, the SWA may be able to provide the employer with replacement workers without an additional request to the CO. However, we recognize that there are circumstances where an employer's U.S. workers fail to report to work or quit before the end of the certified period of employment, and it is at times not viable for an employer to seek additional workers from the SWA. We have determined that it is prudent to provide an avenue for relief for those employers. In the event that some or all of the employer's U.S. workers become unavailable, we are adopting a regulation similar to that in the H-2A program which provides the CO with the authority to issue a redetermination based on the unavailability of U.S. workers, upon a timely and proper request by the employer. Under this added section, the employer must make a written request directly to the CO for a new determination by electronic mail or other appropriate means, such as a private courier. The request must be accompanied by a signed statement confirming the employer's assertion and providing reasons for the nonavailability (e.g., information regarding the departure of the workers after one day, the fact they never showed up for work on the first day.). If the employer has not previously provided notification of abandonment or termination of a U.S. worker under § 655.20(y), the employer will be required to include in the signed statement the name and contact information for each U.S. worker who has become unavailable. Before granting the employer's request, the CO will contact the SWA in an attempt to locate qualified replacement workers who are available or are likely to become available for the job opportunity. If no such workers are found, the CO will grant the employer's request for a new determination. The employer may appeal a denial of its request under the administrative appeal process in § 655.61. For these reasons, we are adding this new section, Request for determination based on unavailability of U.S. workers, to address the concerns raised by commenters.

H. Post Certification Activities

1. § 655.60 Extensions

In the proposed rule, we identified instances when an employer will have a reasonable need for an extension of the time period that was not foreseen at the time the employer originally filed

the *Application for Temporary Employment Certification*. This provision provides flexibility to the employer in the event of such circumstances while maintaining the integrity of the certification and the determination of temporary need.

We proposed that the employer make its request to the CO in writing and submit documentation showing that the extension is needed and that the employer could not have reasonably foreseen the need. Extensions would be available only to employers whose original certified period of employment is less than the maximum period allowable in this subpart and under DHS H-2B regulations. Extensions differ from amendments to the period of need because extensions are requested after certification, while amendments are requested before certification. Extensions will only be granted if the employer demonstrates that the need for the extension arose from unforeseeable circumstances, such as weather conditions or other factors beyond the control of the employer (including unforeseen changes in market conditions). We have decided to keep this provision as proposed, with a few edits to remove redundancy related to the maximum period allowable through extension and employer obligations and otherwise clarify the provision.

A comment received from a labor organization suggested that the words reasonably unforeseeable, when referring to changes in market conditions, should replace unforeseeable. We have determined that adding the term reasonably would not confer any additional clarity as it is the CO who determines whether the employer has provided a sufficient reason for the extension based on the facts of the specific case and evidence presented.

2. § 655.61 Administrative Review

The Administrative Review provision in the NPRM was substantially the same as the 2008 Final Rule, with a proposed adjustment in the timeframe from 5 to 7 business days each for the submission of the appeal file by the CO, the submission of a brief by the CO's counsel, and the issuance of a decision by BALCA. We are adopting the provision of the NPRM without change in this Final Rule.

Two commenters recommended that we provide de novo review in the administrative review process. As proposed in the NPRM, a request for administrative review may contain only legal arguments and such evidence as was actually submitted to the CO before the date the determination was issued.

By contrast, de novo review would permit the parties to add additional information for the BALCA to consider beyond what was actually submitted to the CO. After considering this issue, we decline to change the administrative process to provide de novo review. Given that an employer is provided with multiple opportunities to submit information and respond to the CO at each step of the labor certification adjudication process, record review provides employers with a fair and efficient process to appeal the CO's determinations. De novo review, if anything, provides employers with less of an incentive to submit the required information or documentation when requested. Additionally, establishing de novo proceedings would further lengthen the adjudication process and require additional resources that may produce a backlog in H-2B appeals. Furthermore, the regulations have limited BALCA review to the record considered by the CO for the past 18 months without any problems, and we believe continuing with this process is unlikely to cause problems in the future, for the reasons mentioned previously.

One of these commenters also recommended that the rule require us to include all information relating to a particular matter in the administrative file. The commenter stated that placing all material relating to a particular matter in the administrative file as a matter of course would enhance public perception of the fairness of the process and would likely produce better outcomes on the merits. The CO already includes in the administrative file any documents that it receives from the employer and third parties that pertain to the adjudication of the certification. Therefore, we do not believe that it is necessary to add to the regulatory language a requirement that the CO include in the administrative file all information that any party states is related to particular matter in the administrative file.

This commenter also requested modification of the rule to establish that appellate proceedings are adversary proceedings for the purposes of the Equal Access of Justice Act (EAJA). However, Federal courts have recognized the EAJA is a waiver of the sovereign's traditional immunity from claims for attorneys' fees and therefore must be construed strictly in favor of the U.S. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274 (1983); *Fidelity Construction Co. v. United States*, 700 F.2d 1378, 1385 (Fed. Cir. 1983). In *Smedberg Mach. & Tool, Inc. v. Donovan*, 730 F.2d 1089 (7th Cir. 1984), the court specifically found that labor

certification review proceedings are not adversary adjudication for the purposes of the EAJA. While the *Smedberg* decision dealt with the administrative review process for the permanent labor certification program, it is just as applicable to the H-2B program. The court found that unless an agency hearing is statutorily mandated, the EAJA does not provide for the award of attorney fees to the prevailing party. See *Smedberg*, 730 F.2d at 1092. Because the INA does not mandate an agency hearing for the granting or denial of H-2B labor certifications, EAJA does not provide for attorneys fee awards to plaintiffs who prevail in those proceedings. Therefore, we decline to establish an H-2B appeal is an adversary proceeding.

We received a comment about the provision which increased the time for the CO to assemble and submit the appeal file in § 655.61(b) from 5 business days to 7 business days. The commenter recommended that the rule require the submission within 3 business days. However, 3 business days is not, in many cases, enough time to assemble, review and submit an appeal file, particularly when coupled with the CO's continuing responsibility to adjudicate other pending applications within a short timeframe and to prepare appeal files for other cases on appeal. Furthermore, 7 business days is an administratively efficient timeframe, consistent with similar deadlines for the Chicago NPC in our other labor certification programs. Therefore, we decline to change the deadline to assemble and submit the appeal file to 3 days and instead maintain the 7 business day deadline proposed.

One commenter recommended that we establish procedures which would allow for intervention by workers and/or organizations of workers to participate in ALJ hearings. For the reasons provided in the general discussion of integrity measures later in this preamble, we decline to accept this suggestion.

3. § 655.62 Withdrawal of an Application for Temporary Employment Certification

Under the proposed rule, an employer may withdraw an *Application for Temporary Employment Certification* before it is adjudicated. We are retaining this provision as proposed with one clarifying edit. We received one comment on the withdrawal provision. This commenter encouraged us to adopt additional language providing that if an employer withdraws a pending H-2B *Application for Temporary Employment Certification*, any U.S. workers hired or

in corresponding employment must still receive the benefits and protections provided under that *Application for Temporary Employment Certification*. We decline to accept this suggestion, as we do not have the authority to enforce the benefits and protections provided under an *Application for Temporary Employment Certification* if there is no final determination. Presumably, an employer can withdraw its application the day after submission, at which point no recruitment has begun. Hence, we distinguish between a request to withdraw an *Application for Temporary Employment Certification* before adjudication, where the employer makes a decision not to participate in the program and is likely to have not completed the recruitment process, and a request to withdraw an adjudicated, i.e. certified (full or partial) or denied, *Application for Temporary Employment Certification* where the employer has already initiated the recruitment process on which the CO based the determination. Where the CO has already made a final decision on an employer's *Application for Temporary Employment Certification*, regardless of whether it is denied or certified, and where the employer requests withdrawal after such adjudication, we have maintained as proposed, within the integrity measures of both 29 part 503 and this subpart, that the employer is bound by the assurances and obligations of the *Application for Temporary Employment Certification* to any U.S. worker hired or any corresponding workers under the positions listed in the *Application for Temporary Employment Certification*. Therefore, we are retaining this provision with one clarifying change. Although implied in the NPRM, we have included language in the regulations to clarify that a withdrawal of an *Application for Temporary Employment Certification* must be requested in writing.

4. § 655.63 Public Disclosure

This proposed section codifies our practice of maintaining, apart from the electronic job registry, an electronic database accessible to the public containing information on all employers that apply for H-2B labor certifications. The database will continue to include information such as the number of workers the employer requests on an application, the date an application is filed, and the final disposition of an application. The continued accessibility of such information will increase the transparency of the H-2B program and process and provide information to those currently seeking such

information from the Department through FOIA requests.

The comments that were received in regard to public disclosure were requests that we include additional information or documentation. These comments are addressed below.

We received several suggestions as to the types of documents that should be posted on the OFLC Web site or electronic job registry. One labor organization requested that all information received from an employer seeking registration in the H-2B program be placed on an online database, in order to facilitate private enforcement of the regulations. An advocacy group also stated that program integrity would be better served by expanding the database to include all of the materials that the NPC receives from employers. While we are committed to transparency, we have determined that there are several reasons why it may not be appropriate or feasible to disclose every document to the public. Again, many of the documents now required to be submitted under the Final Rule may contain privileged information, which for legitimate reasons cannot be disclosed to a third party. In addition, the amount of time it would take OFLC staff to appropriately redact and upload all documentation is beyond OFLC's capabilities at this time. That being said, we reserve the right to post, as appropriate, any documents pertaining to an *Application for Temporary Employment Certification* in order to align with the government's goal to be as open and transparent as possible.

Another advocacy group specified different types of information and documentation that should be included within the public disclosure such as: the type of work, the prevailing wage, the beginning and the ending dates of employment, and if housing is provided, then location of the housing. An additional concern was the timeliness of disclosure, so as to allow workers and advocates to participate in the administrative review processes. Much of the information listed by the commenter is contained within the *Application for Temporary Employment Certification* and/or the job order, which is already disclosed through the electronic job registry. We decline to accept the suggestion that documents related to pre-certification review such as agreements with agents and/or recruitment reports, or administrative actions such as audits should be posted before a determination is made by the CO and/or an ALJ to give the public time to review the documents and provide information. In addition to causing delays in processing, such

information if disseminated during the administrative process could undermine the integrity of the certification and appeal processes. There are mechanisms for relaying information regarding an H-2B job opportunity or an employer application; such information may be relayed in a complaint lodged through the Job Service Complaint System, or may be provided to the Administrator, OFLC and/or CO at any time. Employers filing applications are also reminded that where the employer or its agent/attorney is found to have provided false information on the *Application for Temporary Employment Certification*, the application may be subject to revocation, and that person or entity may be subject to debarment or additional penalties, as appropriate.

Several commenters also recommended that we create a searchable database with all enforcement actions. OFLC already maintains a publically available list of debarred entities on its Web site, and WHD also maintains a list of enforcement actions in closed cases, which include the violations, on its Web. As stated above, we continue to be open to transparency and potentially developing a process to make additional information, such as final determinations, publically available. However, we do not believe that it would be appropriate to disclose information on pending enforcement actions, as doing so may undermine the integrity of the audit, investigation, or adjudication process. Therefore, we decline to adopt the commenter's proposal.

Another commenter recommended that ETA and WHD file an annual public report about their enforcement actions. The commenter is concerned that without such public reporting the public will have little idea whether the changes to the rule are making a difference. We decline to adopt this requirement in this Final Rule, as such information is already available to the public. As stated above, OFLC already maintains a publically available list of debarred entities on its Web site, and WHD also maintains a list of enforcement actions in closed cases, which include the violations, on its Web site.

Several commenters recommended that additional information and documentation should be included on the electronic job registry, in order to provide potential workers with a better sense of the job opportunity and employer. Some wanted us to include ETA Forms and other job-offer-related documents, while others wanted us to go as far as including contracts between

employers and foreign recruiters. Other commenters expressed concern about the type and amount of information that could become public via the electronic job registry. These commenters asserted that employers have a legitimate business interest in maintaining the confidentiality of employment terms. At this time we have decided not to include any additional information to the electronic job registry other than what was proposed under § 655.34.

Many commenters requested that the *H-2B Registration* be included as part of the public disclosure process. These commenters contend that such transparency would permit public monitoring compliance with regulatory requirements. For example, members of the general public could bring to light evidence that an employer misrepresented its actual need or the employer's need materially changed after the employer received a multi-year *H-2B Registration*. The types of information that these commenters wanted incorporated under our public disclosure are: employer names, worksite addresses, number of H-2B workers each employer is seeking to employ, the industries in which each employer operates, indication of the employer's application stage (e.g. registration or application), while others wanted on-going public disclosure of an employer's certified payrolls demonstrating compliance with the minimum wage requirements of the H-2B program. Though we understand why the public may want to see the *H-2B Registration* and the specific information listed above, at this time because the registration process is one by which employers may demonstrate their ability to participate in the H-2B program and does not provide an explicit right to access H-2B workers, we decline to make it part of our public disclosure.

I. Integrity Measures

Proposed §§ 655.70 through 655.73 have been grouped together under the heading Integrity Measures, describing those actions we propose to take to ensure that an *Application for Temporary Employment Certification* filed with the Department in fact complies with the requirements of this subpart.

Several commenters suggested that we establish procedures to allow for workers and organizations of workers to intervene and participate in the audit, revocation, and debarment processes. We find that such procedures would be administratively infeasible and inefficient and would cause numerous delays in the adjudication process. For

example, under this proposal, we would have to identify which workers and/or organizations of workers should receive notice and should be allowed to intervene. Processing delays would be exacerbated by the fact that once identified, we would have to provide additional time and resources to notify the parties and provide them with the opportunity to prepare and present their information, regardless of whether they have any specific interest or information about the particular proceedings at hand. Workers and worker advocates continue to have the opportunity to contact the OFLC or WHD with any findings or concerns that they have about a particular employer or certification, even without a formal notice and intervention process in place. For these reasons, we are not adding procedures to allow workers and organizations of workers to participate in the audit, revocation, and debarment processes.

1. § 655.70 Audits

This proposed section outlined the process under which OFLC would conduct audits of adjudicated applications. The proposed provisions were similar to the 2008 Final Rule. The Final Rule retains this provision as proposed with one clarifying edit.

Our regulatory mandate to ensure that qualified workers in the U.S. are not available and that the foreign workers' employment will not adversely affect wages and working conditions of similarly employed U.S. workers serves as the basis for our authority to audit adjudicated applications, even if the employer's application is ultimately withdrawn after adjudication or denied. Adjudicated applications include those that have been certified, denied, or withdrawn after certification. There is real value in auditing denied applications because they could be used to establish a record of employer non-compliance with program requirements and because the information they contain assists us in determining whether we need to further investigate or debar an employer or its agent or attorney.

Under the proposed rule, OFLC had the discretion to choose which *Applications for Temporary Employment Certification* will be audited, including selecting applications using a random assignment method. When an *Application for Temporary Employment Certification* is selected for audit, the CO will send a letter to the employer and, if appropriate, its attorney or agent, listing the documentation the employer must

submit and the date by which the documentation must be sent to the CO.

The NPRM also provided that an employer's failure to comply with the audit process may result in the revocation of its certification or in debarment, under proposed §§ 655.72 and 655.73, or require assisted recruitment in future filings of an *Application for Temporary Employment Certification*, under § 655.71. The CO may provide any findings made or documents received in the course of the audit to DHS or other enforcement agencies, as well as WHD. The CO may also refer any findings that an employer discriminated against a qualified U.S. worker to the Department of Justice, Civil Rights Division, and Office of Special Counsel for Unfair Immigration Related Employment Practices.

We received many comments on this provision. The comments were equally divided between those that opposed post-adjudication audits and those that believed that audits are an effective tool to enhance integrity and successfully root out bad actors.

Most comments supported OFLC's ability to audit, though one individual had concerns about the discretion that OFLC has under the NPRM to choose which employer that is audited. OFLC audits both employers about which it has information suggesting that the employer may have violated one or more provisions of the application and employers selected either randomly or by industry or other area of concern for quality assurance purposes. We do not believe that it is appropriate to limit our discretion as to which applications may be audited, as such a limitation could reduce the effectiveness of the integrity measures in the H-2B program.

Several commenters brought up the issue of allowing others to intervene in the OFLC audit process. As stated above in the general discussion of the integrity measures, we have decided that such procedures would be administratively infeasible and inefficient and would cause numerous delays in the adjudication process.

A comment submitted by several employer advocacy groups recommended that the post-adjudication audit procedure be eliminated as unnecessary and duplicative. They argued that post-adjudication audits are appropriate in the attestation-based certification model; however, there is no justification for them under the compliance model. These groups also stated that the incorporation of ETA's audit procedure coupled with WHD enforcement cannot be justified at a time when Federal funding resources are extremely limited. We disagree with

these commenters. We have a duty to use the tools and resources in our power to protect all workers in the U.S. By creating multiple checks and balances within the H-2B program, and allowing both ETA and WHD the ability to ensure compliance, we are meeting our goal of ensuring the protection of workers as well as keeping employers accountable.

One commenter wanted to be sure that all findings made by OFLC and all documents provided during an audit would be provided to DHS or other enforcement agencies. We work very closely with our sister agencies in all aspects of the H-2B program and will continue to do so. But we have come to recognize that providing documentation before the determination of an audit may result in unnecessary confusion and cause unwarranted delays, costs, or penalties to an employer. In addition, this commenter requested that we share information submitted in response to an audit or action for revocation or debarment with the SWA, so that the SWA can provide any relevant information to promote informed DOL decisions. As previously discussed, we have decided that incorporating such procedures could cause numerous delays in the adjudication process. A worker advocacy group suggested that any person should be able to request that the CO audit a particular employer. We reiterate that workers and worker advocates always have had the opportunity to contact us with any information or concerns that they have about a particular employer or certification, and they will continue to have that opportunity, even without a formal notice and intervention process in place. We cannot, however, commit to auditing every employer about which we receive a complaint or information. We will evaluate all information and complaints we receive to determine whether an audit is appropriate.

This same commenter requested that the provisions of 29 CFR 503.6 and 503.7 be incorporated into the audit section under this subpart. However, though this subpart and 29 CFR part 503 in many instances parallel each other, there are many provisions in one part that, based on the different roles of OFLC and WHD, may not be deemed appropriate for the other. For example, one of the provisions in 29 CFR 503.6 (Waiver of rights prohibited) provides that a person may not seek to have an H-2B worker, a worker in corresponding employment, or any other person's rights waived. This provision is not necessarily applicable to the audits requirements under the post-adjudication audit section, where OFLC is auditing the employer's

application. It is highly unlikely that the documentation provided or requested in an audit would provide evidence of any waiver of a worker's rights. Under 29 CFR 503.7 (Investigation authority of the Secretary) WHD has assumed the authority delegated to the Secretary under 8 U.S.C. 1184(c)(14)(B). WHD is the primary agency within the Department for investigating employer compliance with the requirements of the H-2A and H-2B programs. WHD has the necessary expertise and knowledge to enforce and investigate the various regulatory provisions. Requiring OFLC to have duplicative investigative authority under the audit provision would not be the best use of the Department's resources. For the reasons stated above, we are retaining the substance of this provision as proposed, except for several clarifying edits. We clarified that the Audit Letter will advise the employer of its obligation to fully comply with the audit process and included a consistency change in the last sentence of paragraph (c) by replacing the word additional with the word supplemental.

2. § 655.71 CO-Ordered Assisted Recruitment

The proposed rule permitted OFLC to determine that a violation that does not warrant debarment has occurred and, as a result, to require an employer to participate in assisted recruitment. This provision also applied to those employers that due to either program inexperience or confusion, have made mistakes in their *Application for Temporary Employment Certification* that indicate a need for further assistance from OFLC.

Under this provision the CO will notify the employer (and its attorney or agent, if applicable) in writing of the requirement to participate in assisted recruitment for any future filed *Application for Temporary Employment Certification* for a period of up to 2 years. The assisted recruitment will be at the discretion of the CO, and determined on the unique circumstances of the employer.

The assisted recruitment may consist of, but is not limited to, requiring the employer to conduct additional recruitment, reviewing the employer's advertisements before posting and directing the employer where such advertisements are to be placed and for how long, requesting and reviewing copies of all advertisements after they have been posted, and requiring the employer to submit proof of contact with past U.S. workers, and proof of SWA referrals of U.S. workers. If an employer fails to comply with the

requirements of this section, the employer's application will be denied and the employer may be debarred from future program participation under § 655.73.

We also invited comments and suggestions of industry-specific recruitment and advertising sources to be used by the CO in administering assisted recruitment in the H-2B program under this section. We are retaining the proposed provision with one change. While we received no suggestions about industry-specific recruitment sources, the comments did indicate general support for allowing the CO to order assisted recruitment as a means of helping an employer rectify recruitment problems before more severe administrative actions are pursued. One individual stated that the COs should refrain from inserting themselves into the employer-attorney/agent relationship and should only notify the employer of the need to participate in assisted recruitment. We disagree with this commenter. An employer has the right under the regulations to seek the advice and assistance of an attorney or agent. We know of no reason why we should limit the areas in which the employer can seek that advice and assistance.

Having considered comments on this proposal, we are retaining this provision in its entirety with one edit in paragraph (d), where we clarify that the employer's failure to comply must be material in nature.

3. § 655.72 Revocation

Under this section, OFLC can revoke an approved temporary labor certification under certain conditions, including where there is fraud or willful misrepresentation of a material fact in the application process or a substantial failure to comply with the terms and conditions of the certification. The 2008 Final Rule did not include a similar revocation provision. We are adopting the provisions of the NPRM without change in this Final Rule.

Many commenters expressed general approval of the new revocation provision as an important enforcement technique. Commenters also submitted comments on specific provisions of this section.

Several of these commenters discussed the bases for revocation in paragraph (a) of this section. The basis generating the most comments is paragraph (a)(2), which lists a substantial failure to comply with the terms and conditions of the certification as a basis for revocation and defines a substantial failure as a willful failure to comply. Several worker advocacy

organizations stated the willful standard is too high. Many of these organizations suggested an intentional standard, instead. Several stated an intentional standard would be consistent with the Job Service Complaint System and with the MSPA. One organization noted that the courts have provided considerable interpretation of the intentional standard under MSPA, so use of the intentional standard would enhance the standard's clarity. Another worker advocacy organization proposed a new eight-part definition for substantial failure that included failure to provide wages, benefits or acceptable working conditions; violations of H-2B regulations; and violations of other laws.

We elect to maintain the willful standard. The reason for maintaining this standard is discussed in more depth at 29 CFR 503.19 (Violations) of the WHD preamble.

A labor organization suggested that all of an employer's existing labor certifications be revoked if one is revoked, because the employer has been found to be untrustworthy. While we recognize that an employer would be undermining the integrity of the labor certification program if it meets any of the bases for revocation set forth in this section, we are retaining the language as proposed in the NPRM, because we do not believe that violations relating to a particular certification should not necessarily be imputed to an employer's other certifications. We recognize the serious impact that a revocation would have on employers and H-2B workers alike and do not believe that it should be applied to certifications for which there has been no finding of employer culpability.

However, we acknowledge that in some situations, the Administrator, OFLC, may revoke all of an employer's existing labor certifications where the underlying violation applies to all of the employer's certifications. For instance, if the Administrator, OFLC finds that the employer meets either the basis for revocation in paragraph (a)(3) of this section (failure to cooperate with a Department investigation or with a Department official performing an investigation, inspection, audit, or law enforcement function) or in paragraph (a)(4) of this section (failure to comply with sanctions or remedies imposed by WHD or with decisions or orders of the Secretary with respect to the H-2B program), this finding could provide a basis for revoking any and all of the employer's existing labor certifications. Additionally, where we find violations of paragraphs (a)(1) or (a)(2) of this section affect all of the employer's

certifications, such as where an employer misrepresents its legal status, we also may revoke all of that employer's certifications. Lastly, where an employer's certification has been revoked, we certainly would take a more careful look at the employer's other certifications to determine if similar violations exist that would warrant their revocation.

Representing the opposite perspective, one coalition of employers expressed concern about the effect of revocation on businesses and concern that revocation may be too frequent under the bases proposed in the NPRM. The coalition wants us to clarify that revocation is an extreme penalty for egregious violations. This commenter also suggested that we consider the totality of the circumstances, not just the potential bases listed in paragraph (a) of this section, when considering whether or not to revoke a temporary labor certification.

We cannot say how often revocation will occur under the Final Rule, because a similar provision did not exist in the 2008 Final Rule or before. We recognize the seriousness of revocation as a remedy; accordingly, the bases for revocation in paragraph (a) reflect violations that significantly undermine the integrity of the H-2B program. We intend to use the authority to revoke only when an employer's actions warrant such a severe consequence. We do not intend to revoke certifications if an employer commits minor mistakes.

Several worker advocacy organizations also submitted comments on paragraph (b) of this section, which details the procedures for revocation. Three organizations suggested that the rules should provide for notice to employees of revocation proceedings and for intervention by employees in revocation proceedings. One organization suggested giving notice of revocation to entities listed as potential recruitment sources, such as former employees. We have decided not to add procedures for employee or third party notification and intervention to the revocation section for the reasons set forth in the Integrity Measures preamble at §§ 655.70–655.73.

4. § 655.73 Debarment

The NPRM proposed to revise the existing debarment provision to strengthen the enforcement of H-2B labor certification requirements and to clarify the bases for a debarment. It also proposed that WHD have debarment authority independent of OFLC. The Final Rule adopts these provisions with minor changes.

A number of commenters had concerns about the willfulness standard that would apply not only to debarment, but also to the assessment of violations and other remedies. However, many of the comments were based on a misunderstanding of what a willful violation entailed. The violations discussion at 29 CFR 503.19 of the WHD preamble discusses the willfulness standard. As explained in that section, we will judge all violations by the willfulness standard and will not debar for minor, unintentional violations.

a. Debarment of an employer. A labor union encouraged us to extend debarment to the individual principals of a company or legal entity to foreclose the ability of these individuals to reconstitute under another business entity. Although we do not have the authority to routinely seek debarment of entities that are not listed on the ETA Form 9142, in appropriate circumstances, we may pierce the corporate veil in order to more effectively remedy the violations found.

b. Debarment of an agent or attorney. As discussed under § 655.8, the NPRM raised explicit concerns about the role of agents in the program, and whether their presence and participation have contributed to problems with program compliance, such as the passing on of prohibited costs to employees. These concerns were so significant that we solicited comments on whether to continue to permit the representation of employers by agents in the H-2B program. As discussed in the preamble discussion of § 655.8, we have decided to continue to allow agents to represent employers. However, as the NPRM also explained, if we were to continue to accept applications from agents, additional requirements might need to be applied to strengthen program integrity and we solicited comments on this issue as well.

Several employers and employer organizations responded by acknowledging that bad actors exist in the H-2B program, and urging us to use our enforcement authority to pursue fraud involving agents rather than prohibiting the legitimate work of agents in preparing and filing H-2B applications on behalf of employers. In addition, several worker advocacy organizations' comments expressed concern about violations committed by agents and attorneys, and encouraged us to take stronger actions to prevent such abuses, primarily by holding employers strictly liable for the actions of their agents. We are unable to do that for the reasons discussed in the preamble discussion at 29 CFR 503.20.

As a number of both employer and worker advocacy organizations noted, the Department's statistics show that in FY 2010, 86 percent of employers filed H-2B applications using an agent. These agents are intimately familiar with the H-2B program requirements. As commenters affirmed, agents have a high level of program knowledge and help guide employers through the process. The agents and attorneys who file applications on behalf of employers certify under penalty of perjury on the ETA Form 9142 *Application for Temporary Employment Certification* that everything on the application is true and correct. However, where, for example, a bad actor agent passes on prohibited fees to workers in violation of the prohibition on collecting such fees in § 655.20(o) and 29 CFR 503.16(o) while affirming that everything on the application is true and correct, including the employer's declaration that its agents and/or attorneys have not sought or received prohibited fees, the agent is not currently held accountable for such a violation absent a link to an employer violation.

In addition, § 655.20(p) and 29 CFR 503.16(p) require an employer to contractually prohibit an agent or recruiter from seeking or receiving payments from prospective employees. This creates a loophole, under which an employer may contractually prohibit the attorney or agent (and agents and employees) from collecting prohibited fees, yet the attorney or agent independently charges the workers for prohibited fees. In this situation, the employer will not be debarred for the independent violation of the agent or attorney because the employer has not committed any violation. A coalition of worker advocacy organizations pointed out that the proposed regulations "continue the Department's efforts to eliminate the pernicious practice of foreign workers paying substantial fees to recruiters to obtain H-2B jobs. While the proposed changes are praiseworthy, they are not sufficient to curb these abuses and may actually help relieve employers of responsibility for such charges."

In light of the concerns expressed in the NPRM and the comments received, we have decided to strengthen program integrity in the Final Rule by applying debarment to independent violations by attorneys and agents, recognizing that agents and attorneys should be held accountable for their own independent willful violations of the H-2B program, separate from an employer's violation. Language to this effect has been added to the OFLC and WHD debarment provisions at § 655.73(b) and 29 CFR

503.24(b), as well as the WHD sanctions and remedies section, as discussed further in the preamble at 29 CFR 503.20. These enhanced compliance measures apply only to the agents and attorneys who are signatories on the ETA Form 9142, as these agents and attorneys have become directly involved with the H-2B program and have made attestations to the Department.

A coalition of agents and employers suggested that we provide guidance on how we would apply the reckless disregard standard to agents and attorneys and the extent to which agents and attorneys must intrude into the details of the employer's business to avoid showing reckless disregard for the truthfulness of the agent's or attorney's representations or for whether their conduct satisfies the required conditions. We do not intend to make attorneys or agents strictly liable for debarable offenses committed by their employer clients, nor do we intend to debar attorneys who obtain privileged information during the course of representation about their client's violations or whose clients disregard their legal advice and commit willful violations. We will be sensitive to the facts and circumstances in each particular instance, and when considering whether an attorney or agent has participated in an employer's violation; we will seek to debar only those attorneys or agents who work in collusion with their employer-clients to either willfully misrepresent material facts or willfully and substantially fail to comply with the regulations. Similarly, where employers have colluded with their agents or attorneys to commit willful violations, we will consider debarment of the employer as well.

We did not propose in the NPRM to debar recruiters who are not agent or attorney signatories to the ETA Form 9142. However, several commenters specifically recommended that we maintain a public list of debarred recruiters. Since recruiters are not subject to debarment unless they are signatories to the ETA Form 9142, we will not maintain a list of debarred recruiters. However, both OFLC and WHD already publicly post a list of employers, agents, or attorneys that have been debarred under all of the labor certification programs and to the extent that a recruiter might also be debarred, the recruiter would also appear on the list.

Another commenter requested that we report debarred attorneys to State bar associations. We note that there is nothing in the regulations that restricts us from making such a report. Where

circumstances warrant, we may decide to report debarred attorneys to State bar associations using the information provided in the ETA Form 9142 which provides a field for the attorney's State bar association number and State of the highest court where the attorney is in good standing. However, we note that these fields are limited to only one State bar association. Therefore, while we may be able to notify the State bar association listed on the ETA Form 9142, there may be other State bar associations unknown to us, of which the attorney is a member that we are unable to notify. However, as stated in 20 CFR 655.73(h) and 29 CFR 503.24(e), copies of all final debarment decisions will be forwarded to DHS and DOS promptly.

c. Period of debarment. The NPRM proposed that the Administrator, OFLC may not debar an employer, attorney, or agent for less than 1 year nor more than 5 years from the date of the final debarment decision. The Final Rule adopts this provision as proposed. One commenter stated that increasing the maximum debarment period to 5 years based on what could be a single innocent act could result in a disproportionate and overly harsh penalty. In addition, a trade association questioned why a debarment period of up to 5 years was included in the NPRM, recommending that we adopt the up-to-3-year debarment maximum rule from the current H-2A regulations or at least articulate why a more extreme penalty is justified under the H-2B program. On the other hand, several commenters suggested that the Department remove the 5-year cap and impose debarment for up to 10 years, or in some cases permanent debarment, on repeat violators.

The 1- to 5-year range for the period of debarment is consistent with the H-2B enforcement provisions in the INA, and we believe that it is appropriate to apply the same standard in our regulations. 8 U.S.C. 1184(c)(14)(A)(ii). We do not intend to debar employers, attorneys, or agents who make minor, unintentional mistakes in complying with the program, but rather those who commit a willful misrepresentation of a material fact, or a substantial failure to meet the terms and conditions, in the *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*. Additionally, just because the Administrator, OFLC has the authority to debar a party for up to 5 years does not mean that would be the result for all debarment determinations, as the Administrator, OFLC retains the discretion to determine the appropriate

period of debarment based on the severity of the violation.

d. Violations. The NPRM proposed that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment. A labor union noted that the proposed regulation text, stating at § 655.73(f)(12) and 29 CFR 503.24(a)(10) that a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot be reasonably expected implies that a single violation in one of the eleven categories listed before the single act language is insufficient for debarment. The commenter noted that this implication was at odds with our stated intent to make any of the listed acts sufficient for debarment. The commenter suggested that the regulation establish that failure to comply with any representation, requirement, or offer in the registration, application, or job order would warrant *per se* debarment. By contrast, a professional organization took issue with debarment for a single act, rather than a pattern or practice of repeat violations, where there was no evidence of fraud or misrepresentation.

We agree that the single heinous act language is potentially confusing. We did not intend to suggest that a single violation falling into one of the other 13 listed categories of violations may not be sufficient for debarment. Thus, we have added language in the Final Rule text at § 655.73 and 29 CFR 503.24 making one or more acts of commission or omission debarable for all of the listed violations, and have revised § 655.73(f)(12) and 29 CFR 503.24(a)(10) to encompass any other act as opposed to a single heinous act. As discussed in the preamble discussion of 29 CFR 503.19, which explains the standard that applies to all H-2B debarment actions, any act or omission would have to be willful to warrant debarment.

A State attorney general recommended that we add failure to cooperate in State and local investigations to the grounds for debarment. It is beyond our jurisdiction and the scope of our responsibilities under the H-2B program to evaluate whether an entity cooperated with a State or local investigation and to penalize the entity for failing to so.

A coalition of worker advocacy organizations and several additional worker advocacy organizations encouraged us to add to the non-exhaustive list of debarable offenses the failure to disclose a recruiter's identity under the requirement proposed in § 655.9, the use of a debarred recruiter, and the failure of an employer to report recruiter violations to OFLC and WHD.

The NPRM did not propose violations for employer use of a debarred recruiter, nor did it propose a reporting requirement for recruiter violations known to the employer but not to us. Further, as the list of debarable offenses is explicitly non-exhaustive, we decline to add non-compliance with § 655.9 to the list. However, we are adding obligations under § 655.9 to the list of employer assurances and obligations in § 655.20 and 29 CFR 503.16 to clarify that we view employer (and its agent or attorney, as applicable) disclosure of foreign worker recruitment by an agent or recruiter as a critical obligation. We will pursue enforcement where employers (and their agents or attorneys, as applicable) commit willful violations of this provision.

A labor union expressed concern about employer misclassification of immigrant workers as independent contractors, and suggested that we add to the list of debarable offenses the misclassification of H-2B workers or corresponding U.S. employees as independent contractors. Although the misclassification of workers as independent contractors is a matter WHD might pursue as it relates to its enforcement authority under statutes such as the Fair Labor Standards Act, this type of misclassification has not been characterized as a violation of the H-2B regulations, where an employer is explicitly seeking permission to hire foreign workers as employees. Therefore, it would not be appropriate to add to the list of debarable offenses.

e. Debarment procedure. A worker advocacy organization commented that the debarment timeline should allow debarment to take place before employers are able to recruit and hire workers for the next season, to ensure that employers who violate worker protection laws are removed before the next recruitment cycle. However, the debarment timeline varies greatly depending on the timing of when violations are discovered through OFLC audits, WHD targeted investigations, or WHD investigations initiated by complaints. In other words, there is no one time within a season when a debarment proceeding might be initiated. Additionally, various factors affect the timing of an investigation that may lead to debarment, including the complexity of the case and the number of violations involved. Parties subject to debarment also have the right to appeal the debarment decision. Thus, we cannot ensure any particular timing for the debarment process.

f. Concurrent debarment jurisdiction. Several commenters objected to WHD's concurrent debarment authority. These

comments are fully discussed in the concurrent actions section at 29 CFR 503.21 of the WHD preamble.

g. Interagency communication. A commenter recommended amending the proposed rule to require us to share information about problem entities with other departments and agencies that administer U.S. visa programs to prevent the offender from refocusing its efforts on possible alternative visa programs outside of our jurisdiction. Also, the commenter recommended that in more serious cases we should permanently debar the entity and refer the entity to the Department of Justice for prosecution. Similarly, another commenter recommended that the regulations require the provision of regular notices to other agencies about investigations and enforcement actions that we have taken against employers for possible or adjudicated violations of Department-administered visa programs and that we should ask other departments and agencies, *i.e.*, DOS, USCIS, and ICE, to provide similar notices to us. We decline to make these recommended changes to the regulation text. Paragraph (h) of this section already provides that copies of final debarment decisions will be forwarded to DHS and DOS promptly. Clearly, where it is warranted, we will notify additional agencies, such as DOJ, of the violations, but we do not believe that it is necessary for the regulation to provide that as an additional requirement. Also, we do not believe that it is appropriate to provide regular notices to other agencies, or require such agencies to notify us, of pending enforcement actions and investigations of possible violations because that information is of little practical use until these actions have been concluded and a final determination has been issued. Finally, for the reasons discussed above, we do not believe that permanent debarment is appropriate but rather have determined that the 5-year maximum period is consistent with the H-2B enforcement provisions under the INA.

h. Additional penalties for debarred employers. Two commenters requested that the regulations add discontinuation of job services to the list of sanctions of debarred employers. Because discontinuation of services under the employment service system, along with other sanctions for non-compliant H-2B employers, is already governed at § 658.500 subpart F of this part, we do not believe that it is necessary to make any change to the regulations in this subpart to reflect that provision. Additional remedies offered by commenters that would apply to all

non-compliant employers, including those that are debarred, are discussed in the preamble discussion of the sanctions and remedies at 29 CFR 503.20.

III. Addition of 29 CFR Part 503

Effective January 18, 2009, pursuant to INA section 214(c)(14)(B), DHS transferred to the Secretary enforcement authority for the provisions in section 214(c)(14)(A)(i) of the INA which govern petitions to admit H-2B workers. The 2008 Final Rule contains the regulatory provisions governing ETA's processing of the employer's *Application for Temporary Employment Certification* and the WHD's enforcement responsibilities in ensuring that the employer has not willfully misrepresented a material fact or substantially failed to meet a condition of such application.

The Department carefully reviewed the 2008 Final Rule and proposed substantive changes to both the certification and enforcement processes to enhance protection of U.S. and H-2B workers.

The proposed rule added a new part, 29 CFR part 503, to further define and clarify the protections for workers. This proposal and the proposed changes in 20 CFR part 655, Subpart A added workers in corresponding employment to the protected worker group, imposed additional recruitment obligations and employer obligations for laid off U.S. workers, and increased wage protections for H-2B workers and workers in corresponding employment. Additionally, the Department proposed to enhance the WHD's enforcement role in administrative proceedings following a WHD investigation, such as by allowing WHD to pursue debarment rather than simply recommending to ETA that it debar an employer as occurs under current § 655.65(h).

To ensure consistency and clear delineation of responsibilities between Departmental agencies implementing and enforcing H-2B provisions, this new Part 503 was written in close collaboration with ETA and is being published concurrently with ETA's Final Rule in 20 CFR part 655, Subpart A to amend the employer certification process. Some editorial changes have been made to the text of the proposed regulations, for clarity and to improve readability. Those changes are not intended to alter the meaning or intent of the regulations and are not further discussed in this preamble. A discussion of the comments received on the proposal and substantive changes made by the Department are discussed at length below.

A. General Provisions and Definitions

Proposed §§ 503.0 through 503.8 provided general background information about the H-2B program and its operation. Proposed § 503.1 and § 503.2 are similar to the existing regulations at 20 CFR 655.1 and 655.2. Proposed § 503.3 described how the Department will coordinate both internally and with other agencies. One commenter expressed concerns that the provision at § 503.3 did not provide specific information on where to file a complaint. The Department considers the guidance provided in § 503.7 to be sufficient notice to potential complainants.

Sections 503.0, 503.1, 503.2, and 503.3 are adopted in the Final Rule as proposed.

1. § 503.4 Definition of Terms

Under this section of the NPRM, the proposed definitions were identical to those contained in proposed 20 CFR part 655, Subpart A, except that this section contained only those definitions applicable to this part. The preamble to 20 CFR part 655, Subpart A contains the relevant discussion of comments received on and changes made to those definitions. For the reasons discussed there, the Final Rule makes identical conforming changes in this section.

2. § 503.5 Temporary Need

Under this proposed section, the provision regarding temporary need was identical to the requirements set forth in proposed 20 CFR 655.6; the preamble to that section includes a full discussion of the comments received in response to the proposed provisions. The Final Rule adopts the provision as proposed.

3. § 503.6 Waiver of Rights Prohibited

The Department proposed in § 503.6 to add new language that would prohibit any employer from seeking to have workers waive or modify any rights granted them under these regulations. The proposed paragraph would have, with limited exceptions, voided any agreement purporting to waive or modify such rights. The proposed language was consistent with similar prohibitions against waiver of rights under other laws, such as the Family and Medical Leave Act, see 29 CFR 825.220(d), and the H-2A program, see 29 CFR 501.5. The Department received several comments concerning this proposed addition, all of which supported the change. One advocacy group cited the vulnerability of the H-2B workers as a reason for needing this provision. One union mentioned concerns that without the provision unscrupulous employers might attempt

to use waivers to gut the program. The Department has retained the section as proposed in the Final Rule.

4. § 503.7 Investigation Authority of Secretary

In § 503.7 of the NPRM, the Department proposed to retain the current authority established under 20 CFR 655.50, affirming WHD's authority to investigate employer compliance with these regulations and WHD's obligation to protect the confidentiality of complainants. This proposed section also discussed the reporting of violations. No comments were received on this section; the proposed language has been maintained in the Final Rule.

5. § 503.8 Accuracy of Information, Statements, Data

Under this proposed section, making false representations to the government would make an entity subject to penalties, including a fine of up to \$250,000 and/or up to 5 years in prison. A few commenters expressly supported this provision, stating that the inclusion of this provision makes it clear to employer that there are serious consequences for criminal acts. The proposed language has been maintained in the Final Rule.

B. Enforcement Provisions

1. § 503.15 Enforcement

In order to ensure that U.S. workers are not adversely affected by the employment of H-2B workers, the NPRM proposed expanding the type of workers entitled to protection by WHD enforcement to workers in corresponding employment, as defined under 20 CFR 655.5. Comments regarding corresponding employment are discussed fully in that section. The NPRM proposed to continue WHD enforcement for H-2B workers and U.S. workers improperly rejected, laid off, or displaced. Labor unions supported WHD's proposed enforcement, with one commenting that giving U.S. workers this means of redress is critical to effectuating the Secretary of Labor's mandate to ensure that the certification and employment of H-2B aliens does not harm similarly-situated U.S. workers, and asserting that it also prevents U.S. workers being employed alongside H-2B aliens who might otherwise receive greater pay, benefits, and protection from abuse through the H-2B program than their domestic counterparts enjoy. Similarly, a State Attorney General's office strongly supported the Department's strengthened efforts to protect

workers—U.S. workers as well as H-2B workers laboring along side them.

A trade association expressed its concern that the proposed investigation and enforcement regulations in this Part would only be complaint-driven, *i.e.*, that WHD would only investigate where there were complaints from foreign workers, which would potentially overlook violations because foreign workers may be reluctant to file complaints. However, WHD investigates complaints filed by both foreign and U.S. workers affected by the H-2B program, as well as concerns raised by other federal agencies, such as USCIS, regarding particular employers and agents. WHD also conducts targeted or directed investigations of H-2B employers to evaluate program compliance.

An individual stakeholder questioned the avenue for filing a complaint alleging non-compliance with the H-2B program. Complaints may be filed by calling WHD at 866-4US-WAGE or by contacting a local WHD office. Contact information for local offices is available online at <http://www.dol.gov/whd/america2.htm>.

Several agents and employer organizations contended that the Department's proposed enforcement authority over H-2B program compliance exceeded its statutory authority, as delegated by DHS. Based on the enforcement authority outlined in the preamble under 20 CFR 655.2 and the addition of 29 CFR part 503, and the detailed discussion of the Department's enforcement authority in the 2008 Final Rule in response to similar comments, 73 FR78020, 78043–44 (debarment) 78046–47 (civil monetary penalties and remedies), Dec. 19, 2008, the Department has concluded that it is authorized to conduct the enforcement activities described in this Final Rule.

2. § 503.16 Assurances and Obligations of H-2B Employers

The provisions proposed in this section were identical to those proposed in 20 CFR 655.20, with the exception of the additional obligation in proposed paragraph (aa) (Cooperation with investigators) requiring employers to cooperate in any administrative or enforcement proceeding. No comments were received on that paragraph and the provision is adopted in the Final Rule as paragraph (bb). Proposed paragraph § 503.16(aa) is redesignated as § 503.16(bb) in the final rule. Proposed paragraph (aa), paragraph (bb) in the Final Rule matches the language of a new provision at 20 CFR 655.20(aa), which is consistent with 20 CFR 655.9 of the proposed rule and this Final Rule,

requiring an employer to provide with its *Application for Temporary Employment Certification* copies of agreements with foreign labor contractors and recruiters (see discussion of 20 CFR 655.9 in this preamble). The Department carefully reviewed all comments concerning employer assurances and obligations (a) through (z), a full discussion of which is included in the preamble to 20 CFR 655.20. Identical conforming changes are made in this Final Rule section as are made there, for the reasons discussed in that preamble.

3. § 503.17 Documentation Retention Requirements of H-2B Employers

In § 503.17 the Department proposed to consolidate the document retention requirements previously found throughout 20 CFR 655, subpart A. These requirements are similar to those in 20 CFR 655.56, with minor differences related to OFLC's and WHD's separate interests. A coalition representing agents and employers commented in support of this proposal, noting that most employers are already familiar with their obligation to keep documents for three years to comply with the FLSA. However one employer stated that the documentation provision was complex and demanding for the employer. As stated in the preamble to the proposed rule, this section does not require employers to create any new documents but simply to preserve those documents that are already required for applying for participation in the H-2B program, and therefore should not place any further burden on employers. A commenter representing the outdoor entertainment industry indicated that it would be difficult to comply with the 72-hour availability requirement and urged the Department to allow retention and provision of required documents in electronic format. This request was repeated by an employer advocacy group. The Department recognizes these commenters' concern and reminds them that under the FLSA employers who maintain records at a central recordkeeping office, other than in the place(s) of employment, are required to make records available within 72 hours following notice from WHD. See 29 CFR 516.7. This provision, which has been in place for decades, has not created undue burden for employers; as many H-2B employers are likely covered by the FLSA, this provision results in no additional burden. A full discussion of the use of electronic records can be found in the preamble to 20 CFR 655.56.

A commenter stated that a retention period of 3 years was insufficient and expressed concern that in the case of a

3-year certification, the employer could destroy records before completion of the job. Another comment included a recommendation that records be retained for 5 years in case of an investigation for criminal fraud. The Department has decided that a 3-year record retention requirement is adequate for its civil enforcement purposes.

Finally, a number of comments included recommendations that employers be required to retain records of the visa, subsistence, transportation, and recruitment costs, including the amount, by whom and to whom they were paid and the time of payment. The Department considers the general requirement that employers retain documents and records to prove compliance with the regulations to be sufficient for its enforcement purposes. Further discussion of recordkeeping provisions is included in the preamble of 20 CFR 655, subpart A. The proposed provision is adopted without change.

4. § 503.18 Validity of Temporary Labor Certification

In § 503.18 the Department proposed to include clarifying edits to this section (which corresponds to existing 20 CFR 655.34 (a) and (b)), providing the time frame and scope for which an *Application for Temporary Employment Certification* is valid. A discussion of comments received on this section can be found in the preamble to 20 CFR 655.55. The proposed provision is adopted without change.

5. § 503.19 Violations

The NPRM proposed retention of the willfulness standard for the assessment of violations, monetary remedies, and civil money penalties, as well as determinations concerning revocation and debarment. As discussed below, comments from employers, agents, industry organizations, labor unions, and worker advocacy organizations reflected a significant amount of confusion about the standards by which violations are determined under the H-2B program, as well as whether the standards apply equally to revocation, debarment, monetary or other remedies, and civil money penalties. After briefly summarizing the comments received, the Department will attempt to clarify for the benefit of all affected parties the basis for the continued use of a willfulness standard for determining whether a violation has occurred, regardless of whether the violation results in revocation imposed by OFLC pursuant to 20 CFR 655.72, debarment imposed by OFLC pursuant to 20 CFR 655.73 or WHD pursuant to § 503.24,

monetary or other remedies assessed by WHD pursuant to § 503.20, and/or civil money penalties assessed by WHD pursuant to § 503.23.

Several worker advocacy organizations stated the willful standard is too high. Many of these organizations suggested an intentional standard, instead. Several stated an intentional standard would be consistent with the Job Service Complaint System and with the Migrant and Seasonal Agricultural Worker Protection Act. One organization noted that the courts have provided considerable interpretation of the intentional standard under MSPA, so use of the intentional standard would enhance the standard's clarity. Another worker advocacy organization proposed a new eight-part definition for substantial failure.

Conversely, several employers, employer coalitions, and trade associations commented that the substantial failure standard was too low, believing this standard would lead the Department to debar for unintentional, negligent failures or technical violations, as opposed to knowing failures. In addition, several agents and employer organizations wanted the Department to clarify that it views the punishments of revocation and debarment as extreme penalties for egregious violations rather than routine remedies, indistinguishable from back pay and civil money penalties.

In light of the numerous comments suggesting what commenters believed to be the adoption of essentially a higher or lower standard than the standard currently in place, the Department wishes to clarify that violations under these regulations, both in the 2008 Final Rule and in the 2011 NPRM, have been defined to be consistent with the INA's provisions regarding violations for H-2B workers. Specifically, INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A), sets forth two potential violations under the H-2B program: (1) "a substantial failure to meet any of the conditions of the petition" and (2) "a willful misrepresentation of a material fact in such petition." The INA further defines a substantial failure to be a "willful failure to comply * * * that constitutes a significant deviation from the terms and conditions of a petition." 8 U.S.C. 1184(c)(14)(D). The *H-2B Petition* includes the approved *Application for Temporary Employment Certification*. See § 503.4; 20 CFR § 655.5. Therefore, it is the Department's view that non-willful violations are not cognizable under the H-2B program, and that it is not appropriate for the Department to select a lower standard for determining H-2B violations.

Thus, in this Final Rule, the basis for determining violations has not changed since the 2008 Final Rule, and continues to be either a misrepresentation of material fact or a substantial failure to comply with terms and conditions, both of which continue to be willful. See 20 CFR 655.72(a)(1) & (2) (revocation), 20 CFR 655.73(a)(1)-(3) (OFLC debarment), § 503.19(a)(1) & (2) (WHD violations, which lead to remedies, civil monetary penalties, and/or debarment). To determine whether a violation is willful, the Department will consider whether the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions. See 20 CFR 655.73(d), § 503.19(b). This is consistent with the longstanding definition of willfulness. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Further, tracking the INA language, a substantial failure continues to be defined as willful as well as a significant deviation from the terms or conditions of a petition. 20 CFR 655.72(a)(2), 20 CFR 655.73(a)(2), § 503.19(a)(2). OFLC revocation and debarment are tied to the definitions in 20 CFR 655.73(d) and (e), which explain how to determine willfulness and how to determine whether a substantial violation is a significant deviation; these provisions mirror the definitions for WHD violations in § 503.19(b) and (c).

A labor union that approved of the willfulness standard and recognized that it encompasses reckless disregard suggested that the Department impute willfulness where there are multiple, non-willful violations because such repeated violations evidence reckless disregard. Rather than imputing willfulness, when the Department encounters violations that do not rise to the level of willfulness, it puts the party on notice regarding future compliance and will consider subsequent violations committed with the knowledge that such acts or omissions violate H-2B program requirements to be willful.

The NPRM also proposed an additional change in the description of violations in § 503.19. Unlike the definition of violations in the 2008 Final Rule, which only mentioned employer violations specifically, the proposed definition of violations does not specify a violator, thus encompassing violations committed by an employer, attorney and/or agent. After receiving no comments, the Department is adopting this provision of the NPRM without change in the Final Rule.

6. § 503.20 Sanctions and Remedies—General

The NPRM proposed that the Department continue to pursue essentially the same remedies upon a WHD determination that a violation has occurred, including but not limited to payment of back wages, recovery of prohibited fees paid or impermissible deductions, enforcement of the provisions of the job order, assessment of CMPs, make-whole relief for victims of discrimination, and reinstatement and make-whole relief for U.S. workers who were improperly denied employment. The NPRM also proposed to give WHD independent debarment authority, concurrent with ETA's debarment authority. Comments regarding WHD's debarment authority are discussed under § 503.21.

Sanctions and remedies in general. In general, worker advocacy organizations favored the enforcement measures proposed in the NPRM, noting that the H-2B program has been plagued by wage and hour violations, fraudulent applications for non-existent jobs, race and gender discrimination and human trafficking. Worker advocacy organizations commented that debarment, revocation, civil money penalties, and traditional remedies such as payment of back wages and impermissible fees and deductions, as well as reinstatement for workers improperly rejected for employment, were important tools to encourage compliance. One worker advocacy organization proposed that the Department should allow workers who have been subjected to H-2B violations and who live outside the United States to participate in related investigations or proceedings, recover any damages, and be recommended for visas for this purpose. The Department does not prohibit such participation by workers who may have returned to their home country, and it often distributes back wages to workers who have experienced violations and have returned to their home countries. Where appropriate given the circumstances in any given investigation or proceeding, the Department might seek a means for the worker to travel to the U.S. to participate in such proceedings.

Liability for prohibited fees collected by foreign labor recruiters and subcontractors. A coalition of worker advocacy organizations, several additional worker advocacy organizations, and a federation of national and international labor unions explained that although the NPRM took important steps toward reducing exploitative foreign labor recruiting

practices by prohibiting the collection of transportation, visa, recruiting, and other fees from workers, these prohibitions would be unenforceable as a practical matter unless the Department held employers strictly liable for such charges levied on workers by the employer's recruiters, agents, or sub-contracted recruiters and agents. These commenters cited instances where employers were insulated from liability for unlawful fee-charging because the employers obtained assurances from their agents that fees were not being charged, noting that the NPRM would similarly shield employers from liability for prohibited fees charged by recruiters where an employer complied with the provision requiring it to contractually prohibit agents from seeking or receiving payments from workers. In addition, these commenters noted that exploitative practices, which leave H-2B workers in significant pre-employment debt, are often left unchecked because most of the local *recruiters* who charge these fees are beyond the direct regulatory reach of the Department and it is difficult for workers to bring actions against recruiters operating overseas due to issues of personal jurisdiction, solvency, cost and collectability.

As the preamble to the 2008 Final Rule emphasized, 73 FR 78037, the Department is adamant that recruitment of foreign workers is an expense to be borne by the employer and not by the foreign worker. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported in the comments received by the Department and elsewhere. The Department is concerned about the exploitation of workers who have heavily indebted themselves to secure a place in the H-2B program, and believes that such exploitation may adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.

The Department believes that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country. However, the Department recognizes that an employer's ability to control the actions of agents and sub-contractors across international borders is constrained, just as the Department's ability to enforce regulations across international borders is constrained. As discussed in the preamble to 20 CFR 655.20 (p), the Department is requiring that the employer, as a condition of

applying for temporary labor certification for H-2B workers, contractually forbid any foreign labor contractor or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees. The Department will attempt to ensure the bona fides of such contracts and will work together with DHS, whose regulations also generally preclude the approval of an *H-2B Petition* and provide for denial or revocation if the employer knows or has reason to know that the worker has paid, or has agreed to pay, fees to a recruiter, facilitator, agent, and similar employment service as a condition of an offer or maintaining condition of H-2B employment. See 8 CFR 214.2(h)(6)(i)(B). As explained in WHD Field Assistance Bulletin No. 2011-2, any fee that facilitates an employee obtaining the visa in order to be able to work for that employer will be considered a recruitment fee, which must be borne by the H-2B employer. In addition, although employees may voluntarily pay some fees to independent third-party facilitators for services such as assisting the employee to access the Internet or in dealing with DOS, such fees may be paid by employees only if they are not made a condition of access to the job opportunity. When employers use recruiters, and in particular when they impose the contractual prohibition on collecting prohibited fees, they must make it abundantly clear that the recruiter and its agents or employees are not to receive remuneration from the foreign worker recruited in exchange for access to a job opportunity or in exchange for having that worker maintain that job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or continued to use a recruiter about whom the employer had received credible complaints, could be an indication that the contractual prohibition was not bona fide. In addition, where the Department determines that workers have paid these fees and the employer cannot demonstrate the requisite bona fide contractual prohibitions, the Department will require the employer to reimburse the workers in the amount of these prohibited fees. However, where an employer has complied in good faith with this provision and has contractually prohibited the collection of prohibited fees from workers, there is no willful violation. Thus, the Final Rule does not impose strict liability on

employers for the collection of prohibited fees from workers by others.

Agent and attorney liability. For the reasons stated in the discussion under Debarment of Agents and Attorneys in 20 CFR 655.73, this Final Rule holds agent and attorney signatories to the Form 9142 liable for their independent willful violations of the H-2B program, separate from an employer's violation. As noted earlier, the Final Rule adopts the language proposed in § 503.19 that: "A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions." The Final Rule also adopts the language proposed in § 503.20(a) that WHD can seek appropriate relief for any violation defined in § 503.19, including recovery of prohibited recruitment fees. Clarifying language has been added to § 503.20(b) to reflect that remedies will be sought directly from the employer or its successor, or from the employer's agent or attorney, where appropriate. For example, it would be appropriate to seek reimbursement of prohibited fees to affected workers from an attorney or agent, as opposed to an employer, where the employer has contractually prohibited the attorney or agent from collecting such fees yet the agent or attorney does so, despite the employer having affirmed on the *Application for Temporary Employment Certification* that everything in the application is true and correct, including the employer's attestation that "[t]he employer and its attorney, agents and/or employees have not sought or received payment of any kind from the H-2B worker for any activity related to obtaining temporary labor certification, including but not limited to payment of the employer's attorney or agent fees, application fees, or recruitment costs." On the other hand, it would not be appropriate to hold the attorney or agent liable for unpaid wages when an employer fails to pay the required wage during the period of the application where the attorney or agent was uninvolved in such a violation.

Make-whole relief. A coalition representing agents and employers requested that the Department clarify the meaning of make-whole relief in this provision. Specifically, these commenters were concerned that make-whole relief would include compensatory damages for injuries beyond those that occur because of acts

or omissions related to violations of the terms and conditions of the H-2B program, as these damages would typically be available in a civil court action but employers would be disadvantaged if the Department imposed them in informal administrative proceedings. These commenters suggested that make-whole relief be deleted if the Department did not provide a clearer definition.

These commenters' concerns are unfounded. The Department intended make-whole relief to be limited to its traditional meaning, which is that the party subjected to the violation is restored to the position, both economically and in terms of employment status, that he or she would have occupied had the violation never taken place. Make-whole relief includes equitable and monetary relief such as reinstatement, hiring, front pay, reimbursement of monies illegally demanded or withheld, or the provision of specific relief such as the cash value of transportation or subsistence payments which the employer was required to, but failed to provide, in addition to the recovery of back wages, where appropriate. Nothing in the regulations allows recovery for injuries or losses in addition to actual damages and equitable relief. Therefore, the Department has decided to retain make-whole relief as one of the types of remedies available when a violation has been found, without further specification.

A federation of national and international labor unions suggested that the Department include a new subsection under this provision clarifying that "[i]n any proceeding concerning unpaid wages or make whole relief, any monetary remedy will be determined based on the actual number of hours worked by similarly situated employees or the three-fourths guarantee described in 20 CFR 655.20(f), whichever is greater." The Department agrees that this statement accurately summarizes how such monetary remedies are calculated under this section. However, just as the Department believed it unnecessary to further define make-whole relief with respect to compensatory damages, it has determined that it is not necessary to add the suggested language to this section because these concepts and comparators are already encompassed under make-whole relief and are reflected in § 503.23(b) and (c), which explain that the civil money penalty for such violations is the difference between what should have been paid or earned and the amount that was actually paid.

Finally, a State Attorney General commented specifically regarding the importance of providing remedies for unlawful retaliation, particularly so that H-2B workers who are vulnerable to retaliation will have adequate protection when making meritorious complaints about workplace violations. This Attorney General's Office noted that, because reinstatement is a critical component of make-whole relief and may not be possible if the employer is debarred or chooses not to use the H-2B program in the future, the Department might wish to adopt a provision similar to a recent amendment to the New York labor law that provides up to \$10,000 in liquidated damages for each instance of unlawful retaliation. While the Department appreciates the utility of this suggestion, liquidated damages are not consistent with make-whole relief for actual damages. However, as this Attorney General's Office further suggested, the Department wishes to clarify that make-whole relief for unlawful retaliation and discrimination may include front pay (such as for the duration of the work remaining in the job order) where reinstatement is not possible.

Additional comments regarding sanctions and remedies. A legal organization suggested that the Department should encourage the reporting of non-compliant employers by offering a reward to employee whistleblowers equal to a portion of the fines collected from the non-compliant employers. The Department does not believe authority exists to offer rewards to whistleblowers under the enforcement authority that has been delegated by DHS. This commenter also suggested that non-compliant employers be required to register for and use E-Verify. It is unclear how E-Verify is relevant to violations of these H-2B regulations, and mandating the use of E-Verify by employers is beyond the Department's jurisdiction.

7. § 503.21 Concurrent Actions

The NPRM proposed that OFLC and WHD would have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.73 and under § 503.24, while recognizing the differing roles and responsibilities of each agency under the program, as set forth in § 503.1. The cross-reference in § 503.3(c) proposed the safeguard that a specific violation for which debarment is sought will be cited in a single debarment proceeding, and that OFLC and WHD would coordinate their activities to achieve this result. This will ensure streamlined adjudications and that an employer will not face two debarment

proceedings for a specific violation. The Department is adopting the provisions as proposed without change.

Numerous labor unions, worker advocacy organizations, and a congressman welcomed WHD's independent debarment authority. On the other hand, a coalition representing agents and employers, employer associations, and a legal association opposed the Department's proposal to grant debarment authority to WHD. They primarily contended that allowing both agencies to exercise debarment authority would likely result in inefficient and duplicative actions. However, as noted earlier, the NPRM proposed a safeguard that requires coordination rather than duplicative debarment proceedings.

The coalition representing agents and employers felt that OFLC should continue to have exclusive debarment authority because OFLC has greater familiarity with the nature and extent of employer violations in the application and recruitment process, and would therefore be better equipped to determine whether a violation warranted this type of punishment. This comment ignores the fact that employers and the Department have important roles and obligations during both the H-2B application and recruitment process and during the validity of the job order, when employers must comply with critical assurances and program obligations. While OFLC has more expertise in the application and recruitment process, and will retain specific authority to debar for failure to comply with the Notice of Deficiency and assisted recruitment processes, WHD has extensive expertise in conducting workplace investigations under numerous statutes, and has been enforcing H-2B program violations since the 2008 Final Rule became effective on January 18, 2009.

Providing WHD with the ability to order debarment, along with or in lieu of other remedies, will streamline and simplify the administrative process, and eliminate unnecessary bureaucracy by removing extra steps. Under the 2008 Final Rule, WHD conducts investigations of H-2B employers, and may assess back wages, civil money penalties, and other remedies, which the employer has the right to challenge administratively. However, under the 2008 Final Rule, WHD cannot order debarment, no matter how egregious the violations, and instead must take the extra step of recommending that OFLC issue a Notice of Debarment based on the exact same facts, which then have to be litigated again. Contrary to the commenters' assertions, allowing WHD

to impose debarment along with the other remedies it can already impose in a single proceeding will simplify and speed up this duplicative enforcement process, and result in less bureaucracy for employers who have received a debarment determination. Instead, administrative hearings and appeals of back wage and civil money penalties, which the WHD already handles, will now be consolidated with challenges to debarment actions based on the same facts, so that an employer need only litigate one case and file one appeal rather than two. This means that both matters can be resolved more expeditiously. Moreover, WHD has extensive debarment experience under regulations implementing other programs, such as H-1B, the Davis-Bacon Act, and the Service Contract Act. See, e.g., 29 CFR 5.12.

The commenters opposing WHD's debarment authority also argued that WHD's debarment process was not as fair as OFLC's because WHD's process does not include a 30-day rebuttal period. These commenters were concerned that WHD might make a determination about a violation and initiate debarment proceedings before employers had an opportunity to provide critical information relating to the alleged violation. This concern is misplaced, however, and may reflect a lack of familiarity with how WHD conducts investigations and reaches a determination about whether violations have occurred and which remedies are appropriate. During the course of an investigation, WHD contacts and interviews both the employer and workers. WHD investigators discuss potential violations with the employer and, when requested, with his or her legal representative, providing the employer ample notice and an opportunity to provide any information relevant to WHD's final determination. Rather than a formal, 30-day rebuttal period, employers have numerous opportunities during the course of a WHD investigation and during a final conference to provide critical information regarding violations that may lead to debarment.

Finally, an employer association opposed the Department's proposal to grant WHD debarment authority because it believed it would make it easier for the Department to remove employers from the program without impartial review by an independent review panel or judge. However, the NPRM specifically included procedural protections for parties subject to WHD debarment proceedings, including notice of debarment, the right to a hearing before an Administrative Law

Judge (ALJ), the right to seek judicial review of an ALJ's decision by the Administrative Review Board (ARB). See Subpart C, Administrative Proceedings.

8. § 503.22 Representation of the Secretary

The NPRM proposed to continue to have the Solicitor of Labor represent the Administrator, WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and these regulations. After receiving no comments, the Department is adopting this provision of the NPRM without change in the Final Rule.

9. § 503.23 Civil Money Penalty Assessment

The NPRM proposed a civil money penalty (CMP) assessment scheme similar to the CMP assessment contained in the 2008 Final Rule, with additional and clarifying language specifying that WHD may find a separate violation for each failure to pay an individual worker properly or to honor the terms or conditions of the worker's employment, as long as the violation meets the willfulness standard and/or substantial failure standard in § 503.19. Similar to the CMPs in the 2008 Final Rule, the proposed CMP assessments set CMPs at the amount of back wages owed for violations related to wages and impermissible deductions or prohibited fees, and at the amount that would have been earned but for an illegal layoff or failure to hire, up to \$10,000 per violation. The NPRM also proposed to retain the catch-all CMP provision for any other violation that meets the standards in § 503.19, and set forth the factors WHD will consider in determining the level of penalties to assess for all violations but wage violations.

A coalition representing agents and employers was concerned that the NPRM blurred the lines between back pay remedies and civil money penalties. Specifically, these commenters questioned whether the CMPs that are set at the amount of unpaid wages (§ 503.23(b) and (c)) were treated as back wages or as a penalty payable to the U.S. Treasury rather than to the employee or applicant. As indicated in the NPRM, unpaid wages, including the recovery of wages owed for work performed, prohibited fees paid or impermissible deductions from pay, or recovery of wages due for improperly placing workers in areas of employment or in occupations other than those identified on the *Application for Temporary Employment Certification*, are recoverable as monetary remedies under

§ 503.20. These monetary remedies serve to make workers whole based on the violations to which they have been subjected. By contrast, the CMP provision, § 503.23, represents a penalty for non-compliance, and is payable to WHD for deposit with the Treasury.

These commenters also noted that the CMP assessment provision is confusing because § 503.23(b) and (c) suggest a formulaic means to determine a CMP (*i.e.*, the CMP is equal to the wages owed, up to a maximum of \$10,000 per violation), whereas § 503.23(e) sets forth the factors WHD will consider in determining the level of CMPs to assess, yet the NPRM states that these factors apply to both § 503.23(c) and (d). The Department agrees that this is confusing, and is an unintentional holdover from the 2008 Final Rule, which contained the same language. Therefore, in this Final Rule, the reference to § 503.23(c) is deleted, in order to clarify that, as the commenters pointed out, § 503.23(b) and (c) use a fixed CMP amount and the factors set forth in § 503.23(e) apply only to the catch-all provision in § 503.23(d).

An individual U.S. worker felt that the Department should not limit CMPs to a \$10,000 maximum, and should instead impose treble damages payable to the worker and a fine covering the costs of the Department's investigation and enforcement. The maximum CMP amount is set at \$10,000 in order to be consistent with the statutory limit under 8 U.S.C. 1184(c)(14)(A), the statutory enforcement authority delegated to WHD by DHS. As stated earlier, the Department does not believe this enforcement authority permits liquidated damages.

10. § 503.24 Debarment

The NPRM's proposal to provide WHD with independent debarment authority is discussed under § 503.21. For the reasons stated under Debarment of Agents and Attorneys in 20 CFR 655.73, the Final Rule allows WHD to seek debarment of agents and attorneys for their own independent violations, and § 503.24(b) has been amended to that effect. Comments received regarding debarment that apply equally to OFLC and WHD are also discussed in the OFLC preamble discussion of debarment (20 CFR 655.73). With respect to the comments received from several worker advocacy organizations suggesting that the Department establish procedures to allow for workers and organizations of workers to intervene in and participate in WHD's debarment process, the Department has concluded that the Final Rule will not adopt additional procedures mandating that it

provide workers a right to intervene and participate in every case, for the reasons stated in OFLC's preamble under Integrity Measures (20 CFR 655.70–655.73). In addition to that discussion, which applies to both OFLC and WHD proceedings, WHD further notes that workers already participate in WHD investigations, which involve interviews with workers regarding program compliance. It is WHD's practice to provide notice to the individual complainants and their designated representatives and/or any third-party complainants when WHD completes an investigation by providing them a copy of the WHD Determination Letter. To further protect their interests, workers can seek, and have sought, intervention upon appeal to an Administrative Law Judge. See 20 CFR 18.10(c) and (d).

11. § 503.25 Failure To Cooperate With Investigators

The NPRM defined and expanded the penalties for failure to cooperate with a WHD investigation, noting the federal criminal laws prohibiting interference with federal officers in the course of official duties and permitting WHD to recommend revocation to OFLC and/or initiate debarment proceedings. Several worker advocacy organizations commended the Department for making it clear to employers that they may face serious consequences for certain violations of the regulations. The Department is adopting this provision of the NPRM without change in the Final Rule.

12. § 503.26 Civil Money Penalties—Payment and Collection

The NPRM proposed revised language instructing employers how to submit payment to WHD. After receiving no comments, the Department is adopting this provision of the NPRM without change in the Final Rule.

C. Administrative Proceedings

The NPRM proposed few changes to the administrative proceedings from the 2008 Final Rule. These minor changes were intended to bring clarity to the administrative proceedings that govern H–2B hearings, and to achieve general consistency with the procedural requirements applicable to H–2A proceedings. The Department received no comments on the particular provisions proposed in subpart C of the NPRM. However, upon further internal review, the Department concluded that additional minor changes were necessary to make clear that the procedures contained in this subpart apply to any party or entity subject to the Administrator, WHD's

determination to assess a civil money penalty, to debar, or to impose other appropriate administrative remedies, including for the recovery of monetary relief—not just the employer. Therefore, in the Final Rule, in §§ 503.41, 503.42, 503.43, and 503.50, the term employer is replaced with the term party or recipient(s) of the notice. The Department intends the terms party or recipient(s) of the notice to include the employer, agent, or attorney, as appropriate. These changes correct internal inconsistencies in the provisions proposed in this subpart of the NPRM, and will make these provisions consistent with the language used in 20 CFR 655.73(g) (OFLC debarment procedure).

The Department received numerous comments from worker advocacy organizations suggesting that workers should be provided notice of administrative actions and a right to intervene, as workers possess valuable information relevant to these proceedings such as the appropriateness of job qualifications and the assessment of unlawful recruitment fees. Similarly, an individual stakeholder, commented that employers are afforded procedures for seeking review of the Department's determinations, yet such procedures are not provided for workers.

The importance of worker communication with WHD by filing complaints, participating in investigations, and serving as witnesses in administrative or judicial proceedings cannot be understated; it is essential in carrying out WHD's enforcement obligations. However, the Department has concluded that the Final Rule will not adopt additional procedures mandating that it provide workers notice of administrative actions and a right to intervene in every case, for the reasons stated in OFLC's preamble under Integrity Measures (20 CFR 655.70–655.73), which also apply to WHD's administrative actions. Further, as noted under § 503.24, workers already participate in WHD investigations, which involve interviews with workers regarding program compliance. It is WHD's practice to provide notice to the individual complainants and their designated representatives and/or any third-party complainants when WHD completes an investigation by providing them a copy of the WHD Determination Letter. To further protect their interests, workers can seek, and have sought, intervention upon appeal to an Administrative Law Judge. See 20 CFR 18.10(c) and (d). Thus, the Department is adopting the provisions of this Subpart of the NPRM

without further change in the Final Rule.

IV. Administrative Information

A. Executive Orders 12866 and 13563

Under Executive Order (E.O.) 12866 and E.O. 13563, the Department must determine whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and to review by the OMB. Section 3(f) of the E.O. defines an economically significant regulatory action as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this rule is an economically significant regulatory action under section 3(f)(1) of E.O. 12866. This regulation would have an annual effect on the economy of \$100 million or more; however, it would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. The Department also has determined that this rule is a significant regulatory action under sec. 3(f)(4) of E.O. 12866. Accordingly, OMB has reviewed this rule.

1. Need for Regulation

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program. The Department believes that the practical ramifications of the 2008 Final Rule (e.g., streamlining the H–2B process to defer many determinations of program compliance until after an application has been adjudicated, inadequately protecting U.S. workers who may be paid less than H–2B workers performing the same jobs, failing to ensure the integrity of the program by not requiring employers to guarantee U.S. and H–2B employees work for any number of weeks during the period of the job order) have undermined the program's intended

protection of both U.S. and foreign workers.

For these reasons the Department is promulgating the changes contained in the Final Rule.

2. Alternatives

The Department has considered a number of alternatives: (1) To promulgate the policy changes contained in this rule; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to consider a number of other options discussed in more detail below. We believe that this rule retains the best features of the 2008 Final Rule and adopts additional provisions to best achieve the Department's policy objectives, consistent with its mandate under the H-2B program.

The Department considered alternatives to a number of program provisions. First, the Department considered another alternative to the definition of full-time work: a 40-hour threshold instead of the 35-hour level proposed and actually implemented in this Final Rule. As discussed in detail in the preamble to proposed 20 CFR 655.5, the Department established a 35-hour minimum as the definition of full-time employment because it more accurately reflects full-time employment expectations when coupled with the obligation for the employer to accurately disclose the hours of work that will be offered each week, and is consistent with other existing Department standards and practices in the industries that currently use the H-2B program to obtain workers.

Second, this rule included a three-fourths guarantee requirement, with the Final Rule requiring that the guarantee be measured based on 12-week periods (if the period of the job order is 120 or more days) and 6 weeks (if the period of the job order is less than 120 days). The Department considered using 4-week periods, as proposed, and also considered retaining the language of the H-2A requirement, under which employers 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 length of the contract. The Department rejected this alternative because, while this would provide workers with significant protection, it would not be sufficient to discourage the submission of imprecise dates of need and/or imprecise numbers of employees needed and would therefore fail to protect U.S. and H-2B workers from periods of unforeseen underemployment.

The Department believes that the rule, which calculates the hours of employment offered in 12-week and 6-week periods, better ensures that workers' commitment to a particular employer will result in real jobs that meet their reasonable expectations. We do not believe this Final Rule will create any additional financial burden on employers who have accurately represented their period of need and number of employees needed, and will provide an additional incentive for applicants to correctly state all of their needs on the *H-2B Registration and the Application for Temporary Employment Certification*.

Third, the Department considered omitting the registration of H-2B employers and instead retaining the current practice for the adjudication of the employer's temporary need and the labor market analysis to occur simultaneously. While this might be more advantageous for employers new to the program, it delays the vast majority of employers that are recurring users with relatively stable dates of need and that would benefit from separate adjudication of need and adequacy of recruitment. Moreover, employers and potential workers benefit from a recruitment process close in time to the actual date of need which a registration process, by pre-determining temporary need, expressly permits. Therefore, the Department rejected the alternative of simultaneous adjudication because it undercuts the Secretary's fulfillment of her obligations under the program.

Fourth, the Final Rule provides that employers may arrange and pay for workers' transportation and subsistence from the place from which the worker has come to the place of employment directly, advance at a minimum, the most economical and reasonable common carrier cost, or reimburse the worker's reasonable costs if the worker completes 50 percent of the period of employment covered by the job order if the employer has not previously reimbursed such costs. The Final Rule continues to require employers to provide return transportation and subsistence from the place of employment; however, the obligation attaches only if the worker completes the period of employment covered by the job order or if the worker is dismissed from employment for any reason before the end of the period. In addition, the Final Rule continues to provide that if a worker has contracted with a subsequent employer that has agreed to provide or pay for the worker's transportation to the subsequent employer's worksite, the subsequent employer must provide or pay for such

expenses; otherwise, if this agreement is not made, the employer must provide or pay for that transportation and subsistence. The Final Rule reminds employers that the FLSA imposes independent wage payment obligations, where it applies. The Department considered requiring employers to reimburse the worker in the first workweek any cost of transportation and subsistence, as proposed, but rejected this alternative in response to commenter concerns.

Finally, the proposed rule required the employers to extend offers of employment to qualified U.S. workers referred by the SWAs until 3 days before the date of need or the date of departure of the last H-2B worker, whichever is later. In consideration of commenter concerns, and to taking into consideration USCIS regulations governing the arrival of H-2B workers, the Department has modified this requirement. In the Final Rule, employers are required to accept SWA referrals of qualified U.S. applicants until 21 days before the date of need, irrespective of the date of departure of the last H-2B worker.

3. Economic Analysis

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 Final Rule, against the benefits and costs associated with the implementation of the provisions in this Final Rule. The benefits and costs of the provisions of this Final Rule are estimated as incremental impacts relative to the baseline. Thus, benefits and costs attributable to the 2008 Final Rule are not considered as benefits and costs of this Final Rule. We explain how the actions of workers, employers, and government agencies resulting from the Final Rule are linked to the expected benefits and costs.

The Department sought to quantify and monetize the benefits and costs of this Final Rule where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively. The analysis covers 10 years (2012 through 2021) to ensure it captures major benefits and costs that accrue over time.¹⁴ We have sought to present benefits and costs both undiscounted and discounted at 7 percent and 3 percent.

In addition, the Department provides an assessment of transfer payments associated with certain provisions of the

¹⁴ For the purposes of the cost-benefit analysis, the 10-year period starts on July 1, 2012.

rule.¹⁵ Transfer payments, as defined by OMB Circular A-4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect, but do not result in additional benefits or costs to society. The rule would alter the transfer patterns and increase the transfers from employers to workers. The primary recipients of transfer payments reflected in this analysis are U.S. workers and H-2B workers. The primary payors of transfer payments reflected in this analysis are H-2B employers, and under the rule, those employers who choose to participate are likely to be those that have the greatest need to access the H-2B program. When summarizing the benefits or costs of specific provisions of this rule, we present the 10-year averages to reflect the typical annual effect.

The inputs used to calculate the costs of this rule are described below.

a. Number of H-2B Workers

The Department estimates that from FY 2000–2007, there were an average of 185,879¹⁶ H-2B workers requested per year and 154,281 H-2B positions certified. Because the number of H-2B visas is statutorily limited, only some portion of these certified positions were ultimately filled by foreign workers.

The number of visas available in any given year in the H-2B program is 66,000, assuming no statutory changes in the number of visas available. Some costs, such as travel, subsistence, visa and border crossing, and reproducing the job order apply to these 66,000 workers. Employment in the H-2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in this program. The H-2B program's annual cap of 66,000 visas issued per year (33,000 allocated semi-annually) represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (129.8 million).¹⁷ The number of visas per year does not fully capture the number of H-2B workers in the U.S. at any given time as there are exceptions to the H-2B cap; additionally, a nonimmigrant's H-2B classification may be extended for qualifying employment

for a total stay of up to 3 years without being counted against the cap. The Department assumes that half of all H-2B workers entering the United States (33,000) in any year stay at least 1 additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H-2B workers employed at any given time. This suggests that 57 percent of H-2B workers (66,000/115,500) are new entrants in a given year. Extending the analysis to the 115,500 H-2B workers we estimate are in the country at any given time, the number of H-2B workers represents approximately 0.09 percent of total nonfarm employment.

According to H-2B program data for FY 2007–2009, the average annual numbers of H-2B positions certified in the top five industries were as follows:

Landscaping Services—78,027
Janitorial Services—30,902
Construction—30,242
Food Services and Drinking Places—22,948
Amusement, Gambling, and Recreation—14,041

These numbers overestimate the number of actual H-2B workers, as the number of positions certified exceeds the number of H-2B workers in the country at a given time.

The Department estimates the number of H-2B workers in these industries based on the number of positions certified by dividing 115,500 H-2B workers (66,000 plus 33,000 staying one additional year plus 16,500 staying a third year) by the 236,706 positions certified per year on average during FY 2007–2009. This produces a scalar of 48.8 percent. Applying this scalar to the number of positions certified suggests that the number of H-2B workers in the top five industries is:

Landscaping Services—38,073
Janitorial Services—15,079
Construction—14,756
Food Services and Drinking Places—11,197
Amusement, Gambling, and Recreation—6,851

These employment numbers represent the following percentages of the total employment in each of these industries:¹⁸

Landscaping Services—6.5 percent (38,073/589,698)
Janitorial Services—1.6 percent (15,079/933,245)
Construction—0.2 percent (14,756/7,265,648)
Food Services and Drinking Places—0.1 percent (11,197/9,617,597)
Amusement, Gambling, and Recreation—0.5 percent (6,851/1,506,120)

As these data illustrate, the H-2B program represents a small fraction of the total employment even in each of the top five industries in which H-2B workers are found.

b. Number of Affected Employers

The Department estimates that from FY 2000–2007, an average of 6,425 unique employers applied for H-2B workers, and of these, an average of 5,298 were granted certifications. Several of the Final Rule's provisions (the requirement for employers to translate the job order from English to a language understood by the foreign workers, and payment of visa and visa-related fees) will predominantly or only apply to employers that ultimately employ H-2B workers. As there is no available source of data on the number of H-2B employer applicants who ultimately employ H-2B workers, the Department uses the ratio of estimated H-2B workers in the country at a given time (115,500) to the number of positions certified in an average year (154,281) to derive a scale factor of 74.9 percent. Multiplying the average number of unique certified H-2B employer applicants from FY2000–2007 (5,298) by the scale factor (74.9) suggests that there are 3,966 unique certified H-2B employer applicants who ultimately employ H-2B workers.

c. Number of Corresponding Workers

Several provisions of the Final Rule extend to workers in corresponding employment, defined as those non-H-2B workers who perform work for an H-2B employer, where such work is substantially the same as the work included in the job order, or is substantially the same as other work performed by H-2B workers. Corresponding workers are U.S. workers employed by the same employer performing the substantially the same tasks at the same location as the H-2B workers, and they are entitled to at least the same terms and conditions of employment as the H-2B workers. Corresponding workers might be temporary or permanent; that is, they could be employed under the same job order as the H-2B workers for the same period of employment, or they could have been employed prior to the H-2B workers, and might remain after the H-2B workers leave. However, the Final Rule excludes two categories of workers from the definition of corresponding employment. Corresponding workers are entitled to the same wages and benefits that the employer provides to H-2B workers, including the three-fourths guarantee, during the period covered by the job order. The

¹⁵ The specific provisions associated with transfer payments are: wages paid to corresponding U.S. workers, payments for transportation, subsistence, and lodging for travel to and from the place of employment, and visa-related fees.

¹⁶ Office of Foreign Labor Certification, Public Disclosure Data.

¹⁷ U.S. Bureau of Labor Statistics (BLS). 2011. Employees on nonfarm payrolls by major industry sector, 1961 to date. Available at <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt>.

¹⁸ U.S. Census Bureau. 2007. 2007 Economic Census. Available at <http://www.census.gov/econ/census07/>.

corresponding workers would also be eligible for the same transportation and subsistence payments as the H-2B workers if they travel a long distance to reach the job site and cannot reasonably return to their residence each workday. In addition, as a result of the enhanced recruiting in this rule, including the new electronic job registry, certain costs may be avoided as employers are able to find U.S. workers in lieu of some H-2B workers. The Department believes that the costs associated with hiring a new U.S. worker would be lower than the costs associated with hiring an H-2B worker brought to the U.S. from abroad, as the costs of visa and border crossing fees to be paid for by the employer will be avoided and travel costs may likely be less (or zero for workers who are able to return to their residence each day).

There are no reliable data sources on the number of corresponding workers at work sites for which H-2B workers are requested or the hourly wages of those workers. The Department does not collect data regarding what we have defined as corresponding employees, and therefore cannot identify the numbers of workers to whom the obligations would apply.¹⁹ The Department extensively examined alternative data sources that might be used to accurately estimate the number of corresponding workers. First, in the proposed rule, the Department asked the public to propose possible sources of data or information on the number of corresponding workers at work sites for which H-2B workers were requested and the current hourly wage of those corresponding workers. The Department reviewed comments received in response to this request, but unfortunately, no data were provided by commenters. Perhaps the most interesting qualitative feedback from comments was the apparent dichotomy in perceptions of the issue of corresponding workers. Some commenters indicated there would be no corresponding workers whose wages were affected by this rule: they hired H-2B workers because they could not find corresponding U.S. workers willing to do the job. At the opposite end of the spectrum were commenters who asserted that many, if not most, of their permanent employees might require wage increases as a result of this rule. However, at least some of the latter comments reflected a potential

misunderstanding of the rule; most commenters who made such assertions were misguided in their assumption that any activity performed by any worker that is also performed by H-2B workers would make those workers corresponding.²⁰

Second, the Department asked its WHD field staff to provide information they might have on the number of corresponding workers employed by H-2B employers based on the data gathered during investigations. The number of U.S. workers similarly employed varies widely among the companies investigated, ranging from 0 to 310. No data on the number of H-2B workers was collected, though, so it is impossible to compare the pattern of employment of U.S. and H-2B workers. Because such data gathering was not the principal goal of the investigation, the data provided are the result of chance and what the investigator happened to record, rather than a systematic collection of worker counts relevant to the estimation of corresponding employment. Furthermore, the results of only 36 investigations were available. Finally, they did not represent a random sample of H-2B employers, but just that subset of employers that the Department had some reason to investigate.

Third, the Department reviewed a random sample of 225 certified and partially certified applications from FY2010 submitted by employers in response to Request for Information (RFIs) during the application process. While the 2011 version of ETA Form 9142 includes an optional item on the number of non-family full-time equivalent employees, that number includes all employees and not only the employees in corresponding employment. (See also the instructions to the Form 9142, which inform the employer to “[e]nter the number of full-time equivalent (FTE) workers the employer employs.”) Moreover, even if this number accounted for the number of corresponding employees, none of the applications in the random sample used the 2011 version of the form. Of the 225 applications reviewed, two applications gave the current number of employees

as part of the other information submitted. Additionally, DOL examined data in 34 payroll tables that were provided to supplement the application. The payroll tables reported data by month for at least 1 year from 2007 to 2010 and included information such as the total number of workers, hours worked, and earnings for all workers performing work covered by the job order. These workers were broken down into categories for permanent workers (those already employed and performing the certified job) and for temporary workers (both H-2B workers and corresponding workers who responded to the job order). The Department divided the total payroll by the total hours worked across the two categories of workers to estimate an average hourly wage per permanent and temporary worker. The Department compared the total number of workers in months where permanent workers were paid more than and less than temporary employees for those months in which both were employed.

The Department found 7,548 temporary and 10,310 permanent worker-months (defined as one worker, whether full- or part-time, employed one month) in the 34 payroll tables examined. Of these, permanent employees were paid more than temporary employees in 9,007 worker-months, and were paid less than temporary employees in 1,303 worker-months. This suggests the rule would have no impact on wages for 87 percent of permanent workers (9,007/10,310). Conversely, 13 percent of permanent workers (1,303/10,310), were paid less than temporary employees and would receive an increase in wages as a result of the rule. Calculating the ratio of 1,303 permanent worker-months to 7,548 temporary worker-months when permanent workers are paid less than temporary workers suggests that for every temporary worker-month, there are 0.17 worker-months where the permanent worker wage is less than the temporary worker wage. Extrapolating this ratio based on the Department's estimate that there are a total of 115,500 H-2B employees at any given time, this suggests that 19,939 permanent workers ($115,500 \times 0.17$) would be eligible for pay raises due to the rule.

The Department also calculated the percentage difference in the corresponding and temporary worker wages in months where temporary workers were paid more. On average, corresponding workers earning less than temporary employees would need their wages to be increased 4.5 percent to match temporary worker wages.

¹⁹ The Department only recently began asking employers (in a non-required field) to state on an H-2B Application for Temporary Employment Certification the number of full-time equivalent employees that they employ. Further, the Department does not have this information from concluded investigations.

²⁰ Comments by the SBA, for example, (ETA-2011-0001-0438) stated that in some industries (e.g., landscaping, restaurants), supervisors and H-2B workers might sometimes perform the same task (e.g., a landscaping supervisor might mow lawns if someone calls in sick; a supervisor at a small restaurant might help clear tables during busy times). Therefore, as explained in the preamble, the commenters mistakenly believed that because the H-2B worker and the supervisor “perform the same work,” they are corresponding employees, and the firm must pay the H-2B worker the same wage rate as the supervisor, which then means all other workers must be paid the same as the H-2B worker.

For several reasons, however, the Department did not believe it was appropriate to use the data in the payroll tables to extrapolate to the entire universe of H-2B employers. First, because of the selective way in which these payroll records were collected by the Department, the distribution of occupations represented in the payroll tables is not representative of the distribution of occupations in H-2B applications. The 34 payroll tables examined by the Department included the following occupations:

Nonfarm Animal Caretakers (12 payroll tables)
Landscaping and Groundskeeping Workers (four payroll tables)
Maids and Housekeeping Cleaners (four payroll tables)
Cooks (two payroll tables)
Waiters and Waitresses (two payroll tables)
Forest and Conservation Workers (two payroll tables)
Dishwashers (one payroll table)
Dining Room and Cafeteria Attendants and Bartender Helpers (one payroll table)
Separating, Filtering, Clarifying, Precipitating, and Still Machine Setters, Operators, and Tenders (one payroll table)
Food Cooking Machine Operators and Tenders (one payroll table)
Floor Sanders and Finishers (one payroll table)
Production Workers, All Other (one payroll table)
Receptionists and Information Clerks (one payroll table)
Grounds Maintenance Workers, All Other (one payroll table)

The four payroll tables for landscaping and groundskeeping workers made up only 12 percent of the payroll tables, while applications for these workers comprised 35 percent of FY 2010 applications. Conversely, the 12 payroll tables from nonfarm animal caretakers made up 35 percent of the payroll tables in our sample, while applications for such workers made up only 6 percent of the FY 2010 applications.

Second, the total number of payroll tables or payroll records provided to the Department was very small. We found only 34 payroll tables in 225 randomly selected applications. Furthermore, payroll records in H-2B applications are provided in specific response to an RFI or in the course of a post-adjudication audit. In both instances the primary purpose of these records is to demonstrate compliance with program requirements, usually either to demonstrate proactively that the need for workers is a temporary need, or to demonstrate retroactively compliance with the wage obligation. Because payroll tables were submitted in response to an RFI rather than as a

matter of routine in the application process, it is not clear that the data in the limited number of payroll tables for a given occupation are representative of all workers within that occupation in the H-2B program. Something triggered the RFI, presumably some indication that the need for temporary workers was not apparent, and therefore these applications are not representative of the 85 percent of applications that did not require a payroll table.

Third, the payroll wage information in these tables is provided at the group level, and the Department is unable to estimate how many individual corresponding workers are paid less than temporary workers in any given month. The payroll tables only allow a gross estimate of whether corresponding or temporary workers were paid more, on average, in a given month. Because wages would only increase for those U.S. workers currently making less than the prevailing wage, this information is necessary to determine the effect the rule would have on workers in corresponding employment. Finally, the Department has no data regarding the number of employees who would fall under the two exclusions in the definition of corresponding employment.

The Department, therefore, cannot confidently rely upon the payroll tables alone and has no other statistically valid data to quantify the total number of corresponding workers or the number that would be eligible for a wage increase to match the H-2B workers. Nevertheless, the Department believes that the payroll tables show that the impact of the corresponding employment provision would be relatively limited, both as to the number of corresponding workers who would be paid more and as to the amount their wages would increase.

Based upon all the information available to us, including the payroll tables, the anecdotal evidence in the comments, and the Department's enforcement experience, the Department has attempted to quantify the impact of the corresponding employment provision. We note that the 2008 Final Rule already protects U.S. workers hired in response to the required recruitment, including those U.S. workers who were laid off within 120 days of the date of need and offered reemployment. Therefore, this rule will have no impact on their wages. This Final Rule simply extends the same protection to other employees performing substantially the same work included in the job order or substantially the same work that is actually performed by the H-2B workers. Based in particular upon the

numerous employer commenters who asserted that they were unable to find U.S. workers to perform the types of jobs typically encompassed within their job orders, the Department believes that a reasonable estimate is that H-2B workers make up 75% to 90% of the workers in the particular job and location covered by a job order; we assume, therefore, that 10% to 25% of the workers will be U.S. workers newly covered by the rule's wage requirement. This assumption does not discount at all for the fact, as noted above, that some of these U.S. workers already are covered by the prevailing wage requirement or could be covered by one of the two exclusions from the definition of corresponding employment. Carrying forward with our estimate that there are a total of 115,500 H-2B workers employed at any given time, we thus estimate that there will be between 12,833 (if 90% are H-2B workers) and 38,500 (if 75% are H-2B workers) U.S. workers newly covered by the corresponding employment provision.

d. Wages Used in the Analysis

The Department updated the wage and benefit costs under the proposed rule by incorporating the most recent OES wage data available from BLS, and its most recent estimate of the ratio of fringe benefit costs to wages, 30.4 percent.²¹

To represent the hourly compensation rate for an administrative assistant/executive secretary, the Department used the median hourly wage (\$22.06) for SOC 43-6011 (Executive Secretaries and Executive Administrative Assistants).²² The hourly compensation rate for a human resources manager is the median hourly wage of \$47.68 for SOC 11-3121 (Human Resources Managers).²³ Both wage rates were multiplied by 1.304 to account for private-sector employee benefits.

For registry development and maintenance activities, the proposed rule used fully loaded rates based on an Independent Government Cost Estimate

²¹ U.S. Bureau of Labor Statistics (BLS). 2011a. Employer Costs for Employee Compensation news release text. June 8, 2011. Available at <http://www.bls.gov/news.release/ecec.nr0.htm> (Accessed July 12, 2011).

²² U.S. Bureau of Labor Statistics (BLS). 2011b. Occupational Employment and Wages, May 2010—43-6011 Executive Secretaries and Executive Administrative Assistants. Available at <http://www.bls.gov/oes/current/oes436011.htm> (Accessed June 3, 2011).

²³ U.S. Bureau of Labor Statistics (BLS). 2011c. Occupational Employment and Wages, May 2010—11-3121 Human Resources Managers. Available at <http://www.bls.gov/oes/current/oes113121.htm> (Accessed July 12, 2011).

(IGCE) produced by OFLC,²⁴ which are inclusive of direct labor and overhead costs for each labor category.²⁵ Because the BLS data used to update other wages does not include overhead costs, the

Department updated these wage estimates using the Producer Price Index (PPI) for software publishers producing application software to inflate the loaded wage rates for each

labor category from 2010 (average annual PPI, 96.8) to 2011 (average of first five months' PPIs, 97.0).

The 2011 wages used in the analysis are summarized in Table 3.

TABLE 3—WAGES USED IN THE ANALYSIS

Occupation	Hourly wage	Loaded wage ^[a]	PPI adjusted wage ^[b]
Administrative Assistant	\$22	\$29
HR Manager	48	62	N/A
Program Manager	N/A	138	\$139
Computer Systems Analyst II	N/A	92	92
Computer Systems Analyst III	N/A	110	110
Computer Programmer III	N/A	90	90
Computer Programmer IV	N/A	108	108
Computer Programmer Manager	N/A	124	124
Data Architect	N/A	105	105
Web Designer	N/A	125	125
Database Analyst	N/A	78	78
Technical Writer II	N/A	85	85
Help Desk Support Analyst	N/A	55	55
Production Support Manager	N/A	126	126

^[a] Accounts for 30.4 percent fringe.

^[b] Multiplied by ratio of 2011 PPI to 2010 PPI (97.0/96.8).

N/A: Not Applicable.

Sources: BLS, 2011a; BLS, 2011b; BLS, 2011c; BLS, 2011d; BLS, 2011e.

e. H–2B Employment in the Territory of Guam

This Final Rule applies to H–2B employers in the Territory of Guam only in that it requires them to obtain prevailing wage determinations in accordance with the process defined at 20 CFR 655.10. To the extent that this process incorporates the new methodology defined in the January 2011 prevailing wage rule, it is possible that some H–2B employers in Guam will experience an increase in their H–2B prevailing wages. The Department expects that the H–2B employers in Guam working on Federally-funded construction projects subject to the Davis-Bacon and Related Acts (DBRA) are already paying the Davis-Bacon Act prevailing wage for the classification of work performed and that such employers may not experience an increase in the wage levels they are required to pay. Employers performing work ancillary or unrelated to DBRA projects, and therefore paying a wage potentially lower than the Davis-Bacon Act prevailing wage, may receive increased prevailing wage determinations under this Final Rule. However, because the H–2B program in Guam is administered and enforced by the Governor of Guam, or the Governor's designated representative, the Department is unable to quantify the effect of this provision on H–2B

employers in Guam due to a lack of data.

4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the Final Rule provisions against the baseline (*i.e.*, the 2008 Final Rule). The sections detail the costs of provisions that provide additional benefits for H–2B and/or workers in corresponding employment, expand efforts to recruit U.S. workers, enhance transparency and worker protections, and reduce the administrative burden on SWAs.

a. Three-Fourths Guarantee

Under the Proposed Rule, the Department specified that employers guarantee to offer hours of employment equal to at least three-fourths of the certified work days during the job order period, and that they use successive 4-week periods to measure the three-fourths guarantee. The use of 4-week periods was proposed (as opposed to measuring the three-fourths guarantee over the course of the entire period of need as in the H–2A program) in order to ensure that work is offered during the entire certified period of employment. The Department received comments from employers expressing concern that they are unable to predict the exact timing and flow of tasks by H–2B workers, particularly at the beginning

and end of the period of certification, and that they need more scheduling flexibility due to unexpected events such as extreme weather or catastrophic man-made events. Acknowledging these commenters' concerns, the Department lengthened the calculation period from 4 weeks to 12 weeks for job orders lasting at least 120 days and 6 weeks for job orders lasting less than 120 days. In order to ensure that the capped H–2B visas are appropriately made available to employers based upon their actual need for workers, and to ensure that U.S. workers can realistically evaluate the job opportunity, the Department maintains that employers should accurately state their beginning and end dates of need and the number of H–2B workers needed. To the extent that employers submit *Applications for Temporary Employment Certification* accurately reflecting their needs, the three-fourths guarantee provision should not represent a cost to employers, particularly given the extended 12-week and 6-week periods over which to calculate the guarantee.

b. Application of H–2B Wages to Corresponding Workers

There are two cohorts of corresponding workers: (1) The U.S. workers hired in the recruitment process and (2) other U.S. workers who work for the employer and who perform

²⁴ OFLC, 2010. Independent Government Cost Estimates.

²⁵ The Department would not typically use a wage that included overhead costs, but here the Department uses the services of a contractor to

develop the registry, and therefore the fully loaded wage is more reflective of costs.

the substantially the same work as the H-2B workers, other than those that fall under one of the two exclusions in the definition. The former are part of the baseline for purposes of the wage obligation, as employers have always been required to pay U.S. workers recruited under the H-2B program the same prevailing wage that H-2B workers get. Of the latter group of corresponding workers, some will already be paid a wage equal to or exceeding the H-2B prevailing wage so their wages represent no additional cost to the employer. Those who are currently paid less than the H-2B prevailing wage will have to be paid at a higher rate, with the additional cost to the employer equal to the difference between the former wage and the H-2B wage.

As discussed above, the Department was unable to identify a reliable source of data providing the number of corresponding workers at work sites for which H-2B workers are requested or the hourly wages of those workers. Nevertheless, the Department has attempted to quantify the impacts associated with this provision. All increases in wages paid to corresponding workers under this provision represent a transfer from participating employers to U.S. workers.

In the absence of reliable data, the Department believes it is reasonable to assume that H-2B workers make up 75 to 90 percent of the workers in a particular job and location covered by the job-order, with the remaining 10 to 25 percent of workers being corresponding workers newly covered by the rule's wage requirement. When these rates are applied to our estimate of the total number of H-2B workers (115,500) employed at any given time, we estimate that the number of corresponding workers newly covered by the corresponding employment provision will be between 12,833 and 38,500. This is an overestimate of the rule's impact, since some of the employees included in the 10-25 percent proportion of corresponding workers are those hired in response to required recruitment and are therefore already covered by the existing regulation, and some employees will fall within one of the two exclusions under the definition.

The prevailing wage calculation represents a typical worker's wage for a given type of work. Since the prevailing wage calculation is based on the current wages received by all workers in the occupation and area of intended employment, it is reasonable to assume that 50 percent of the corresponding workforce earns a wage that is equal to

or greater than the calculated prevailing wage. Conversely, it would be reasonable to assume that 50 percent of the workers in corresponding employment earn less than the prevailing wage and would have their wages increased as a result of the Final Rule. Applying this rate to our estimate of the number of workers covered by the corresponding employment provision would mean that the number of newly-covered workers is between 6,417 and 19,250.

We also believe it is reasonable to assume that the typical hourly wage increase for the newly-covered U.S. workers will be less than the average increase for H-2B workers resulting from the Wage Rule. This reflects our expectation that a majority of the newly-covered corresponding workers are currently earning close to the new H-2B prevailing wage (which represents the mathematical mean wage for the occupation in the area of intended employment). These corresponding workers, who would already be part of an employer's staff in occupations for which a certification is being sought, have likely experienced some wage growth during their tenure with the employer; therefore, their wage increase should be significantly less than the hourly wage increase for the H-2B workers in that occupations.

We also expect that few corresponding workers are likely to receive a wage increase that is close to or greater than the weighted average hourly increase for H-2B workers. This small number of incumbent employees would likely be limited to those hired shortly before an employer applied for an H-2B Temporary Employment Certification. Because they would not have had sufficient tenure to experience any wage growth, their hourly wage increase may be equivalent to the average wage increases provided to H-2B workers under the Wage Rule.

Therefore, we believe that U.S. workers' wage increases will be largely distributed between the previous H-2B prevailing wage and the new prevailing wage. Using the weighted average hourly wage increase for H-2B workers to approximate an upper bound for the increase in corresponding workers' wages, we assume that the wage increases for newly-covered workers will be distributed between three hourly-wage intervals: 30 percent of the newly-covered corresponding workers will receive an average hourly wage increase of \$1.00; 15 percent will receive a wage increase of \$3.00 per hour; and, 5 percent will receive an average hourly increase of \$5.00, which encompasses the weighted average

hourly wage increase for H-2B workers from the Wage Rule.

Finally, we estimate that these workers in corresponding employment will have their wages increased for 1,365 hours of work. This assumes that every H-2B employer is certified for the maximum period of employment of nine months (39 weeks), and that every corresponding worker averages 35 hours of work per week for each of the 39 weeks. This is an upper-bound estimate since it is based upon every employer voluntarily providing in excess of the number of hours of work required by the three-fourths guarantee for the maximum number of weeks that can be certified.

Therefore, based on all the assumptions noted above, we estimate the total annual transfer incurred due to the increase in wages for newly-covered workers in corresponding employment ranges from \$17.5 million to \$52.6 million. See Table 4.

Also, based on our review of available information on the characteristics of industries employing H-2B workers, there will be natural limit on the number of corresponding workers whose wages might be affected by the revised rule. The Department found that the two industries that most commonly employ H-2B workers are landscaping services and janitorial services.

Establishments in these industries tend to be small: Approximately 7 percent of janitorial service and 3 percent of landscaping establishments have more than 50 year-round employees; and, 86 percent of janitorial services and 91 percent of landscaping establishments have fewer than 20 year-round employees. Therefore, we believe that a majority of H-2B employers are small-sized firms whose workforces are comprised predominately of H-2B workers.

This assertion is consistent with employer comments on the proposed rule that firms hire H-2B workers primarily because they find it difficult to fill those positions with U.S. workers. This is also consistent with the fact that 20 percent in janitorial services and 30 percent in landscaping do not even operate year-round. Taken in total, the small size of a typical H-2B employer would place limits on the number of potential corresponding workers.

Finally, to the extent that firms in landscaping and janitorial services incur increased payroll costs, those increased costs are unlikely to have a significant aggregate impact. U.S. Bureau of Economic Analysis (BEA) input-output analysis of the economy demonstrates that the demand for "Services to Buildings and Dwellings" (the sector in

which janitorial and landscaping services are classified) is highly diffused throughout the economy.

BEA calculates Direct Requirements tables that indicate the dollar amount of input from each industry necessary to produce one dollar of a specified industry's output. These results show that building services account for a relatively negligible proportion of production costs: Of 428 sectors, building services account of less than \$0.01 for each dollar of output in 414 sectors, and less than \$0.005 for each dollar of output in 343 sectors. The largest users of these services tend to be retail trade, government and educational facilities, hotels, entertainment and similar sectors. In other words, these services do not impact industrial productivity or the production of commodities that will result in large impacts that ripple throughout the economy. To further place this in perspective, Services to Buildings and Dwellings, upon which this characterization is based includes more than just the janitorial and landscaping service industries. The estimated 53,173 H-2B workers hired by these industries account for only 3.1 percent of employment in the Services to

Buildings and Dwellings sector, even including impacts through corresponding employee provisions (described above as limited), and are only a small fraction of the already small direct requirements figures for this sector.

Therefore, based on the characteristics of industries that use H-2B workers, only a relatively small fraction of employees and firms in those industries likely will be affected by corresponding worker provisions.

However, because the Department does not have data on the number of corresponding workers or their wages relative to prevailing wages, it cannot project firm-level impacts to those firms that do have permanent corresponding workers. Standard labor economic models suggest that an increase in the cost of employing U.S. workers in corresponding employment would reduce the demand for their labor. Because employers cannot replace U.S. workers laid off 120 days before the date of need or through the period of certification with H-2B workers, the Department concludes that there would be no short-term reduction in the employment of corresponding workers among participating employers. In the

long-run, however, these firms might be reluctant to hire additional permanent staff. The extent to which such unemployment effects might result from the prevailing wage provision will be a function of: The number of permanent staff requiring wage increases; the underlying demand for the product or service provided by the firm during off-peak periods; and the firm's ability to substitute for labor to meet that off-peak demand for its products or services. First, the fewer the number of permanent staff receiving wage increases, then the smaller the increase in the cost of producing the good or service. Second, the demand for labor services is a "derived demand." That is, if the product or service provided has few substitutes, purchasers would prefer to pay a higher price rather than do without the product. Third, some goods and services are more difficult to produce than others by substituting equipment or other inputs for labor services. In summary, if increased wages result in a small overall cost increase, demand for the product is inelastic, and there are few suitable substitutes for labor in production, then unemployment effects are likely to be relatively small.

TABLE 4—COST OF CORRESPONDING WORKER WAGES

Hourly wage increase	Percent corresponding employees	Corresponding employees	Total cost
H2B Workers 90% of Occupation at Firm			
\$0.00	50	6,417	\$0
1.00	30	3,850	5,255,250
3.00	15	1,925	7,882,875
5.00	5	642	4,379,375
Total	100	12,833	17,517,500
H2B Workers 75% of Occupation at Firm			
\$0.00	50	19,250	\$0
\$1.00	30	11,550	15,765,750
\$3.00	15	5,775	23,648,625
\$5.00	5	1,925	13,138,125
Total	100	38,500	52,552,500

Source: DOL assumptions.

c. Transportation to and From the Place of Employment for H-2B Workers

The Final Rule requires H-2B employers to provide workers—both H-2B workers and those in corresponding employment who are unable to return to their permanent residences—with transportation and daily subsistence to the place of employment from the place from which the worker has come to work for the employer, whether in the

U.S. or abroad, if the worker completes 50 percent of the period of the job order. The employer must also pay for or provide the worker with return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer if the worker completes the period of the job order or is dismissed early. The impacts

of requiring H-2B employers to pay for employees' transportation and subsistence represent transfers from H-2B employers to workers because they represent distributional effects, not a change in society's resources.²⁶

To estimate the transfer related to transportation, the Department first

²⁶ For the purpose of this analysis, H-2B workers are considered temporary residents of the United States.

calculated the average number of certified H-2B positions per year during FY 2007–2009 from the ten most common countries of origin, along with each country's proportion of this total.²⁷ These figures, presented in Table 5, are used to create weighted averages of travel costs in the analysis below.

TABLE 5—NUMBER OF CERTIFIED H-2B WORKERS BY COUNTRY OF ORIGIN, FY 2007–2009

Country	Positions certified	Percent of total
Mexico	134,226	75.6
Jamaica	17,068	9.6
Guatemala	6,530	3.7
Philippines	4,963	2.8
Romania	3,251	1.8
South Africa	3,239	1.8
UK	2,511	1.4
Canada	2,371	1.3
Israel	1,784	1.0
Australia	1,577	0.9
Total	177,520	100.0

Source: H-2B Program Data and DHS, 2009.

The Department received a comment from a worker advocacy organization requesting clarification that inbound and outbound transportation costs include the expenses incurred between their home community and the consular city, and between the consular city and the place of employment in the United States. In response, the Department confirms that this is the intent of the rule. Therefore, in this section the Department accounts for a cost not clearly accounted for in the proposed rule: The cost of travel from the worker's home to the consular city to

obtain a visa. As in the proposed rule, the Department also accounts for travel from the consular city to the place of employment (assumed to be St. Louis, MO for the purpose of cost estimation). Where these costs were given in foreign currency, the Department converted them to U.S. dollars using exchange rates effective July 11, 2011.²⁸

Transportation costs were calculated by adding two components: the estimated cost of a bus or ferry trip from a regional city²⁹ to the consular city to obtain a visa, and the estimated cost of a trip from the consular city to St. Louis. Workers from Mexico and Canada (77 percent of the total) are assumed to travel by bus; workers from all other countries, by air. In response to the proposed rule, an employer representative submitted a comment expressing concern that the travel expenses underestimated the cost of airfare.³⁰ The Department reviewed air transport costs, found that some have risen significantly since the NPRM was published, and revised them accordingly. The increases are likely attributable to a combination of increased fuel costs and decreases in passenger capacity. The same commenter expressed concern that the proposed rule's requirement that employers continue hiring U.S. workers up to 3 days before the listed job start date means that employers will need to pay a premium for refundable tickets. Because this Final Rule changed the last day an employer must hire U.S. applicants to 21 days before the date of need, employers will not have to pay a premium for refundable fares. This analysis, therefore, includes only the cost for non-refundable tickets.

The revised travel cost estimates are presented in Table 6. The Department estimated the roundtrip transportation costs by doubling the weighted average one-way cost (for a roundtrip travel cost of \$929), then multiplying by the annual number of H-2B workers entering the U.S. (66,000). The Department estimates average annual transfer payments associated with transportation expenditures to be approximately \$61.3 million. This estimate is an increase of approximately \$23.5 million over the Proposed Rule estimate of \$37.8 million. The addition of travel costs from the worker's hometown to the consular city accounts for approximately \$2.9 million (12 percent) of this increase and the overall increase in average airfares accounts for \$20.6 million (88 percent). It is not possible for the Department to determine how much of the cost of transportation the employer is already paying, however, in order to secure the workers or because of the employer's obligations under the FLSA. (Under the FLSA, the majority of H-2B employers are required to pay for the proportion of inbound and outbound transportation costs that would otherwise bring a worker's earnings below the minimum wage in the first and last workweeks of employment.) To the extent that this does already occur, this transportation transfer is an upper-bound estimate. The Department also believes we have overestimated this transfer for the additional reason that inbound transportation is only due for workers who complete 50 percent of the job order and outbound transportation is due only for those who complete the full job order or are dismissed early.

TABLE 6—COST OF TRAVEL FOR H-2B WORKERS

Item	Value
New entrants per Year	66,000
Mexico:	
One way travel (bus)—Hometown to Monterrey ³¹	\$50
One way travel (bus)—Monterrey to Juarez ³²	\$83
One way travel (bus)—El Paso to St. Louis ³³	\$214
Total one way travel	\$347
Jamaica:	
One way travel (bus)—Hometown to Kingston ³⁴	\$3
One way travel (air)—Kingston to St. Louis ³⁵	\$499
Total one way travel	\$502
Guatemala:	
One way travel (bus)—Hometown to Guatemala City ³⁶	\$4
One way travel (air)—Guatemala City to St. Louis ³⁷	\$490
Total one way travel	\$594

²⁷ U.S. Department of Homeland Security (DHS). 2009. Yearbook of Immigration Statistics. Available at <http://www.dhs.gov/files/statistics/publications/yearbook.shtm> (Accessed June 12, 2011).

²⁸ Exchange rates sourced from Google's currency converter. If no exchange rate is mentioned, then costs were provided in U.S. dollars.

²⁹ Where possible, we used a selection of cities to represent travel from different regions of the country.

³⁰ ETA-2011-0001-0456.

TABLE 6—COST OF TRAVEL FOR H-2B WORKERS—Continued

Item	Value
Philippines:	
One way travel (ferry)—Hometown to Manila ³⁷	\$41
One way travel (air)—Manila to St. Louis ³⁷	\$1,083
Total one way travel	\$1,124
Romania:	
One way travel (bus)—Hometown to Bucharest ³⁸	\$21
One way travel (air)—Bucharest to St. Louis ³⁷	\$1,388
Total one way travel	\$1,409
South Africa:	
One way travel (bus)—Hometown to Pretoria ³⁹	\$41
One way travel (bus)—Pretoria to O.R. Tambo International Airport (ORTIA) ³⁹	\$17
One way travel (air)—ORTIA to St. Louis ³⁷	\$1,391
Total one way travel	\$1,449
United Kingdom:	
One way travel (bus or rail)—Hometown to London ⁴⁰	\$32
One way travel (air)—London to St. Louis ³⁷	\$1,111
Total one way travel	\$1,143
Canada:	
One way travel (air)—Hometown to Ottawa ⁴¹	\$175
One way travel (bus)—Ottawa to St. Louis ³⁵	\$178
Total one way travel	\$353
Israel:	
One way travel (bus)—Hometown to Tel Aviv ⁴²	\$11
One way travel (air)—Tel Aviv to St. Louis ³⁷	\$1,176
Total one way travel	\$1,187
Australia:	
One way travel (bus)—Hometown to Canberra ⁴³	\$92
One way travel (air)—Canberra to St. Louis ³⁷	\$2,064
Total one way travel	\$2,156
All:	
One way travel—Weighted average	\$465
Roundtrip travel—Weighted average	\$929
Total Travel Costs—H2B Workers	\$61,328,243

d. Transportation to and From the Place of Employment for Corresponding Workers

The proposed rule did not address inbound and outbound transportation to

³¹ Omnibus de México. 2011. Venta en Línea. Available at <http://www.odm.com.mx/> (Accessed July 22, 2011). Averages cost of a bus ticket to Monterrey from: Tampico (473 pesos), Actopan (680 pesos); and Acámbaro (585 pesos). Converted from pesos to US dollars at the rate of 0.0861 pesos per dollar for an average cost of \$50.

³² Omnibus de México. 2011. Venta en Línea. Available at <http://www.odm.com.mx/> (Accessed July 22, 2011). The cost of a bus ticket from Monterrey to Ciudad Juárez is 970 pesos, converted from pesos to US dollars at the rate of 0.0861 pesos per dollar for a cost of \$83.

³³ Greyhound. 2011. Tickets. Available at <https://www.greyhound.com/farefinder/step1.aspx> (Accessed July 8, 2011).

³⁴ Jamaica Guide. 2011. Getting around. Available at <http://jamaica-guide.info/getting.around/buses/> (Accessed July 11, 2011).

³⁵ Orbitz. 2011. Home Page. Available at <http://www.orbitz.com/> (Accessed July 22, 2011).

³⁶ Virtual Tourist. 2011. Guatemala City Transportation. Available at <http://www.virtualtourist.com/travel/>

Caribbean_and_Central_America/Guatemala/Departamento_de_Guatemala/Guatemala_City-1671108/Transportation-Guatemala_City-TG-C-1.html (Accessed July 10, 2011).

³⁷ Lonely Planet. 2011a. Ferry travel in the Philippines. Available at <http://www.lonelyplanet.com/philippines/transport/getting-around> (Accessed July 10, 2011).

³⁸ Mersul Trenulior. 2011. Mersul Trenulior. Available at <http://www.mersultrenulior.ro> (Accessed July 8, 2011).

³⁹ Computicket. 2011. Computicket Home Page. Available at http://www.computicket.com/web/bus_tickets/ (Accessed July 22, 2011).

⁴⁰ Megabus. 2011. Megabus UK Home Page. Available at <http://uk.megabus.com/default.aspxhttp\uk.megabus.com> (Accessed July 10, 2011) and Raileasy. 2011. Raileasy Home Page. Available at <https://www.raileasy.co.uk/> (Accessed July 10, 2011); average of the cost of a bus ticket from three cities in England to London (GBP 15) and a train from Northern Ireland to London (GBP 50); Converted at the rate of 1.36 GBP per USD for an average of \$32.

⁴¹ Air Canada. 2011. Air Canada Home Page. Available at <http://www.aircanada.com> (Accessed July 10, 2011).

⁴² Wikitravel. 2011. Bus travel in Israel. Available at http://wikitravel.org/en/Bus_travel_in_Israel (Accessed July 10, 2011).

and from the place of employment for corresponding workers who are unable to return daily to their permanent residences. The Department estimates an approximate unit cost for each traveling corresponding worker by taking the average of the cost of a bus ticket to St. Louis from Fort Wayne, IN (\$91), Pittsburgh, PA (\$138), Omaha, NE (\$93), Nashville, TN (\$86), and Palmdale, CA (\$233).⁴⁴ Averaging the cost of travel from these five cities results in an average one way cost of \$128.20, and a round trip cost of \$256.40 (see Table 7).

⁴³ Greyhound Australia. 2011. Greyhound Australia Home Page. Available at <http://www.greyhound.com.au> (Accessed July 11, 2011).

⁴⁴ Greyhound. 2011. Tickets. Available at <https://www.greyhound.com/farefinder/step1.aspx> (Accessed July 8, 2011).

TABLE 7—UNIT COSTS OF
CORRESPONDING WORKER TRAVEL

One way travel to St. Louis	Cost
Fort Wayne, IN	\$91
Pittsburgh, PA	138
Omaha, NE	93
Nashville, TN	86
Palmdale, CA	233
One way travel—Average	128
Roundtrip travel	256

Source: Greyhound, 2011.

Some employers have expressed concern that the rule's provision that employers reimburse workers for transportation costs will lead to workers quitting soon after the start date and thus in effect receiving a free trip to the city of their employment. The Department has addressed this concern with a provision that workers are not reimbursed for inbound travel until they work for half of the job order work period, and they do not receive outbound travel unless they complete the work period or are dismissed early. Therefore, this estimate also is an upper-bound estimate for these reasons as well. Because the Department has no basis for estimating the number of workers in corresponding employment who will travel to the job from such a distance that they are unable to return daily to their permanent residence, or to estimate what percentage of them will remain on the job through at least half or all of the job order period, we are unable to further estimate the total transfer involved.

e. Subsistence Payments

We estimated the transfer related to subsistence payments by multiplying the annual cap set for the number of H-2B workers generally entering the U.S. (66,000) by the subsistence per diem (\$10.64), and the roundtrip travel time for the top ten H-2B countries (4 days). In the Proposed Rule the Department estimated a weighted average roundtrip travel time of 1.055 days, but in response to a comment from a workers' advocacy organization the Department has increased this estimate to account for workers' travel to the consular city to obtain a visa. The roundtrip travel time now includes 3 days to account for travel from the worker's home town to the consular city and from the consular city to the place of employment, and 1 day to account for the workers' transportation back to their home country. Multiplying by 66,000 new entrants per year and the subsistence per diem of \$10.64 results in average annual transfers associated with the subsistence per diem of approximately \$2.8 million (see Table 8). Again, this is

an upper-bound estimate because the inbound subsistence reimbursement only is due for workers who complete 50 percent of the period of the job order and outbound subsistence is due only for those who complete the full job order period or are dismissed early.

TABLE 8—COST OF SUBSISTENCE
PAYMENTS

Cost component	Value
New entrants per year	66,000
Subsistence Per Diem	\$11
One way travel days—Inbound	3
One way travel days—Outbound	1
Roundtrip travel days	4
Total annual subsistence costs—H2B workers	\$2,808,960

This provision applies not only to H-2B workers, but also to workers in corresponding employment on H-2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. Assuming that each worker can reach the place of employment within 1 day and thus would be reimbursed for a total of 2 roundtrip travel days at a rate of \$10.64 per day, each corresponding worker would receive \$21.28 in subsistence payments. The Department was unable to identify adequate data to estimate the number of corresponding workers who are unable to return to their residence daily or, as a consequence, the percent of corresponding workers requiring payment of subsistence costs; thus the total cost of this transfer could not be estimated.

f. Lodging for H-2B Workers

The Department received a comment from a workers' advocacy organization requesting clarification that inbound and outbound transportation costs include the expenses incurred between their home community and the consular city and between the consular city and the place of employment in the U.S. The Department clarifies that the proposed rule considered any expenses incurred between a worker's hometown and the consular city to be within the scope of inbound transportation and subsistence costs, and therefore includes an additional cost not accounted for in the proposed rule: lodging costs while H-2B workers travel from their hometown to the consular city to wait to obtain a visa and from there to the place of employment. The Department estimates that H-2B workers will spend an average of two nights in an inexpensive hostel-style accommodation and that the costs of those stays in consular cities of

the ten most common countries of origin are as follows: Monterrey, \$11; Kingston, \$13; Guatemala City, \$14; Manila, \$7; Bucharest, \$11; Pretoria, \$19; London, \$22; Ottawa, \$30; Tel Aviv, \$22; and Canberra, \$26.⁴⁵ Using the number of certified H-2B workers from the top ten countries of origin, we calculate a weighted average of \$11.99 for one night's stay, and \$23.98 for two nights' stay. Multiplying by the 66,000 new entrants per year suggests total transfers associated with travel lodging of \$1.6 million per year (see Table 9). This cost would not apply to U.S. workers.

TABLE 9—COST OF LODGING FOR H-
2B WORKERS

Cost component	Value
New entrants per year	66,000
Nights in Hostel	2
City	Lodging cost
Monterrey	\$11
Kingston	13
Guatemala City	14
Manila	7
Bucharest	11
Pretoria	19
London	22
Ottawa	30
Tel Aviv	22
Canberra	26
Weighted Average—One Night	12
Weighted Average—Two Nights	24
Total Cost of Lodging	1,582,673

Source: Lonely Planet, 2011b.

g. Visa and Consular Fees

Under the 2008 Final Rule, visa-related fees—including fees required by the Department of State for scheduling and/or conducting an interview at the consular post—may be paid by the temporary worker. This Final Rule, however, requires employers to pay visa fees and associated consular expenses. Requiring employers to bear the full cost of their decision to hire foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on U.S. workers. As explained in the Preamble, government-mandated fees such as these are integral to the employer's choice to use the H-2B program to bring temporary foreign workers into the United States.

The reimbursement by employers of visa application fees and fees for scheduling and/or conducting an

⁴⁵ Lonely Planet. 2011b. Hotels & Hostels Search. Available at <http://hotels.lonelyplanet.com/> (Accessed July 12, 2011).

interview at the consular post is a transfer from employers to H-2B workers. The Department estimates the total cost of these expenses by adding the cost of an H-2B visa and any applicable appointment and reciprocity fees. The H-2B visa fee is \$150 in all of the ten most common countries of origin except Canada, where citizens traveling to the U.S. for temporary employment do not need a visa,⁴⁶ resulting in a weighted average visa fee of \$148. The same countries charge the following appointment fees: Mexico (\$0),⁴⁷ Jamaica (\$10),⁴⁸ Guatemala (\$12),⁴⁹ Philippines (\$10),⁵⁰ Romania (\$11),⁵¹ South Africa (\$0),⁵² the U.K. (\$0),⁵³ Canada (\$0),⁵⁴ Israel (\$22),⁵⁵ and Australia (\$105),⁵⁶ for a weighted average appointment fee of \$3.05. Additionally, South Africa and Australia charge reciprocity fees of \$85 and \$105, respectively, resulting in a weighted average of \$2.48.⁵⁷ Multiplying the weighted average visa

cost, appointment fee, and reciprocity fee by the 66,000 H-2B workers entering the U.S. annually results in an annual average transfer of visa-related fees from H-2B employers to H-2B workers of \$10.1 million (see Table 10). Again, this is an upper-bound estimate because many H-2B employers already are paying these fees in order to ensure compliance with the FLSA's minimum wage requirements.

TABLE 10—COST OF VISA AND CONSULAR FEES

Cost component	Value
New Entrants per Year	66,000
Visa Application Fee:	
Mexico	\$150
Jamaica	150
Guatemala	150
Philippines	150
Romania	150
South Africa	150
UK	150
Canada	0
Israel	150
Australia	150
Weighted Average Visa Fee	148
H2B Visa—Total Costs	9,767,773
Appointment Fee:	
Mexico	0
Jamaica	10
Guatemala	12
Philippines	10
Romania	11
South Africa	0
UK	0
Canada	0
Israel	22
Australia	105
Weighted Average Appointment Fee	3
Appointment Fee—Total Costs	201,439
Reciprocity Fee:	
Mexico	0
Jamaica	0
Guatemala	0
Philippines	0
Romania	0
South Africa	85
UK	0
Canada	0
Israel	0
Australia	105
Weighted Average Reciprocity Fee	2
Reciprocity Fee—Total Costs	163,922
Total Costs:	
Total Visa and Consular Fees	10,133,134

Sources: Given in text.

h. Enhanced U.S. Worker Referral Period

The Final Rule ensures that U.S. workers are provided with better access to H-2B job opportunities by requiring employers to continue to hire any

qualified and available U.S. worker referred to them from the SWA until 21 days before the date of need, representing an increase in the recruitment period compared to the baseline. The rule also introduces expanded recruitment provisions, including requiring employers to notify their current workforce of the job opportunity and contact their former U.S. employees from the previous year. The enhanced recruitment period and activities improve the information exchange between employers, SWAs, the public and workers about job availability, increasing the likelihood that U.S. workers will be hired for those jobs.

The benefits to U.S. workers also apply to sections “i” through “k” below, which discuss additional provisions aimed at further improving the recruitment of U.S. workers.

The extension of the referral period in this Final Rule will likely result in more U.S. workers applying for these jobs, requiring more SWA staff time to process additional referrals. The Department does not have estimates of the additional number of U.S. applicants, and thus is unable to estimate the costs to SWAs associated with this provision.

The Department believes that hiring a U.S. worker will cost employers less than hiring an H-2B worker, as transportation and subsistence expenses will likely be reduced, if not avoided entirely. The cost of visa fees will be entirely avoided if U.S. workers are hired. Because the Department has not identified appropriate data to estimate any increase in the number of U.S. workers that might be hired as a result of the Final Rule's enhanced recruitment, it is unable to estimate total cost savings. Likewise, the enhanced recruitment period along with more extensive recruitment activities and a number of program changes that should make these job opportunities more desirable should generate an increased number of local referrals for whom no transportation or subsistence costs will be incurred. Since the number of such workers cannot be estimated with precision, these cost saving are not factored into this analysis however we are confident the actual overall costs to employers for transportation and subsistence will be lower than the estimates provided here.

i. Additional Recruitment Directed by the CO

Under the Final Rule, an employer may be directed by the CO to conduct additional recruitment if the CO has determined that there may be qualified

⁴⁶ U.S. Department of State. 2011a. Citizens of Canada, Bermuda and Mexico—When is a Visa Required? Available at http://travel.state.gov/visa/temp/without/without_1260.html (Accessed July 22, 2011).

⁴⁷ Consulate General of the United States—Monterrey—Mexico. 2011. Temporary worker. Available at http://monterrey.usconsulate.gov/work_visa.html (Accessed July 22, 2011).

⁴⁸ The U.S. Visa Information Service in Jamaica. 2011. How the Online System Works. Available at <http://www.usvisa-jamaica.com/jam/> (Accessed July 22, 2011).

⁴⁹ Embassy of the United States—Guatemala. 2011. Application Process. Available at http://guatemala.usembassy.gov/niv/how_to_apply.html#appointment (Accessed July 22, 2011).

⁵⁰ Embassy of the United States—Manila—Philippines. 2011. Visa Point™—The Online Visa Information and Appointment System. Available at <http://manila.usembassy.gov/www/vpnt.html> (Accessed July 22, 2011).

⁵¹ Embassy of the United States—Bucharest—Romania. 2011. Non Immigrant Visas. Available at http://romania.usembassy.gov/visas/visa_application_process.html (Accessed July 22, 2011).

⁵² The U.S. Visa Information Service in South Africa. 2011. Fee Payment Options. Available at http://usvisa-info.com/en-ZA/selfservice/us_fee_payment_options (Accessed July 22, 2011).

⁵³ Embassy of the United States—London—U.K. 2011. MRV Application Fee. Available at <http://london.usembassy.gov/fee.html> (Accessed July 22, 2011).

⁵⁴ U.S. Department of State. 2011a. Citizens of Canada, Bermuda and Mexico—When is a Visa Required? Available at http://travel.state.gov/visa/temp/without/without_1260.html (Accessed July 22, 2011).

⁵⁵ VisaPoint—Tel Aviv—Jerusalem. 2011. Create New Login. Available at <https://visainfo.us-visaservices.com/Forms/CreateGroupUser.aspx> (Accessed July 22, 2011).

⁵⁶ Embassy of the United States—Canberra—Australia. 2011. Nonimmigrant Visas. Available at http://canberra.usembassy.gov/niv_fees.html (Accessed July 22, 2011).

⁵⁷ U.S. Department of State. 2011b. Reciprocity by Country. Available at http://travel.state.gov/visa/fees/fees_3272.html (Accessed July 22, 2011).

U.S. workers available, particularly when the job opportunity is located in an area of substantial unemployment. This provision applies to all employer applicants regardless of whether they ultimately employ H-2B workers. Therefore, the Department estimates costs using the average number of unique employer applicants for FY 2000–2007 (6,425), rather than the average number of employer applicants that ultimately hire H-2B workers (4,810). The Department conservatively estimates that 50 percent of these employer applicants (3,213) will be directed by the CO to conduct additional recruitment.

In response to the NPRM, the Department received a comment from an employer expressing concern that the NPRM understated the cost of placing a newspaper advertisement that would capture all the requirements of proposed 20 CFR 655.41. The Department reexamined its original estimate (\$25.09), agrees that it was too low, and has updated the original calculation. While the cost estimate has increased, it does not reflect any additional advertising requirements beyond those proposed. The higher estimate is rather a more accurate reflection of the cost of an advertisement of sufficient length to include the required information and

assurances contained in 20 CFR 655.41. The Department also updated the mix of newspapers used in the analysis to better represent different sized communities in areas in which a significant number of H-2B positions were certified in FY 2009.⁵⁸

To estimate the cost of a newspaper advertisement, we calculated the cost of placing a classified advertisement in the following newspapers: Virginia-Pilot (\$725),⁵⁹ Austin Chronicle (\$120),⁶⁰ Gainesville Sun (\$337),⁶¹ Plaquemines (LA) Gazette (\$50),⁶² Aspen Times (\$513),⁶³ and Branson Tri-Lakes News (\$144),⁶⁴ for an average cost of \$315. Employers may use other means of recruiting, such as listings on Monster.com (\$375)⁶⁵ and Career Builder (\$419).⁶⁶ Because so many newspapers include posting of the advertisement on their Web sites and/or Career Builder in the cost of the print advertisement, we based the estimate on the cost of newspaper recruiting. Multiplying the number of unique employer applicants who will be directed to conduct additional recruitment by the average cost of a newspaper advertisement (\$315) results in a total cost for newspaper ads of \$1.01 million.

The Department estimates that no more than 10 percent of employer

applicants (*i.e.*, 20 percent of those directed to conduct additional recruiting) will need to translate the advertisement in order to recruit workers whose primary language is not English. The Department calculated translation costs by creating a weighted average based on U.S. Census data on the top five non-English languages spoken in the home⁶⁷ and the cost of translating a one-page document from English to Spanish (\$25.50), Chinese (\$28.50), Tagalog (\$28.50), French (\$25.50), and Vietnamese (\$28.50), for a weighted average cost of \$25.88.⁶⁸ Multiplying the number of employers performing translation (643) by the weighted average translation cost results in total translation costs of \$16,627.

To account for labor costs in posting additional ads, the Department multiplied the estimated number of unique employer applicants required to conduct additional recruiting (3,213) by the estimated time required to post the advertisement (0.08 hours, or 5 minutes) and the loaded hourly compensation rate of an administrative assistant/executive secretary (\$28.77). The result, \$0.01 million, was added to the average annual cost of CO-directed recruiting activities for a total of approximately \$1.1 million (see Table 11).

TABLE 11—COST OF ADDITIONAL RECRUITING

Cost component	Value
Number of unique H-2B employer applicants	6,425
Percent directed to conduct additional recruiting	50%
Employer applicants conducting additional recruiting	3,213
Newspaper Advertisement:	
Newspaper advertisement—Unit cost	\$315
Total Cost of Newspaper Ad	\$1,011,274
Translating Newspaper Advertisement:	
Percent workers needing translation	10%
Employers performing translation	643
English to Spanish Translation	\$26
English to Chinese Translation	\$29
English to Tagalog Translation	\$29
English to French Translation	\$26
English to Vietnamese Translation	\$29
Weighted Average Translation Cost	\$26
Total Cost of Translation	\$16,627
Labor to Post Newspaper Ad:	
Time to post advertisement	0.08
Administrative Assistant hourly wage w/fringe	\$29
Administrative Assistant labor per ad	\$2
Total Cost of Labor to Post Newspaper Ad	\$7,701

⁵⁸ The calculation in the NPRM included classified advertising rates from five newspapers (Augusta Chronicle, Huntsville Times, Los Alamos Monitor, San Diego Union-Tribune, and Advertiser Times in Detroit) not included in this final analysis and one newspaper that is included (Austin Chronicle).

⁵⁹ <http://selfserve.pilotzads.com/vp-adportal/classified/index.html>.

⁶⁰ Austin Chronicle. 2011. Place an Ad. Available at <https://ssl.austinchronicle.com/gyrobase/PlaceAd> (Accessed August 1, 2011).

⁶¹ <http://gainesvillesun.adperfect.com/>.

⁶² http://plaqueminesgazette.com/?page_id=118.

⁶³ https://classifieds.swiftcom.com/webentry/url/consumer/c_category.html.

⁶⁴ Data collected by phone interview with a member of classified staff, August 12, 2011.

⁶⁵ Monster.com. 2011. Job Postings Inventory. Available at <http://hiring.monster.com/indexProspect.Redux.aspx> (Accessed August 8, 2011).

⁶⁶ CareerBuilder. 2011. Job Posting. Available at <https://www.careerbuilder.com/JobPoster/ECommerce/CartOrderSummary.aspx?cbid=epjob>

btn&sc_cmp2=JP_HP_PostJobButton&sslRedirectCnt=1 (Accessed August 9, 2011).

⁶⁷ U.S. Census Bureau. 2008. Population: Ancestry, Language Spoken At Home—Table 53: Languages Spoken at Home by Language. Available at http://www.census.gov/compendia/statab/cats/population/ancestry_language_spoken_at_home.html (Accessed August 3, 2011).

⁶⁸ LanguageScape. 2011. How it Works—Cost Calculator. Available at http://www.languagescape.com/how_works_1.asp (Accessed June 7, 2011).

TABLE 11—COST OF ADDITIONAL RECRUITING—Continued

Cost component	Value
Total Cost:	
Total Cost of Additional Recruiting	\$1,035,601

Sources: BLS, 2011a; BLS, 2011b; U.S. Census, 2008; LanguageScape, 2011; Branson Tri-Lake News; Aspen Times; Austin Chronicle; Gainesville Sun; Plaquemines Gazette; Virginia-Pilot.

It is possible that employers will incur costs from interviewing applicants who are referred to H-2B employers by the additional recruiting activities. However, the Department is unable to quantify the impact.

j. Cost of Contacting Labor Organizations

The analysis performed for the Proposed Rule included a cost for employers to contact the local union to locate qualified U.S. workers when seeking to fill positions in occupations and industries that are traditionally unionized. Under this Final Rule, union notification is the responsibility of the SWA, and no costs to employers are included.

k. Electronic Job Registry

Under the Final Rule, the Department will post and maintain employers' H-2B job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The electronic job registry will serve as a public repository of H-2B job orders for the duration of the referral period. The job orders will be posted in the registry by the CO upon the acceptance of each submitted *Application for Temporary Employment Certification*. The posting of the job orders will not require any additional effort on the part of H-2B employers or SWAs.

i. Benefits

The electronic job registry will improve the visibility of H-2B jobs to U.S. workers. In conjunction with the longer referral period under the Final Rule, the electronic job registry will expand the availability of information about these jobs to U.S. workers, and therefore improve their employment opportunities. In addition, the establishment of an electronic job registry will provide greater transparency of the Department's administration of the H-2B program to the public, members of Congress, and other stakeholders. Transferring these job orders into electronic records for the electronic job registry will result in a more complete, real-time record of job opportunities for which H-2B workers are sought. Employers seeking

temporary workers, in turn, will likely experience an increase in job applications from U.S. workers, and thus may not incur the additional expenses of hiring H-2B workers. The Department, however, is not able to estimate the increase in job applications resulting from the electronic job registry, and thus is unable to quantify this benefit.

ii. Costs

The establishment of an electronic job registry in this Final Rule represents increased maintenance costs to the Department. The Department has reduced its cost estimates from the proposed rule as it can rely on design and development resources already used in implementing the H-2A job registry. The Department estimates that first year costs will be 25 percent of the first year costs under the H-2A program (25 percent of \$561,365, or \$140,341) and that subsequent year costs will be 10 percent of the costs under the H-2A program (10 percent of \$464,341, or \$46,434). Using the loaded hourly rate for all relevant labor categories (\$1,238) suggests that 113 labor hours will be required in the first year, and 38 labor hours will be required in subsequent years (see Table 12).

TABLE 12—COST OF ELECTRONIC JOB REGISTRY

Cost component	Value
Sum of All Labor Category Loaded Wages	\$1,238
Registry development and maintenance hours—Year 1	113
Registry maintenance hours—Year 2–10	38
Cost to DOL to Maintain Job Registry—Year 1	\$140,341
Cost to DOL to Maintain Job Registry—Year 2–10	\$46,434

l. Disclosure of Job Order

The Final Rule requires an employer to provide a copy of the job order to H-2B workers outside of the United States no later than the time at which the worker applies for the visa, and to a worker in corresponding employment no later than the day that work starts. For H-2B workers changing employment from one certified H-2B

employer to another, the copy must be provided no later than the time the subsequent H-2B employer makes an offer of employment. The job order must be translated to a language understood by the worker.

We estimate two cost components for the disclosure of job orders: The cost of reproducing the document containing the terms and conditions of employment, and the cost of translation.

The cost of reproducing job orders does not apply to employers of reforestation workers because the Migrant and Seasonal Agricultural Worker Protection Act already requires these employers to make this disclosure in a language common to the worker. According to H-2B program data for FY 2000–2007, 88.3 percent of H-2B workers work in an industry other than reforestation, suggesting that the job order will need to be reproduced for 102,012 (88.3 percent of 115,500) H-2B workers. We estimate the cost of reproducing the terms and conditions document by multiplying the number of affected H-2B workers (102,012) by the number of pages to be photocopied (three) and by the cost per photocopy (\$0.12). The Department estimates average annual costs of reproducing the document containing the terms and conditions of employment to be approximately \$0.04 million (see Table 13).

For the cost of translation, we assume the provision will impact only employers who are hiring H-2B workers. Therefore, the Department uses its estimate of the number of certified employer applicants who ultimately hire H-2B workers in this calculation. This suggests that translation costs potentially apply to 3,966 H-2B employers. The Department estimates that 83.9 percent of H-2B workers from the top ten countries of origin do not speak English,⁶⁹ so approximately 3,328 H-2B employers will need to translate their job orders. The Department assumes that an employer hires all of its H-2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is

⁶⁹ U.S. Department of Homeland Security (DHS). 2009. Yearbook of Immigration Statistics. Available at <http://www.dhs.gov/files/statistics/publications/yearbook.shtm> (Accessed June 12, 2011).

necessary per employer needing translation. The Department has updated its estimates of the cost of translating a three-page document into English from languages spoken in the top ten countries of origin as follows: English to Tagalog, \$76.50; English to Hebrew/Arabic, \$76.50; English to

Romanian, \$72.00; and English to Spanish, \$67.50.⁷⁰ Using the percentage of entrants from the top ten countries of origin produces a weighted average translation cost of \$68.00 per job order. Multiplying the number of H-2B employers who will need to translate the job order (3,328) by the weighted

average cost of translation (\$68) suggests translation costs will total \$0.2 million (see Table 13).

Summing the costs of reproducing and translating the job order results in total costs related to disclosure of the job order of \$0.3 million (see Table 13).

TABLE 13—COST OF DISCLOSURE OF JOB ORDER

Cost component	Value
Reproducing Job Order:	
H2B workers	115,500
Percent workers not in reforestation	88.3%
Affected workers	102,012
Pages to be photocopied	3
Cost per page	\$0.12
Cost per job order	\$0.36
Total Cost of Reproducing Document	\$36,724
Translating Job Order:	
Scaled number of unique certified H-2B employers	3,966
Percent workers needing translation	83.9%
Employers performing translation	3,328
English to Tagalog—3 page document, 3 day delivery	\$77
English to Hebrew/Arabic—3 page document, 3 day delivery	\$77
English to Romanian—3 page document, 3 day delivery	\$72
English to Spanish—3 page document, 3 day delivery	\$68
Weighted average translation cost	\$68
Total Translation Cost	\$226,337
Total Cost:	
Total Cost of Disclosure of Job Order	\$263,061

Sources: DHS, 2009; LanguageScape, 2011.

m. Elimination of Attestation-Based Model

The 2008 Final Rule used an attestation-based model: employers conducted the required recruitment before submitting an *Application for Temporary Employment Certification* and, based on the results of that effort, applied for certification from the Department for a number of foreign workers to fill the remaining openings. Employers simply attested that they had undertaken the necessary activities and made the required assurances to workers. The Department has determined that this attestation-based model does not provide sufficient protection to workers. In eliminating the attestation-based model, the recruitment process under this rule now occurs after the *Application for Temporary Certification* is filed so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of eliminating the attestation based-model is to change the timing of recruitment rather than a change in substantive requirements.

The return to a certification model in which employers demonstrate compliance with program obligations before certification will improve worker protections and reduce various costs for several different stakeholders. Greater compliance will provide improved administration of the program, conserving government resources at both the State and Federal level. In addition, employers will be subject to fewer requests for additional information and denials of Applications, decreasing the time and expense of responding to these Department actions. Finally, it will result in the intangible benefit of increased H-2B visa availability to those employers who have conducted bona fide recruitment around an actual date of need. The Department, however, is not able to estimate the economic impacts of these several effects and is therefore unable to quantify the related benefits.

The elimination of the attestation-based model will impose minimal costs on employers because they will not be required to produce new documents, but only to supplement their

recruitment report with additional information (including the additional recruitment conducted, means of posting the job opportunity, contact with former U.S. workers, and contact with labor organizations where the occupation is customarily unionized).

We estimated two costs for the elimination of the attestation-based model: The material cost of reproducing and mailing the documents, and the associated labor cost. The Department estimated material cost equal to \$2,023, calculated by multiplying the scaled number of H-2B employers (3,966) by the estimated additional number of pages that must be submitted (three) and the additional postage required to ship those pages (\$0.17). Estimated labor cost of \$9,087 was calculated by multiplying the scaled number of H-2B employers (3,966) by the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) and the hourly labor compensation of an administrative assistant/executive secretary (\$28.77). Summing these two components results in incremental costs of \$11,531 per year associated with the elimination of the attestation-based model (see Table 14).

⁷⁰ LanguageScape, 2011. How it Works—Cost Calculator. Available at http://www.languagescape.com/how_works_1.asp

(Accessed June 7, 2011).

TABLE 14—COST OF ELIMINATION OF ATTESTATION-BASED MODEL

Cost component	Value
Postage Costs:	
Scaled number of unique certified H-2B employers	3,966
Additional pages to submit	3
Additional postage	\$0.17
Total Postage Costs	\$2,023
Labor Costs to Photocopy and Mail Documents:	
Scaled number of unique certified H-2B employers	3,966
Labor time to photocopy and mail documents (hours)	0.08
Administrative Assistant hourly wage with fringe	\$29
Total Labor Costs to Photocopy and Mail Documents	\$9,508
Total Cost:	
Total Costs of Elimination of Attestation-Based Model	\$11,531

Sources: BLS, 2011a; BLS, 2011b.

n. Document Retention

Under the Final Rule, H-2B employers must retain documentation in addition to that required by the 2008 Final Rule. The Department assumes that each H-2B employer will purchase a filing cabinet at a cost of \$49.99⁷¹ (an increase of the proposed rule estimate of \$21.99) in which to store the additional documents starting in the first year of the rule. To obtain the cost of storing documents, we multiply the scaled number of H-2B employers (6,425) by the cost per file cabinet for a total one-time cost of \$0.3 million (see Table 15). This cost is likely an overestimate, since the 2008 Final Rule also required document retention and many employers who already use the H-2B program will already have bought a file cabinet to store the documents they must retain under that rule.

TABLE 15—COST OF DOCUMENT RETENTION

Cost component	Value
Scaled number of unique certified H-2B employers	6,425
Filing cabinet	\$50

⁷¹ Prices at Staples, the source cited in the proposed rule, have risen to \$69.99. The current price is for a similar item at a lower price. OfficeMax. 2011. Vertical File Cabinets. Available at http://www.officemax.com/office-furniture/file-cabinets-accessories/vertical-file-cabinets?history=utozftma%7CcategoryId%7E10001%5EcategoryName%7EOffice%2BFurniture%5EparentCategoryID%7Ecategory_root%5EprodPage%7E25%5Eregion%7E1%40porkedzu%7CccategoryId%7E40%5EcategoryName%7EFile%2BCabinets%2B%2526%2BAccessories%5EparentCategoryID%7Ecat_10001%5EprodPage%7E25%5Eregion%7E1%5Erefine%7E1%40wih8mfsy%7CprodPage%7E15%5Erefine%7E1%5Eregion%7E1%5EcategoryName%7Evertical-file-cabinets%5EcategoryId%7E91%5EparentCategoryID%7Ecat_40&view=list&position=1&prodPage=15&sort=Price+%28Low-High%29 (Accessed July 11, 2011).

TABLE 15—COST OF DOCUMENT RETENTION—Continued

Cost component	Value
Total Document Retention Costs	\$321,186

Source: OfficeMax, 2011.

o. Departure Time Determination

The Proposed Rule would have required employers to notify the local SWA of the time at which the last H-2B worker departs for the place of employment, if the last worker has not departed for the work site at least 3 days before the date of need. Under the Final Rule, the obligation to hire U.S. workers will end 21 days before the date of need and the employer is not required to provide any notice to the local SWA, thus eliminating the costs associated with this proposed provision.

p. SWA Administrative Burden

Under this Final Rule, SWAs will see both additions to and reductions from its current, baseline workload. Additional responsibilities that the SWAs will take on include contacting labor organizations to inform them about a job opportunity when the occupation or industry is customarily unionized, and accepting and processing a likely higher number of U.S. applicants during the newly extended recruitment period. The Department, however, does not have reliable data to measure these increased activities and is therefore unable to provide an estimate of any increased workload.

In contrast, SWAs will no longer be responsible for conducting employment eligibility verification activities. These activities include completion of Form I-9 and vetting of application documents by SWA personnel.

Under the 2008 Final Rule, SWAs are required to complete Form I-9 for applicants who are referred through the

SWA to non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this Final Rule SWAs will no longer be required to complete this process, resulting in cost savings. Due to a lack of data on the number of SWA referrals, we are not able to quantify this benefit.

q. Read and Understand the Rule

During the first year that the Final Rule will be in effect, H-2B employer applicants will need to learn about the new processes and requirements. We estimate the cost to read and understand the rule by multiplying the average number of unique H-2B employer applicants in FY 2000–2007 (6,425) by the time required to read the new rule and associated educational and outreach materials (3 hours), and the loaded hourly wage of a human resources manager (\$62.17). In the first year of the rule, this amounts to approximately \$1.2 million in labor costs (see Table 16).

TABLE 16—COST TO READ AND UNDERSTAND RULE

Cost component	Value
Number of unique H-2B employer applicants	6,425
Time to read rule and materials	3
HR Manager hourly wage	\$62
Total Cost to Read and Understand Rule	\$1,198,418

Sources: BLS, 2011a; BLS, 2011c.

r. Job Posting Requirement

The Final Rule requires employers applying for H-2B certification to post a notice of the job opportunity in two conspicuous locations at the place of anticipated employment (when there is no union representative) for at least 15 consecutive days. This provision entails additional reproduction costs. To obtain the total cost incurred due to the job posting requirement, we multiplied the

average number of unique H-2B employer applicants FY 2000–2007 (6,425) by the cost per photocopy (\$0.12) and the number of postings per place of employment (2), which amounts to \$1,542 per year (see Table 17).

TABLE 17—COST OF JOB POSTING REQUIREMENT

Cost component	Value
Number of unique H-2B employer applicants	6,425
Job Postings per Website	2
Cost per photocopy	\$0.12
Total Cost to Post Job Opportunity	\$1,542

s. Workers' Rights Poster

In addition, the Final Rule requires employers to post and maintain in a conspicuous location at the place of employment a poster provided by the Secretary which sets out the rights and protections for workers. The poster must

be in English and, to the extent necessary and as provided by the Secretary, foreign language(s) common to a significant portion of the workers if they are not fluent in English. To estimate the cost of producing workers' rights posters, we multiply the estimated number of H-2B employers (6,425) by the cost of downloading and printing the poster (\$0.12). In total, the cost of producing workers' rights posters is \$771 per year (see Table 18). If an employer needs to download and print additional versions of the poster in languages other than English, this would result in increased costs.

TABLE 18—COST OF WORKERS' RIGHTS POSTER

Cost component	Value
Number of unique certified H-2B employers	6,425
Cost per Poster	\$0.12
Total Cost of Workers' Rights Poster	\$771

5. Summary of Cost-Benefit Analysis

Table 19 presents a summary of the costs associated with this Final Rule. Because of data limitations on the number of corresponding workers and U.S. workers expected to fill positions currently held by H-2B workers, the Department was not able to monetize any costs of the rule that would arise as a result of deadweight losses associated with higher employment costs under the Final Rule. However, because the size of the H-2B program is limited, the Department expects that any deadweight loss would be small.

The monetized costs displayed are the yearly summations of the calculations described above. The total undiscounted costs of the rule in Years 1–10 are expected to total approximately \$15.2 million.

TABLE 19—TOTAL COSTS—UNDISCOUNTED

Cost component	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Transfers:			
Corresponding Workers' Wages—90 Percent	\$17,517,500	\$17,517,500	\$17,517,500
Corresponding Workers' Wages—75 percent	52,552,500	52,552,500	525,525,000
Transportation	61,328,243	61,328,243	613,282,432
Subsistence	2,808,960	2,808,960	28,089,600
Lodging	1,582,673	1,582,673	15,826,727
Visa and Border Crossing Fees	10,133,134	10,133,134	101,331,343
Total Transfers—Low	93,370,510	93,370,510	933,705,103
Total Transfers—High	128,405,510	128,405,510	1,284,055,103
Annual Costs to Employers:			
Additional Recruiting	1,035,601	1,035,601	10,356,014
Disclosure of Job Order	263,061	263,061	2,630,608
Elimination of Attestation-Based Model	11,531	11,531	115,307
Post Job Opportunity	1,542	1,542	15,420
Workers Rights Poster	771	771	7,710
Total Annual Costs to Employers	1,312,506	1,312,506	13,125,058
First Year Costs to Employers:			
Read and Understand Rule	1,198,418	0	1,198,418
Document Retention	321,186	0	321,186
Total First Year Costs to Employers	1,519,603	0	1,519,603
First Year Costs to Government:			
Electronic Job Registry	140,341	46,434	558,248
Enhanced U.S. Worker Referral Period	Not Estimated	Not Estimated	Not Estimated
Total First Year Costs to Government	140,341	46,434	558,248
Total Costs:			
Total Costs & Transfers—Low	96,342,961	94,729,450	948,908,012
Total Costs & Transfers—High	131,377,961	129,764,450	1,299,258,012
Total Transfers—Low	93,370,510	93,370,510	933,705,103
Total Transfers—High	128,405,510	128,405,510	1,284,055,103
Total Costs	2,972,451	1,358,940	15,202,910

Note: Totals may not sum due to rounding.

Summing the present value of the costs in Years 1–10 results in total

discounted costs over 10 years of \$10.3 million to \$12.8 million (with 7 percent

and 3 percent discounting, respectively) (see Table 20).

TABLE 20—TOTAL COSTS—SUM OF PRESENT VALUES

Cost component	Year 1–10 costs
Present Value—7%:	
Total Costs & Transfers—Low	623,222,403
Total Costs & Transfers—High	853,195,468
Total Transfers—Low	612,892,890
Total Transfers—High ...	842,865,955
Total Costs	10,329,513
Present Value—3%:	
Total Costs & Transfers—Low	786,046,544
Total Costs and Transfers—High	1,076,197,666
Total Transfers—Low	773,271,254
Total Transfers—High ...	1,063,422,377
Total Costs	12,775,290

Note: Totals may not sum due to rounding.

Because the Department was not able to monetize any benefits for this Final Rule due to the lack of adequate data, the monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate.

The Department was unable to identify data to provide monetary estimates of several important benefits to society, including increased employment opportunities for U.S. workers and enhancement of worker protections for U.S. and H-2B workers. These important benefits result from the following provisions of this Final Rule: transportation to and from the place of employment, payment of visa and consular fees, the enhanced U.S. worker referral period, additional recruiting directed by the CO, the electronic job registry, the job posting requirement, and enhanced integrity and enforcement provisions. Because the enhanced referral period extends the time during which jobs are available to U.S. workers, it increases the likelihood that U.S. workers are hired for those jobs. In addition, the electronic job registry will improve the visibility of H-2B jobs to U.S. workers and enhance their employment opportunities. In addition, the establishment of a electronic job registry will provide greater transparency with respect to the Department's administration of the H-2B program to the public, members of Congress, and other stakeholders. These benefits, however, are difficult to quantify due to data limitations.

Several unquantifiable benefits result in the form of cost savings. As more U.S. workers are hired as a result of this Final Rule, employers will avoid visa and consular fees for positions that might have otherwise been filled with H-2B workers; it is also likely that transportation costs will be lower.

Under the 2008 Final Rule, SWAs are required to complete Form I-9 for non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this Final Rule, SWAs will no longer be required to complete this process, resulting in cost savings to SWAs. We were not able to quantify these cost savings due to a lack of data regarding the number of I-9 verifications SWAs have been performing for H-2B referrals.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended (RFA), requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. See 5 U.S.C. 605. For the reasons explained in this section, the Department believes this rule is not likely to have a significant impact on a substantial number of small entities and, therefore, a Final Regulatory Flexibility Analysis (FRFA) is not required by the RFA. However, in the interest of transparency we have prepared the following FRFA to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards. The Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this rule upon submission of the rule to OMB under E.O. 12866, as amended, "Regulatory Planning and Review" (58 FR 51735, Oct. 4, 1993; 67 FR 9385, Feb. 28, 2002; 72 FR 2763, Jan. 23, 2007).

1. Statement of the Need for, and Objectives of, the Rule

The Department seeks to help employers meet their legitimate short-term temporary labor needs where and when there are no available U.S. workers and to increase worker protections and strengthen program integrity under the H-2B labor certification program. The legal basis for the rule is the Department's authority, as delegated from DHS under 8 U.S.C. 1184(c) and its regulations at 8 CFR

214.2(h)(6), to grant temporary labor certifications under the H-2B program.

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H-2B program. The Department believes that the practical ramifications of the 2008 Final Rule (e.g., streamlining the H-2B process to defer many determinations of program compliance until after an application has been adjudicated, inadequately protecting U.S. workers who may be paid less than H-2B workers performing the same jobs, failing to ensure the integrity of the program by not requiring employers to guarantee U.S. and H-2B employees work for any number of weeks during the period of the job order) have undermined the program's intended protection of both U.S. and foreign workers.

The protections in this rule are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers, including measures to ensure greater access to jobs for U.S. workers through enhanced recruitment in order to satisfy the statutory requirement that certifications be granted only if no U.S. workers are available.

Additionally, the rule seeks to help employers meet legitimate short-term temporary labor needs where and when there are no available U.S. workers. As the program has evolved, stakeholders in diverse industries throughout the country repeatedly have expressed concerns that some employers were inappropriately using H-2B workers for job opportunities that were permanent, thereby denying U.S. workers the opportunity for long-term employment. These employers' actions are to the detriment of other employers with a legitimate temporary need that are ultimately denied access to the program due to the annual cap on available visas. By preventing employers with a long-term permanent need from participating in the H-2B program, the Department would provide employers with genuine unmet temporary needs with a greater opportunity to participate in the program.

For these reasons the Department is promulgating the changes contained in the Final Rule.

2. Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration and Significant Issues Raised by the Public to the Proposed Rule, the Department's Response, and Changes Made as a Result of the Comments

The Department received and carefully considered written comments

to the proposed rule submitted by the Chief Counsel for Advocacy of the SBA (Advocacy), along with written comments and significant regulatory alternatives from small businesses and their representatives. We also considered feedback gathered during an April 26, 2011 roundtable discussion conducted by the SBA which included Department representatives, small businesses, and the SBA itself. A brief summary of significant comments and Department responses follows, but because the concerns of Advocacy and small businesses were largely similar to those expressed by the wider universe of all employers, the preceding preamble sections contain far more extensive responses and explanations.

Advocacy stated that the economic impact calculated in the IRFA was underestimated because it failed to account for higher wages that employers may have to pay resulting from a separate rule published by the Department on January 13, 2011 changing the way H-2B prevailing wages are determined. Further, Advocacy believed that the IRFA also underestimated the proportion of small businesses that would be impacted. An employer association commented that in order to accurately assess the proposed rule's impact to small businesses, the Department could have conducted a survey to identify the number of small businesses affected and the number in each of the industry sectors that commonly uses the H-2B program.

In response to Advocacy's assertions, the Department notes that it accounted for the full cost impact of the January 2011 prevailing wage Final Rule in that rule's FRFA. Regarding this rule's IRFA calculation of the proportion of small businesses affected, the Department evaluated the economic impact across 1.1 million employers, which represents all small businesses (according to the SBA's definition of a small entity) within the five most common industries using the H-2B program. In calculating the impact of this rule, the Department used this universe of small businesses to be consistent with SBA guidance (see A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20: "the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall.") and because any of those small employers could request certification for H-2B workers. In the *Application for Temporary Employment Certification*, the Department only recently added a non-mandatory field asking for annual dollar revenue and

therefore cannot determine how many H-2B employers typically are small businesses. The Department did not conduct its own small business surveys as an employer association suggested because doing so would have required an extended clearance process under the Paperwork Reduction Act, a process that would have been impossible to fulfill given the time constraints. Instead, we relied on other, more expeditious methods to estimate data. However, even if all 6,980 employers that receive H-2B certifications in an average year were, in fact, small businesses, this Final Rule would not impact a substantial number of small entities because it would only affect less than 1 percent of all small businesses.

An employer association also commented that proposed provisions would remove most temporary labor supply services from H-2B program eligibility, and that the IRFA failed to account for the lost revenue to these U.S. businesses. While the NPRM proposed to eliminate all job contractors from participating in the H-2B program, the Final Rule allows job contractors to continue to participate in the program only if they are able to demonstrate through documentation their own one-time occurrence or seasonal need, and not that of their employer-clients. The Department recognizes that while providing necessary protections to U.S. workers, this rulemaking may also result in some small businesses receiving fewer, or no, temporary labor certifications. However, in typical years, demand for H-2B visas exceeds the program's annual statutory cap of 66,000, meaning that other small businesses will benefit from the opportunity to have their H-2B petitions approved. The Department was unable to accurately project the monetary losses and benefits of scarce visas transitioning from some employers, and even industries, to others.

Though this rulemaking will not impose a significant economic burden on a substantial number of small businesses, the Department did make a number of changes to the proposed rule that should alleviate many of the concerns Advocacy expressed and that were expressed in the comments received from other small business employers. For instance, Advocacy, other employers, and their representatives articulated the difficulty of fulfilling the three-fourths guarantee in 4-week increments given unpredictability of the weather, acts of God, and acts of man. As explained further in the preamble to 20 CFR 655.20(f) and (g), the Department

responded by extending the length of the three-fourths guarantee calculation period to 12 weeks (for job orders that last 120 days or longer, which is the vast majority of job orders) and to 6 weeks (for job orders lasting less than 120 days). We also added catastrophic man-made events such as oil spills or controlled flooding to the proposed list of triggers that employers could use to request cancellation of job orders, send workers home, and relief from obligations such as the three-fourths guarantee. Though Advocacy describes as a burden the small business employer's requirement to inform the CO in a timely manner after a catastrophic event, the Department maintains that it is a relatively low threshold to meet in order to seek termination of the job order.

Small business owners who participated in Advocacy's roundtable discussion were most concerned about the proposed requirement that employers continue to accept SWA referrals of U.S. applicants until 3 days before the date of need or the time of the last H-2B worker's departure, whichever is later. The provision also required employers to inform the SWA if the last H-2B worker had not departed by 3 days before the start of the job order, and to notify the SWA of the new departure date when available so the SWA would know when to stop referring qualified U.S. workers. The concerns of the roundtable participants were consistent with comments submitted by many other businesses in response to these proposed changes. Some small businesses called the provision unworkable and claimed it would disrupt their hiring and training plans. As explained more in depth in the preamble to 20 CFR 655.20(t), the Department believes the current recruitment period—a 10-day window that occurs up to 4 months before the date of need—is far too short and takes place too far in advance of the job order's start date for U.S. applicants to realistically be able to apply. As such, the existing 10-day recruitment period compromises the Department's regulatory mandate to grant H-2B certifications only after ensuring that no qualified U.S. workers are available. However, based upon the comments from small businesses and Advocacy about the potential burdens of this provision, this Final Rule has been changed. The referral period has been reduced so that it ends 21 days before the date of need. Additionally, employers are no longer obligated to continue accepting U.S. applicants after

that point, a change that eliminates the related SWA notification requirements.

Advocacy expressed its belief that the IRFA underestimated its members' exposure to inbound travel expenses, asserting that the price premium on tickets purchased close to the date of need and the cost of transporting U.S. workers represent significant burdens to employers and were not accounted for in the original cost estimates. Because this Final Rule changed the last day an employer must hire U.S. applicants to 21 days before the date of need, the Department does not calculate the extra cost of refundable fares. The FRFA responds to Advocacy's request to account for the transportation of corresponding workers and estimates a per ticket cost to and from the workplace. Moreover, as discussed in the preamble to 20 CFR 655.20(j), this Final Rule also responds to small business concerns about U.S. worker travel by providing that employers may require workers to complete 50 percent of the period of employment before reimbursing the reasonable costs of inbound travel and subsistence if the employer has not already paid for or reimbursed such costs. Further, employers will be required to pay the costs of outbound transportation only for workers who complete the job order period of employment or are dismissed early. And to the extent that employers do hire qualified U.S. applicants responding to national job registry postings and requiring inbound travel, this FRFA estimates that the costs of their travel expenses would be a fraction of those for foreign workers. In addition, hiring these U.S. workers would not require employers to pay the visa or consular expenses related to bringing in workers from foreign countries.

Advocacy cited comments from small businesses that use the H-2B program expressing concern that the new, potentially higher wage rates under the recently changed prevailing wage determination process will interact with the proposed rule's corresponding employment provision, forcing employers to raise payroll across their entire workforce. For example, small landscape companies worried that temporarily assigning to a landscaping supervisor the duties of a landscape laborer who has called in sick would require all laborers to be paid the supervisor's higher wage rate. As discussed in more depth in the preamble to 20 CFR 655.5, this landscape example and other similar examples in the employer comments represent a misunderstanding of what the definition of corresponding employment requires: Corresponding

workers who perform substantially the same work specified in the job order or substantially the same work that H-2B workers actually perform are entitled to at least the same wage rate as the H-2B workers. Employers are not required to apply corresponding employment in the other direction and, in this example, pay laborers the same wage paid to the supervisors. Advocacy also articulated small businesses' recommendation that the Department reconsider the corresponding worker provision because it may impose too great a cost on small H-2B employers. After carefully considering Advocacy's comments and other comments submitted separately from small businesses, the definition of corresponding employment was retained with modifications (also fully discussed in the preamble to 20 CFR 655.5) because it is a critical component in the Department's mandate to protect similarly employed U.S. workers from adverse impacts of the H-2B program; however, the Department did modify the definition to clarify that occasional, insignificant instances of overlapping job duties would not transform a U.S. worker employed in one job into someone in corresponding employment with an H-2B worker employed in another job.

Advocacy also challenged the IRFA's lack of data which prevented the Department from calculating the effects of corresponding employment. Similarly, an employer association commented that the Department could have conducted its own corresponding employment survey to solve any gaps in data. Both organizations stated that the Department could have used an assumed value of 50 percent to estimate the ratio of corresponding workers to H-2B workers, purportedly similar to an estimate used elsewhere in the IRFA. The Department appreciates the proffered solutions and notes that the proposed rule requested that the public suggest data sources we could use to estimate corresponding employment. No such sources were ultimately provided. However, pursuing a statistically valid survey would not only have been prohibitively time-consuming given the Department's time constraints, but also would have required a lengthy clearance process under the Paperwork Reduction Act. The 50 percent estimate found in the IRFA was used in a different context and would have been an inappropriate and misguided way to estimate the ratio of corresponding workers to H-2B workers. In reality, the prevalence of corresponding workers spans a very wide range among businesses: Most comments from employers indicated

that employers use H-2B workers to fill most if not all of their needs; other businesses commented that they hire very few H-2B workers as a way to supplement a wider staff only during a seasonal peak. The Department attempted to use its own data from a random sample of 225 applications to estimate the number of corresponding employees, but as explained in the Executive Order 12866 section, there were too few files that contained employee data to be statistically reliable, and those few files that did contain a breakdown of the numbers of H-2B and U.S. workers were not from a representative pool of the industries that participate in the H-2B program. Further, the 34 of the 225 files that contained payroll data were not a random subset, because the data was provided in response to an RFI or an audit rather than as a routine part of the application process. Nevertheless, the Department attempted to quantify the impact associated with this provision by estimating that 50 percent of incumbent corresponding workers in a given industry earn less than the prevailing wage and would have their wages increased as a result of the Final Rule. Department believes the cost of providing H-2B prevailing wages to corresponding workers will likely not be the undue burden that small businesses fear, because the prevailing wage calculation is representative of a typical worker's wage for a given type of work in a particular area. Since this calculation uses the current wages received by corresponding U.S. workers, many, if not most, of the non-H-2B workers will already be making at least the required prevailing wage rate, and therefore, small business employers will not be obligated to increase the wages of such workers. The Department's estimate assumed that workers in corresponding employment would receive a range of wage increases. The Department's estimate further assumed that all U.S. workers in corresponding employment would work 35 hours per week for 39 weeks (the maximum allowable certification period) in order to determine an upper-bound estimate. Therefore, the Department believes it has been responsive to commenter concerns with the cost of the corresponding employment provision.

Finally, small business participants who attended the SBA roundtable discussion expressed concerns regarding the proposed bifurcation of the certification process into registration and application processes. As Advocacy summarized in its written comments to the proposed rule, small businesses

were concerned that the bifurcated process creates many complicated layers of review by federal and state officials, which may add delays, requests for information and overall administrative paperwork. A complete discussion of the new process can be found at the preamble to 20 CFR 655.11. In summary, the Department believes that OFLC and employers will recognize administrative efficiencies once registration is introduced and the assessment of temporary need is adjudicated separately from and in advance of the determination of U.S. worker availability. In many cases, the determination of temporary need will be required only once every 3 years, which will reduce RFIs that may happen annually under the existing application process, reducing the burden on employers and clearing the way for a more efficient adjudication of *Applications for Temporary Employment Certification* and more effective recruitment of U.S. workers closer to the date of need. On behalf of SBA's small business members, Advocacy recommended that the Department reconsider the bifurcated registration and application processes and retain the current attestation-based system. As explained in both the NPRM and in RFA Section 1, above, the current application process does not provide adequate worker protections that are essential for the Department to meet its regulatory mandates of ensuring that foreign workers may be employed only if qualified U.S. workers are not available and that the hiring of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

3. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply Definition of a Small Business

A small entity is one that is independently owned and operated and that is not dominant in its field of operation. The definition of small business varies from industry to industry to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry. The Department has conducted a small entity impact analysis on small businesses in the five industries with the largest number of H-2B workers and for which data were available, as mentioned in the Executive Order 12866 analysis: Landscaping Services; Janitorial Services (includes housekeeping services); Food Services and Drinking Places; Amusement, Gambling, and Recreation; and

Construction. These top five industries accounted for almost 75 percent of the total number of H-2B job opportunities certified during FY 2007–2009.^{72 73} One industry, Forest Services, made the initial top five list but is not included in this analysis because the only data available for forestry also include various agriculture, fishing, and hunting activities. Relevant data for Forestry only were not available.

We have adopted the Small Business Administration (SBA) small business size standard for each of the five industries, which is a firm with annual revenues equal to or less than the following:

Landscaping Services, \$7 million;
Janitorial Services, \$16.5 million;
Construction, \$20.7 million;^{74 75}
Food Services and Drinking Places, \$7 million; and
Amusement, Gambling, and Recreation, \$7 million.

In order to convert the SBA's revenue-based definitions to employment size-class based definitions that can be used in conjunction with U.S. Census's Statistics of U.S. Businesses data,⁷⁶ the Department calculated average revenue per firm by employment size class for the top five industries, and found the largest employment size class for which average revenue per firm was below the SBA's size standard. This method obtained the following employment size-class based definitions (see Table 18):

Landscaping Services, 499 employees;
Janitorial Services, 499 employees;

⁷² According to H-2B program data, the average annual number of firms (of all sizes) and H-2B workers certified for these industries during FY2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027; Janitorial Services, Firms—788, Workers—30,902; Food Services and Drinking Places, Firms—851, Workers—22,948; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041; and Construction, Firms—860, Workers—30,242.

⁷³ As explained above, the distribution of certified job opportunities might not perfectly reflect the distribution of H-2B workers; however, it serves as a valuable proxy for the purposes of this analysis.

⁷⁴ U.S. Small Business Administration (SBA). 2010. Table of Small Business Size Standards Matched to North American Industry Classification System Codes (effective November 5, 2010). Available at <http://www.sba.gov/content/table-small-business-size-standards>.

⁷⁵ The SBA small business size standards for construction range from \$7 million (land subdivision) to \$33.5 million (general building and heavy construction). However, because employers representing all types of construction businesses may apply for certification to employ H-2B workers, the Department used an average of \$20.7 million as the size standard for construction.

⁷⁶ U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at <http://www.census.gov/econ/susb/data/susb2007.html>. While 2008 data were available at the time of this analysis, 2007 is the most recent year with revenue data included.

Construction, 99 employees;
Food Services and Drinking Places, 99 employees; and
Amusement, Gambling, and Recreation, 499 employees.

Employers seeking to participate in the H-2B program come from virtually all segments of the economy; those participating businesses make up a small portion of the industries they represent as well as of the national economy overall. A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20 (“the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall”). Accordingly, the Department believes that the rule will not impact a substantial number of small entities in a particular industry or segment of the economy.

Employment in the H-2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H-2B program. The H-2B program is capped at 66,000 visas issued per year, and the Department estimates that at any given time there are 115,500 H-2B workers in the country (66,000 plus 33,000 who return in the second year and 16,500 who return in the third year). This represents approximately 0.09 percent of total nonfarm employment in the U.S. economy (129.8 million).⁷⁷ As described in the Executive Order 12866 analysis, the average annual number of H-2B workers in the top five industries is small in absolute terms and relative to total employment in that occupation.

Landscaping Services: 38,073 H-2B workers; 6.5 percent of occupation
Janitorial Services: 15,079 H-2B workers; 1.6 percent of occupation
Construction: 14,756 H-2B workers; 0.2 percent of occupation
Food Services and Drinking Places: 11,197 H-2B workers; 0.1 percent of occupation
Amusement, Gambling, and Recreation: 6,851 H-2B workers; 0.5 percent of occupation

The Department receives an average of 8,717 applications from 6,425 unique employer applicants annually. An average of 6,980 of those applications results in petitions for H-2B workers that are approved by DHS, of which 5,298 are from unique employer applicants. Even if all 6,980 applications were filed by unique small entities, all of which were in the top five

⁷⁷ U.S. Bureau of Labor Statistics (BLS). 2011. Employees on nonfarm payrolls by major industry sector, 1961 to date. Available at <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt>.

industries, the percentage of small entities authorized to employ temporary non-agricultural workers will be less than 1 percent of the total number of small entities in these industries.⁷⁸ Based on this analysis, the Department estimates that the rule will impact less than 1 percent of the total number of small businesses. A detailed industry-by-industry analysis is provided below.

Regarding the Territory of Guam, this Final Rule applies to H-2B employers there only in that it requires them to obtain prevailing wage determinations in accordance with the process defined at 20 CFR 655.10. To the extent that this process incorporates the new methodology defined in the January 2011 prevailing wage rule, it is possible that some H-2B employers in Guam will experience an increase in their H-2B prevailing wages. The Department expects that the H-2B employers in Guam working on Federally funded construction projects subject to the Davis-Bacon and Related Acts (DBRA) are already paying the Davis-Bacon Act prevailing wage for the classification of work performed and that such employers may not experience an increase in the wage levels they are required to pay. Employers performing work ancillary or unrelated to DBRA projects, and therefore paying a wage potentially lower than the Davis-Bacon Act prevailing wage, may receive increased prevailing wage determinations under this Final Rule. However, because the H-2B program in Guam is administered and enforced by

the Governor of Guam, or the Governor's designated representative, the Department is unable to quantify the effect of this provision on H-2B employers in Guam due to a lack of data.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

The Department estimated the incremental costs for small businesses from the baseline. For this rule, the baseline is the 2008 Final Rule.⁷⁹ This analysis reflects the incremental cost of this rule as it adds to the requirements in the 2008 Final Rule. Using available data, we have estimated the costs of the payment of transportation and subsistence to workers, visa and consular fees, corresponding employment, the disclosure of job orders, additional recruiting directed by the CO, the time required to read and review the Final Rule, and other impacts.

To examine the impact of this rule on small entities, the Department evaluates the impact of the incremental costs on a hypothetical small entity of average size, in terms of the total number of both U.S. and foreign workers, in each industry if it were to fill 50 percent of its workforce with H-2B workers. There are no available data to estimate the breakdown of the workforce into U.S. and foreign workers. Based on the U.S. Census' Statistics of U.S. Businesses data, the total number of workers (including both U.S. and foreign

workers) for this hypothetical small business is as follows⁸⁰: Landscaping Services, 5.3 employees; Janitorial Services, 10.9 employees; Construction, 6.2 employees; Food Services and Drinking Places, 11.5 employees; and Amusement, Gambling, and Recreation, 13.9 employees.

These data do not distinguish between U.S. workers and foreign workers. For the purposes of producing a cost estimate, the Department assumes that 50 percent of these employees are H-2B workers, suggesting the total number of H-2B workers for the hypothetical small business is as follows: Landscaping Services, 2.7 H-2B employees; Janitorial Services, 5.5 H-2B employees; Construction, 3.1 H-2B employees; Food Services and Drinking Places, 5.7 H-2B employees; and Amusement, Gambling, and Recreation, 7.0 H-2B employees.

Also using U.S. Census⁸¹ data, we derived the annual revenues per small firm for each of the top five industries by dividing total revenue by total employment. The Department estimates that small businesses in the top five industries have the following annual revenues: Landscaping Services, \$0.5 million; Janitorial Services, \$0.4 million; Construction, \$1.3 million; Food Services and Drinking Places, \$0.5 million; and Amusement, Gambling, and Recreation, \$0.8 million.

These key small business data are summarized in Table 21.

TABLE 21—PROFILE OF SMALL FIRMS IN THE TOP FIVE H-2B INDUSTRIES

Industry	Size standards in millions of dollars	Size standards in number of employees	Small firms	Average employees per small firm	Average H-2B employees per small firm	Average revenue per small firm
Landscaping Services	\$7.0	499	91,483	5.3	2.7	\$517,105
Janitorial Services	16.5	499	50,061	10.9	5.5	425,693
Food Services and Drinking Places	7.0	99	415,225	11.5	5.7	516,055
Amusement, Gambling, and Recreation	7.0	499	65,979	13.9	7.0	846,948
Construction ^[a]	20.7	99	791,396	6.2	3.1	1,292,201

^[a] Average of Construction Size Standards. Sources: SBA, 2011; U.S. Census, 2007.

⁷⁸ The total number of firms classified as small entities in these industries is as follows: Landscaping Services, 63,210; Janitorial Services, 45,495; Food Services and Drinking Places, 293,373; Amusement, Gambling, and Recreation, 43,726; and Construction, 689,040.

⁷⁹ The Department published a revised final rule modifying the methodology by which prevailing wage rates are calculated for the H-2B program. 76 FR 3452, Jan. 10, 2011, 76 FR 45667, August 1, 2011. However, because that final rule is limited to the prevailing wage rate issue, the baseline for this

rule remains the non-prevailing wage rate provisions of the 2008 Final Rule.

⁸⁰ U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at <http://www.census.gov/econ/susb/data/susb2007.html>. Compare to data obtained from H-2B program data for FY 2007–2009, which indicated that the average annual number of firms (of all sizes) and H-2B workers certified for these industries during FY 2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027, an average of 28 workers per firm; Janitorial Services, Firms—788, Workers—

30,902, an average of 39 workers per firm; Food Services and Drinking Places, Firms—851, Workers—22,948, and average of 27 workers per firm; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041, an average of 62 workers per firm; and Construction, Firms—860, Workers—30,242, an average of 35 workers per firm.

⁸¹ U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at <http://www.census.gov/econ/susb/data/susb2007.html>.

work performed by H-2B workers, with two exceptions for employees that meet certain criteria. These provisions include the application of H-2B wages to workers in corresponding employment, the three-fourths guarantee, transportation and subsistence payments for workers who cannot reasonably return to their residence each workday and who complete the required portion of the job order period, and the disclosure of the job order. As discussed in the Executive Order 12866 analysis, although there is no statistically valid data available, the Department has estimated the number of corresponding employees for purposes of estimating the cost of the increased wages due based upon this provision.

The following sections present the impacts that this rule is estimated to have on a small business that chooses to hire H-2B workers, including impacts on the application of H-2B wages to workers in corresponding employment, transportation and subsistence costs, visa-related and consular fees, disclosure of job orders, additional recruiting that may be directed by the CO, reading and reviewing the new processes and requirements, and other impacts. Note that the costs estimated below are not costs to all small businesses or to the average small business in an industry, but rather are the expected value of the cost to any given H-2B employer that is a small business. Most small businesses in the relevant industry do not hire H-2B workers and, therefore, incur no cost burden from the rule. The costs estimated apply only to the relatively small number of firms that are expected to hire H-2B workers. In the estimates below, the hypothetical firm that chooses to hire H-2B workers is assumed to be of the average total employment and revenue size for small businesses in its industry.

a. Three-fourths Guarantee

Under the proposed rule, the Department specified that employers guarantee to offer hours of employment

equal to at least three-fourths of the work days during the job order period, and that they use successive 4-week periods to measure the three-fourths guarantee. The use of 4-week periods was proposed (instead of measuring the three-fourths guarantee over the course of the entire time period of need as in the H-2A program) in order to ensure that work is offered during the entire certified period of employment. The Department received comments from Advocacy, an employer association, and small businesses expressing concern that they are unable to predict the exact timing and flows of tasks by H-2B workers, particularly at the beginning and end of the period of employment, and that they need more scheduling flexibility due to unexpected events such as extreme weather or catastrophic man-made events. Acknowledging these commenters' concerns, the Department lengthened the calculation period from 4 weeks to 12 weeks for job orders lasting at least 120 days and to 6 weeks for job orders lasting less than 120 days. In order to ensure that the capped H-2B visas are appropriately made available to employers based upon their actual need for workers, and to ensure that U.S. workers can realistically evaluate the job opportunity, the Department maintains that employers should accurately state their beginning and end dates of need and the number of H-2B workers needed. To the extent that employers, including small businesses, submit *Applications for Temporary Employment Certification* accurately reflecting their needs, the three-fourths guarantee should not represent a cost to employers, particularly given the extended 12-week and 6-week periods over which to calculate the guarantee.

b. Application of H-2B Wages to Corresponding Workers

The rule requires that workers in corresponding employment be paid at least the same wages paid to foreign workers under the H-2B program. However, while the Department has not

identified a reliable source of data to estimate the number of workers in corresponding employment at work sites on which H-2B workers are requested or the hourly wages of those workers, the Department has attempted to quantify the impacts associated with this provision. The Department believes that H-2B workers will make up 75 to 90 percent of the workers in a particular job and location covered by the job order, with the remaining 10 to 25 percent of the workers being corresponding employees newly covered by the wage requirements. This 10 to 25 percent figure is an overestimate of the Final Rule's impact since some of the employees included in this proportion of corresponding workers are those hired in response to the required recruitment and are therefore already covered by the existing regulation, and some workers will be excluded by the two new exceptions. Since the required H-2B wage is an average wage that generally prevails among existing workers in the occupation in the area of employment, we also estimate that half of the corresponding workers will already be earning a wage at least equal to the H-2B wage, and thus will not require wage increases. Finally, we estimate that the 50 percent of remaining corresponding workers who are eligible for wage increases will be normally distributed at wage levels between the mean wage level and the previous H-2B prevailing wage.

Table 22 shows the average estimated costs of increased wages for corresponding workers at a typical small business in each of the five most common H-2B industries. For each H-2B worker, the corresponding employment requirement will result in an estimated increase in corresponding worker wages of between \$152 (assuming H-2B workers comprise 90 percent of a firm's employees in the job order occupation) and \$455 (assuming H-2B workers comprise 75 percent of those employees) per firm.

TABLE 22—COSTS FOR CORRESPONDING WORKER WAGES AT SMALL FIRMS

Hourly wage increase	Percent	Firm with one H-2B worker	Landscaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
H-2B Workers per Small Firm							
N/A	N/A	1.0	2.7	5.5	5.7	7.0	3.1
H-2B Workers 90 Percent of Occupation at Firm							

Number of Corresponding Workers per Small Firm in Each Category:

\$0.00	50	0.06	0.15	0.30	0.32	0.39	0.17
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TABLE 22—COSTS FOR CORRESPONDING WORKER WAGES AT SMALL FIRMS—Continued

Hourly wage increase	Percent	Firm with one H-2B worker	Landscaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
\$1.00	30	0.03	0.09	0.18	0.19	0.23	0.10
\$3.00	15	0.02	0.04	0.09	0.10	0.12	0.05
\$5.00	5	0.01	0.01	0.03	0.03	0.04	0.02
Total	100	0.11	0.30	0.61	0.64	0.77	0.35

Cost per Firm:

\$0.00	50	\$0	\$0	\$0	\$0	\$0	\$0
\$1.00	30	46	121	249	261	317	142
\$3.00	15	68	182	373	391	475	213
\$5.00	5	38	101	207	217	264	118
Total	100	152	404	830	869	1,056	473

H-2B Workers 75 Percent of Occupation at Firm

Number of Corresponding Workers per Small Firm in Each Category:

\$0.00	50	0.17	0.44	0.91	0.96	1.16	0.52
\$1.00	30	0.10	0.27	0.55	0.57	0.70	0.31
\$3.00	15	0.05	0.13	0.27	0.29	0.35	0.16
\$5.00	5	0.02	0.04	0.09	0.10	0.12	0.05
Total	100	0.33	0.89	1.82	1.91	2.32	1.04

Cost per Firm:

\$0.00	50	\$0	\$0	\$0	\$0	\$0	\$0
\$1.00	30	137	364	747	782	951	426
\$3.00	15	205	546	1,120	1,173	1,426	639
\$5.00	5	114	303	622	652	792	355
Total	100	455	1,212	1,489	2,607	3,169	1,419

Source: DOL Estimate.

c. Transportation To and From the Place of Employment for H-2B Workers

The rule requires H-2B employers to provide H-2B workers with transportation to and from the place of employment. In general, transportation costs are calculated by first estimating the cost of a bus trip from a regional city to the consular city to obtain a visa. Then we estimate the cost of the trip from the consular city to St. Louis. In the case of the 77 percent of H-2B workers who come to the U.S. from Mexico and Canada, we assume this is a bus trip. For employees from other countries, we assume this trip is by air.

We estimate the weighted average roundtrip travel cost per employee to be approximately \$929 per H-2B worker, as detailed in the Executive Order 12866 analysis section titled "Transportation to and from the Place of Employment for H-2B Workers." This increase from the estimate included in the IRFA is due to two factors. First, a bus or ferry fare was added to account for an H-2B worker's trip from their home to a consular city to obtain a visa. Second, since

publication of the NPRM, air fares have increased substantially, attributable to a combination of market condition such as increased fuel costs, anticipated increases in demand for workers from improving economic conditions, and reduced passenger capacity. (Because this Final Rule changed the last day an employer must hire U.S. applicants to 21 days before the date of need, the Department does not account for the extra cost of refundable fares.) We then multiplied the weighted average roundtrip travel cost per employee by the number of H-2B workers per average small entity and the probability that the worker is a new entrant to the country (57 percent).⁸² For a hypothetical small firm with one employee, the annual average roundtrip

⁸² The H-2B program is capped at 66,000 new visas per year. We estimate the probability that the worker is a new entrant by dividing 66,000 by the total number of H-2B workers (115,500), which includes both new entrants and H-2B workers who entered in the previous 2 years. We assume that 33,000 of the 66,000 workers stay one additional year and 16,500 workers stay two additional years, for a total of 115,500 H-2B workers in any given year.

transportation cost is \$531. The total annual average roundtrip transportation costs incurred by the average small employer in the top five industries are listed in Table 23.

TABLE 23—TRAVEL COSTS FOR H-2B WORKERS AT SMALL FIRMS

Industry	Transportation cost
Firm with One H-2B Employee	\$531
Landscaping Services	1,415
Janitorial Services	2,905
Food Services and Drinking Places	3,043
Amusement, Gambling, and Recreation	3,698
Construction	1,656

Sources: Given in text.

We do not know the extent to which employers are currently paying for this cost in order to secure these workers or to comply with their obligations under the FLSA. To the extent that some employers are already paying for inbound and outbound transportation, these calculations represent upper-

bound estimates. These are also upper-bound estimates because workers are entitled to reimbursement of inbound transportation expenses only if they complete 50 percent of the job order period; moreover, they are entitled to outbound transportation expenses only if they complete the entire job order or are dismissed early.

d. Transportation To and From the Place of Employment for Corresponding Workers

The rule requires H-2B employers to provide workers in corresponding employment unable to return each day to their permanent residence with transportation to the place of employment if they complete at least half the period of the job order and from the place of employment if they complete the full period of the job order. However, there is no basis for estimating what percentage of the workers in corresponding employment will be new employees coming from outside the commuting area who will continue to work for at least half or all of the job order period. Therefore, while the Department is unable to estimate the number of corresponding workers at a given small firm who would receive reimbursement, the Department estimates an approximate unit cost for each traveling corresponding worker by taking the average of the cost of a bus ticket to St. Louis from Fort Wayne, IN (\$91); Pittsburgh, PA (\$138); Omaha, NE (\$93); Nashville, TN (\$86); and Palmdale, CA (\$233). Averaging the cost of travel from these five cities results in an average one way cost of \$128.20, and a round trip cost of \$256.40 (see Table 24) representing a transfer from employers to H-2B workers. The inbound transportation costs would be incurred only for those workers who fulfill the required portion of the certified period of employment; the outbound transportation costs would only be incurred for those who work until the end of the certified period of employment or who are dismissed early by the employer.

TABLE 24—COST OF CORRESPONDING WORKER TRAVEL FOR SMALL FIRMS

One way travel to St. Louis	Cost
Fort Wayne, IN	\$91
Pittsburgh, PA	138
Omaha, NE	93
Nashville, TN	86
Palmdale, CA	233
One way travel—Average	128
Roundtrip travel	256

Source: Greyhound, 2011.

e. Subsistence Payments

As discussed in the E.O. 12866 analysis, we estimated the per-worker cost of subsistence by multiplying the subsistence per diem (\$10.64) by the number of roundtrip travel days (4 days) by the probability that the worker is a new entrant to the country (57 percent). The length of time for an H-2B worker to complete round-trip travel reflects an increase from the proposed rule and was made in response to a comment from a worker advocacy organization. The estimate was increased to account for 2 days to obtain the visa (travel time from the home town and time spent in the consular city), 1 day to travel from the consular city to the place of employment, and 1 day of outbound transportation back to the worker's home country. We estimate the average annual cost of subsistence to be \$24.32 ($\$10.64 \times 4 \times 0.57$) per H-2B worker. The total annual average subsistence costs incurred by the average small employer in the top five industries are presented in Table 23.

This provision applies not only to H-2B workers, but also to workers in corresponding employment on H-2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. While we were unable to identify adequate data to estimate the number of corresponding workers who would travel to the job from outside the reasonable commuting area and be eligible to receive compensation for subsistence, the Department assumes that it would take 1 travel day to travel from one city in the U.S. to another, and 1 day to return. Thus each corresponding worker would receive \$21.28 in subsistence payments (see Table 25). Both of these estimates are upper-bound estimates, as the inbound subsistence would be incurred only for workers who fulfill the required portion of the certification period, and outbound subsistence would only be incurred for those who work until the end of the job order or who are dismissed by the employer.

TABLE 25—COST OF SUBSISTENCE PAYMENTS FOR WORKERS AT SMALL FIRMS

Cost component	Value
Subsistence Per Diem	\$11
Weighted Average Roundtrip Travel Days—H-2B Workers	
Firm with One H-2B Employee	\$4
Landscaping Services	\$24
Janitorial Services	\$65
Food Services and Drinking Places	\$133
	\$139

TABLE 25—COST OF SUBSISTENCE PAYMENTS FOR WORKERS AT SMALL FIRMS—Continued

Cost component	Value
Amusement, Gambling, and Recreation	\$169
Construction	\$76
Roundtrip Travel Days—Corresponding Workers	2
Roundtrip Subsistence per Corresponding Worker	\$21

f. Lodging for H-2B Workers En Route to the Place of Employment

In response to a comment from a worker advocacy organization, the Department includes a cost in the FRFA not accounted for in the proposed rule: lodging costs while H-2B workers travel from their hometown to the consular city to obtain a visa and from there to the place of employment. This change does not reflect any additional obligation since the publication of the NPRM, but clarifies the Final Rule's intent that lodging expenses incurred between a worker's hometown and consular city are part of inbound transportation and subsistence costs. The Department estimates that H-2B workers will spend an average of two nights in an inexpensive hostel-style accommodation. The Department estimates the nightly cost of this stay in common consular cities of the top ten countries of origin as follows: Monterrey, \$11; Kingston, \$13; Guatemala City, \$14; Manila, \$7; Bucharest, \$11; Pretoria, \$19; London, \$22; Ottawa, \$30; Tel Aviv, \$22; and Canberra, \$26.⁸³ Using the number of certified H-2B workers from the top ten countries of origin, we calculated a weighted average of \$11.99 for one night's stay, and \$23.98 for two nights' stay. We then multiplied the weighted average lodging cost per employee by the number of H-2B workers per average small entity and the probability that the worker is a new entrant to the country (57 percent). For a hypothetical small firm with one employee, the annual average lodging cost is \$13.70 ($.57 \times \23.98). The total annual average lodging costs incurred by the average small employer in the top five industries are presented in Table 26.

⁸³ Lonely Planet, 2011b. Hotels & Hostels Search. Available at <http://hotels.lonelyplanet.com/> (Accessed July 12, 2011).

TABLE 26—COST OF LODGING FOR H-2B WORKERS AT SMALL FIRMS

Cost component	Value
Firm with One H-2B Employee	\$14
Landscaping Services	37
Janitorial Services	75
Food Services and Drinking Places	79
Amusement, Gambling, and Recreation	95
Construction	43

Source: Lonely Planet, 2011b.

g. Visa-Related and Consular Fees

Under the 2008 Final Rule, visa fees are permitted to be paid by the temporary worker. This Final Rule, however, requires visa fees and related fees to be paid by the employer. Requiring employers to bear the full cost of hiring foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on domestic workers.

The Department estimated the cost of visa fees by adding the weighted average visa cost per H-2B worker (\$148),⁸⁴ weighted average appointment fee (\$3.05), and the weighted average reciprocity fee (\$2.48), then multiplying by the average number of H-2B employees in small entities in each of the top five industries and the probability that the worker is a new entrant to the country (57 percent, or 66,000/115,500). The total annual average visa fee and related costs incurred by the average small employer in the top five industries are listed in Table 27. Again, to the extent that some

employers may already be paying these fees in order to ensure their compliance with the FLSA, this represents an upper-bound estimate. Similarly, to the extent that our estimate that 57 percent of H-2B workers are new is conservative, our estimate of visa and consular fees is an upper-bound estimate.⁸⁵

TABLE 27—COST OF VISA AND CONSULAR FEES FOR H-2B WORKERS AT SMALL FIRMS

Cost component	Value
Firm with One H-2B Employee	\$88
Landscaping Services	234
Janitorial Services	480
Food Services and Drinking Places	503
Amusement, Gambling, and Recreation	611
Construction	274

Source: U.S. Department of State, 2010.

h. Additional Recruiting Directed by the Certifying Officer

Under the Final Rule, the CO may direct an employer to conduct additional recruitment if the CO has determined that there may be qualified U.S. workers available, particularly where the job opportunity is located in an area of substantial unemployment. There is no such provision in the 2008 Final Rule.

In response to an employer comment expressing concern that the NPRM understated the cost of running a newspaper advertisement that would capture all the requirements contained

in 20 CFR 655.41, the Department updated the original calculation in the NPRM. The higher estimated cost does not reflect any additional advertising requirement beyond those in 20 CFR 655.41, but is rather a more accurate reflection of the cost of an advertisement that includes the required information.

We estimate the cost of this requirement by multiplying the average cost of a newspaper advertisement (\$315) by 0.5 based on our estimate that 50 percent of H-2B employer applicants can be expected to be directed by the CO to conduct additional recruitment for a total cost of \$157 (\$315 × 0.50) per employer.⁸⁶ We also added the cost for 10 percent of employer applicants to translate the advertisement into a language other than English at an average cost of \$2.59 (\$25.88 × 0.1), and labor cost to post the advertisement. The latter cost was calculated by multiplying the estimated time required to post the advertisement (0.08 hours, or 5 minutes) by the scaled hourly compensation rate of an administrative assistant/executive secretary (\$28.77) and our estimate that 50 percent of H-2B employers can be expected to be directed by the CO to conduct additional recruiting for a total labor cost of \$1.20 (0.08 × \$28.77 × 0.50) per employer applicant. Thus, the total annual cost of CO-directed recruiting is estimated to be \$161.18 (\$157 + \$2.59 + \$1.20) per employer (see Table 28).

TABLE 28—COST OF ADDITIONAL RECRUITING FOR SMALL FIRMS

Cost component	Value
Percent directed to conduct additional recruiting	50%
Newspaper Advertisement:	
Percent translating advertisement	10%
Newspaper advertisement—Unit cost	\$315
Average cost of newspaper advertisement	\$157
Translating Newspaper Advertisement:	
Translation—Weighted Average Cost	\$26
Average cost of newspaper advertisement	\$3
Labor to Post Newspaper Ad:	
Time to post advertisement	0.05
Administrative Assistant hourly wage w/fringe	\$29
Administrative Assistant labor per ad	\$2
Average cost of labor to post ad	\$1
Total Cost:	

⁸⁴ U.S. Department of State. 2010. Nonimmigrant Visa Application Fees to Increase June 4. Available at <http://www.state.gov/r/pa/prs/ps/2010/05/142155.htm>. The visa fee of \$150 went into effect on June 4, 2010.

⁸⁵ The Department is confident that 66,000 new workers enter the country under H-2B visas each year; it has less information concerning the number of H-2B workers that remain in the U.S. for more than one year. To the extent that more than 67

percent of each year's cohort remains in the U.S. for a second and third year, then the Department has overestimated the percent of H-2B workers that are new, and we have overestimated visa and consular fees.

⁸⁶ To obtain the average cost of a newspaper advertisement, we averaged the rates for a model H-2B advertisement in the following newspapers: Branson Tri-Lakes News, Aspen Times, Austin Chronicle, Gainesville Sun, the Plaquemines

Gazette, and Virginia Pilot. These newspapers were chosen because they are located in areas in which a significant number of H-2B positions were certified in FY 2009. Other means of recruiting are possible under this rule (such as listings on Monster.com and Career Builder), but they may be more costly, while other recruiting means (such as contacting community-based organizations) may be less costly.

TABLE 28—COST OF ADDITIONAL RECRUITING FOR SMALL FIRMS—Continued

Cost component	Value
Total Cost of Additional Recruiting per Firm	\$161

Sources: BLS, 2011a; BLS, 2011b.

It is possible that there will be additional costs incurred by small employers due to interviewing additional applicants who are referred to H-2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and therefore is unable to quantify this impact.

i. Contacting Labor Organizations

The analysis performed for the proposed rule included a cost for employers to contact the local union to locate qualified U.S. workers where the occupation is customarily unionized. Under this Final Rule, union notification is the responsibility of the SWA and employers incur no costs.

j. Disclosure of Job Order

The rule requires an employer to provide a copy of the job order to an H-2B worker no later than the time at which the worker outside of the U.S. applies for the H-2B visa or to a worker in corresponding employment no later

than on the day that work starts. The job order must be translated to a language understood by the worker. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B employer, the copy must be provided no later than the time the subsequent H-2B employer makes an offer of employment.

We estimate two cost components of the disclosure of job orders: The cost of reproducing the document containing the terms and conditions of employment, and the cost of translation. We obtained the cost of reproducing the terms and conditions by multiplying the number of pages to be photocopied (three) by the cost per photocopy (\$0.12) and the percent of certified H-2B workers that are not involved in reforestation (88.3 percent).⁸⁷ We estimate average annual reproduction costs for an employer with one H-2B employee of \$0.32 per year ($3 \times \0.12×0.883). We then multiplied this product by the average number of H-2B workers in the top five industries to

obtain the average annual costs per small employer; these costs are summarized in Table B-9.

For the cost of translation, the Department assumes that an employer hires all of its H-2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is necessary per employer needing translation. Using DHS data, we determined that approximately 83.92 percent of H-2B workers from the top ten countries of origin do not speak English.⁸⁸ We used this as a proxy for the probability that an H-2B employer will need to translate the job order. We obtained the cost of translation by multiplying the percent of H-2B workers who do not speak English (83.92) by the weighted average cost of translation (\$68).⁸⁹ We estimate average annual translation costs of \$57.07 per employer ($0.8392 \times \68).

Summing reproduction and translation costs results in the average annual job order disclosure costs per small employer (listed in Table 29).

TABLE 29—COST OF DISCLOSURE OF JOB ORDER FOR SMALL FIRMS

Cost component	Value
Percent workers not in reforestation	88.3%
Reproducing Job Order:	
Pages to be photocopied	3
Cost per page	\$0.12
Cost per job order	\$0.36
Firm with One H-2B Employee	\$0.32
Landscaping Services—Cost to Reproduce	\$0.85
Janitorial Services—Cost to Reproduce	\$2
Food Services and Drinking Places—Cost to Reproduce	\$2
Amusement, Gambling, and Recreation—Cost to Reproduce	\$2
Construction—Cost to Reproduce	\$1
Translating Job Order:	
Weighted average translation cost	\$68
Translation Cost per H-2B Employer	\$57
Total Cost of Disclosure of Job Order:	
Firm with One H-2B Employee	\$57
Landscaping Services	\$58
Janitorial Services	\$59
Food Services and Drinking Places	\$59
Amusement, Gambling, and Recreation	\$59
Construction	\$58

Sources: DHS, 2009; LanguageScape, 2011.

⁸⁷ The requirement to disclose the job order does not result in a new cost to reforestation employers because the Migrant and Seasonal Agricultural Worker Protection Act presently requires reforestation employers to make this disclosure. According to H-2B program data for FY2000–

FY2009, 88.3 percent of H-2B workers work in an industry other than reforestation.

⁸⁸ U.S. Department of Homeland Security (DHS). 2009. Yearbook of Immigration Statistics. Available at <http://www.dhs.gov/files/statistics/publications/yearbook.shtm> (Accessed June 12, 2011).

⁸⁹ LanguageScape. 2011. How it Works—Cost Calculator. Available at http://www.languagescape.com/how_works_1.asp (Accessed June 7, 2011).

k. Elimination of Attestation-Based Model

The 2008 Final Rule implemented an attestation-based model: employers conduct the required recruitment in advance of application filing and, based on the results of that effort, apply for certification from the Department for the remaining openings. The Department has determined that there are insufficient worker protections in the current attestation-based model. In eliminating the attestation-based model, the rule shifts the recruitment process to after the filing of the *Application for Temporary Employment Certification* so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor

market. Therefore, the primary effect of eliminating the attestation-based model is a change in the timing of recruitment rather than a substantive change in required activities.

The elimination of the attestation-based model will impose minimal costs on employers because they will only need to include additional information in the recruitment report they are already required to submit, including information on additional recruitment conducted, means of posting, and contact with former U.S. workers. We estimated two costs for the elimination of the attestation-based model: the material cost to reproduce and mail the additional pages of the documents, and the labor cost to reproduce and mail the additional pages. To estimate the cost of

reproducing and mailing the documents, we multiplied the additional number of pages that must be submitted (three) by the additional postage required to ship those pages (\$0.17). We estimate this cost to be approximately \$0.51 per employer. To estimate the labor cost of reproducing and mailing the documents, we multiplied the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) by the scaled hourly labor compensation of an administrative assistant/executive secretary (\$28.77). We estimate this cost to be approximately \$2.40 per employer. Summing material and labor costs results in total costs per small firm of \$2.91 (see Table 30).

TABLE 30—COST OF ELIMINATION OF ATTESTATION-BASED MODEL FOR SMALL FIRMS

Cost component	Value
Postage Costs:	
Additional pages to submit	3
Additional postage	\$0.17
Postage Cost per Small Firm	\$0.51
Labor Costs to Photocopy and Mail Documents:	
Labor time to photocopy and mail documents	0.08
Administrative Assistant hourly wage w/fringe	\$29
Photocopying Cost per Small Firm	\$2
Total Cost of Elimination of Attestation-Based Model:	
Total Cost per Small Firm	\$3

Sources: BLS, 2011a; BLS, 2011b.

l. Document Retention

Under the rule, H–2B employers must retain documentation beyond that required by the 2008 Final Rule. The Department assumes that each H–2B employer will purchase a filing cabinet (\$49.99) in which to store the additional documents starting in the first year of the rule.⁹⁰ The cost for each employer is likely an overestimate, since the 2008 Final Rule already contains document retention requirements, and many employers who already use the H–2B program will already have bought a file cabinet to store the documents they must retain under that rule.

⁹⁰ OfficeMax. 2011. Vertical File Cabinets. Available at http://www.officemax.com/office-furniture/file-cabinets-accessories/vertical-file-cabinets?history=utozftma%7CcategoryId%7E10001%5EcategoryName%7EOffice%2BFurniture%5EparentCategoryId%7Ecategory_root%5EprodPage%7E25%5Eregion%7E1%40porkedzu%7CcategoryId%7E40%5EcategoryName%7Efile%2BCabinets%2B%2526%2BAccessories%5EparentCategoryId%7Ecat10001%5EprodPage%7E25%5Eregion%7E1%5Erefine%7E1%40with8mfsy%7CprodPage%7E15%5Erefine%7E1%5Eregion%7E1%5EcategoryName%7Evertical-file-cabinets%5EcategoryId%7E91%5EparentCategoryId%7Ecat_40&view=list&position=1&prodPage=15&sort=Price+%28Low-High%29 (Accessed July 11, 2011).

m. Departure Time Determination

The Proposed Rule would have required employers to provide notice to the local SWA of the time at which the last H–2B worker departs for the place of employment, if the last worker has not departed at least 3 days before the date of need. Under the Final Rule, the obligation to hire U.S. workers will end 21 days before the date of need and the employer is not required to provide any notice to the local SWA, thus eliminating the costs associated with this provision of the Proposed Rule.

n. Read and Understand the Rule

During the first year that this rule would be in effect, employers would need to learn about the new processes and requirements. We estimated this cost for a hypothetical small entity that is interested in applying for H–2B workers by multiplying the time required to read the new rule and any educational and outreach materials that explain the H–2B application process under the rule by the average compensation of a human resources manager. In the first year that the Final Rule is effective, the Department estimates that the average small

business participating in the program will spend approximately three hours of staff time to read and review the new processes and requirements, which amounts to approximately \$186.52 ($\62.17×3) in labor costs in the first year.

o. Job Posting Requirement

The rule requires employer applicants to post the availability of the job opportunity in at least two conspicuous locations at the place of intended employment for at least 15 consecutive days. This provision entails additional reproduction costs. For the job posting requirement, the total cost to photocopy the additional job postings (two) is \$0.24 per employer applicant. Those employer applicants who need to print the posting in languages other than English may face a small additional cost.

p. Workers Rights Poster

The Final Rule requires employers to post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary that sets out the rights and protections for workers. The poster must be in English and, to the extent necessary and as

provided by the Secretary, foreign language(s) common to a significant portion of the workers if they are not fluent in English. We estimate the cost of producing the workers' rights poster to be \$0.12.

q. Total Cost Burden for Small Entities

The Department's calculations indicate that for a hypothetical small entity in the top five industries that applies for one worker (representing the smallest of the small entities that hire H-2B workers), the total annualized first-year costs and annual costs are between \$1,058 (using the low estimate of corresponding worker wages and annualizing at 3 percent over 10 years) and \$1,367 (using the high estimate and annualizing at 7 percent over 10 years). Using the low estimate of corresponding worker wages and annualizing at 3 percent and using the high estimate of

corresponding worker wages and annualizing at 7 percent, respectively, the total annualized first-year and annual costs for employers in the top five industries that hire the average number of employees for their respective industries are as follows:

Landscaping Services, \$2,404 to \$3,218; Janitorial Services, \$4,673 to \$6,339; Food Services and Drinking Places, \$4,884 to \$6,628; Amusement, Gambling, and Recreation, \$5,881 to \$8,000; Construction, \$2,772 to \$3,724.

A rule is considered to have a significant economic impact when the total annual cost associated with the rule is equal to or exceeds 1 percent of annual revenue. To evaluate this impact, the Department calculates the total cost burden as a percent of revenue for each of the top five industries. The

estimated revenues for small entities in the top five industries are as follows:

Landscaping Services, \$517,105; Janitorial Services, \$425,693; Food Services and Drinking Places, \$516,055; Amusement, Gambling, and Recreation, \$846,948; Construction, \$1,292,201.⁹¹

The Department then divides the total cost burden for small entities by the total estimated revenue for small entities in each of the top five industries. The total costs as a percent of revenues for the top five industries are summarized in Table 31:

Landscaping Services, 0.46 to 0.62 percent; Janitorial Services, 1.10 to 1.549 percent; Food Services and Drinking Places, 0.95 to 1.28 percent; Amusement, Gambling, and Recreation, 0.69 to 0.94 percent; Construction, 0.21 to 0.29 percent.

TABLE 31—TOTAL COSTS FOR SMALL FIRMS

	Industry					
	Cost per firm with one H-2B worker	Landscaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
H-2B Workers	1.0	2.7	5.5	5.7	7.0	3.1
Annual Costs to Employers:						
Corresponding Workers' Wages—Low	\$152	\$404	\$830	\$869	\$1056	\$473
Corresponding Workers' Wages—High	\$455	\$1,212	\$2,489	\$2,607	\$3,169	\$1,419
Transportation	\$531	\$1,415	\$2,905	\$3,043	\$3,698	\$1,656
Subsistence	\$24	\$65	\$133	\$139	\$169	\$76
Lodging	\$14	\$37	\$75	\$79	\$95	\$43
Visa and Consular Fees	\$88	\$234	\$480	\$503	\$611	\$274
Additional Recruiting	\$161	\$161	\$161	\$161	\$161	\$161
Disclosure of Job Order	\$57	\$58	\$59	\$59	\$59	\$58
Elimination of Attestation	\$3	\$3	\$3	\$3	\$3	\$3
Post Job Opportunity	\$0.24	\$0.24	\$0.24	\$0.24	\$0.24	\$0.24
Workers Rights Poster	\$0.12	\$0.12	\$0.12	\$0.12	\$0.12	\$0.12
Total Annual Costs—Low	\$1,030	\$2,376	\$4,646	\$4,856	\$5,854	\$2,744
Total Annual Costs—High	\$1,334	\$3,185	\$6,305	\$6,594	\$7,966	\$3,690
First Year Costs to Employers:						
Read and Understand Rule	\$187	\$187	\$187	\$187	\$187	\$187
Document Retention	\$50	\$50	\$50	\$50	\$50	\$50
Total First Year Costs	\$237	\$237	\$237	\$237	\$237	\$237
Annualized First Year Costs (7%)	\$34	\$34	\$34	\$34	\$34	\$34
Annualized First Year Costs (3%)	\$28	\$28	\$28	\$28	\$28	\$28
Total Costs per Small Firm (Annualized First Year and Annual Costs, 7%)						
Total Costs—Low	\$1,064	\$2,410	\$4,679	\$4,890	\$5,877	\$2,778
Total Costs—High	\$1,367	\$3,218	\$6,339	\$6,628	\$8,000	\$3,724
Total Revenue	N/A	\$517,105	\$425,693	\$516,055	\$846,948	\$1,292,201
Costs as a Percent of Revenue—Low	N/A	0.47%	1.10%	0.95%	0.70%	0.21%
Cost as a Percent of Revenue—High	N/A	0.63%	1.50%	1.29%	0.95%	0.29%
Total Costs per Small Firm (Annualized First Year and Annual Costs, 3%):						
Total Costs—Low	\$1,058	\$2,404	\$4,673	\$4,884	\$5,881	\$2,772
Total Costs—High	\$1,361	\$3,212	\$6,333	\$6,622	\$7,994	\$3,718
Total Revenue	N/A	\$517,105	\$425,693	\$516,055	\$846,948	\$1,292,201

⁹¹ U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at <http://www.census.gov/econ/susb/data/susb2007.html>. c.

TABLE 31—TOTAL COSTS FOR SMALL FIRMS—Continued

	Industry					
	Cost per firm with one H-2B worker	Land-scaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
Costs as a Percent of Revenue—Low	N/A	0.46%	1.10%	0.95%	0.69%	0.21%
Cost as a Percent of Revenue—High	N/A	0.62%	1.549%	1.28%	0.94%	0.29%

N/A: Not Applicable.

Note: Totals may not sum due to rounding.

This rule is expected to have a significant economic impact (at least 1 percent of annual revenue) on the average participating small entity in two of the five most common industries: Janitorial Services, and Food Services and Drinking Places. Although applying to hire H-2B workers is voluntary, and any employer (small or otherwise) may choose not to apply, an employer, whether it continues to participate in the H-2B program or fills its workforce with U.S. workers, could face costs equal to or slightly greater than 1 percent of annual revenue. However, in the Department's view, increased employment opportunities for U.S. workers and higher wages for both U.S. and H-2B workers provide a broad societal benefit that outweighs these costs.

The Department considers that a rule has an impact on a "substantial number of small entities" when the total number of small entities impacted by the rule is equal to or exceeds 10 percent of the relevant universe of small entities in a given industry. *See, e.g.*, 76 FR 3476, Jan. 19, 2011. The Department has used the 10 percent threshold in previous regulations. As discussed earlier in the analysis, the percentage of small entities authorized to employ temporary non-agricultural workers would be less than 1 percent of the total number of small entities in the top five industries with the greatest number of H-2B workers. Therefore, this rule is not expected to impact a substantial number of small entities.

5. Alternatives Considered as Options for Small Businesses

We have concluded that this Final Rule will not have a significant economic impact on a substantial number of small entities. This Final Rule sets minimum standards to ensure that foreign workers may be employed only if qualified domestic workers are not available and that the hiring of H-2B workers will not adversely affect the wages and working conditions of similarly employed domestic workers. While we recognize the concerns

expressed by small businesses and have made every effort to minimize the burden on the relatively small number of businesses that use the program, creating different and likely lower standards for one class of employers (*e.g.*, small businesses) would essentially sanction the very adverse effects that we are compelled to prevent.

Under the existing H-2B program, an employer must first apply for a temporary labor certification from the Secretary of Labor. That certification informs USCIS that U.S. workers qualified to perform the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. Our obligation to ensure that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers was reaffirmed in a recent court decision, *CATA v. Solis*, Civil No. 2:09-cv-240, 2011 WL 2414555 (E.D. Pa. 20100), which made clear that our consideration of hardship to employers when setting the January 1, 2012 effective date was contrary to our responsibilities under the INA.

While our responsibilities in the H-2B labor certification program first and foremost are to ensure that U.S. workers are given priority for temporary non-agricultural job opportunities and to protect U.S. workers' wages and working conditions, we solicited and considered public comments on a number of alternatives that would balance the needs of small businesses while providing adequate protection to U.S. and H-2B workers. A discussion on each alternative considered and our final determination is below.

First, we proposed to change the definition of full-time from 30 or more hours of work per workweek to 35 or more hours of work per week in response to the District Court's decision in *CATA v. Solis*, 2010 WL 3431761, which invalidated the 2008 H-2B Final

Rule's 30-hour definition because our decision was not supported by empirical data. We stated in the NPRM that a 35-hour work week was supported by empirical data and was more representative of the actual needs of employers and expectations of workers. However in the NPRM, we requested comments on whether extending the definition of full-time to at least 40 hours is more protective of U.S. workers and better conforms to employer standards and needs.

As discussed in this preamble, several trade associations and private businesses supported retaining the 2008 Final Rule's standard of 30 hours per workweek, citing the difficulties of scheduling work around unpredictable and uncontrollable events, particularly the weather. Other employers suggested that full-time employment should be determined not in each individual workweek, but by averaging workweeks over the length of the certified employment period. In addition, several businesses stated that a 35-hour workweek would be burdensome in combination with other aspects of the proposed rule, particularly the three-quarter guarantee. We concluded, after a thorough review of the comments, to retain the definition of full-time as 35 or more hours of work per week. This standard more accurately reflects full-time employment expectations than the current 30-hour definition, would not compromise worker protections, and is consistent with other existing Department standards and practices in the industries that currently use the H-2B program to obtain workers.

The NPRM also proposed to eliminate job contractors from participating in the H-2B program based on our view that a job contractor's ongoing need is by its very nature permanent rather than temporary and therefore the job contractor does not qualify to participate in the program. We received a comment that questioned our underlying assumption that all job contractors have a permanent need and asserted that the bar on job contractors should not be complete because to the

extent that any one job contractor does not have a year-round need and routinely does not employ workers in a particular occupation for a specific segment of the year, its needs are seasonal. The commenter asserted that job contractors should be afforded the same opportunity as all other employers to prove they have a temporary need for services or labor. Upon further consideration, we recognize that there very well may be job contractors who only operate several months out of the year and thus have a genuine temporary need and that these job contractors should not be excluded from the program. Additionally, we recognize that job contractors with a one-time need may also have a genuine temporary need and should not be excluded from the program. Therefore, we revised § 655.6 to permit only those job contractors that demonstrate through documentation their own temporary need, not that of their employer-clients, to continue to participate in the H-2B program. Job contractors will only be permitted to file applications based on seasonal need and one-time occurrences.

We also introduced in the NPRM a three-fourths guarantee provision that would require that H-2B employers guarantee to offer the worker employment for a total number of hours equal to at least three-fourths of the workdays in each 4-week period of the certified period of employment. We believed that this guarantee would motivate employers to carefully consider the extent of their workforce needs before applying for certification and discourage employers from applying for unnecessary workers or from promising work which may not exist. While we stated in the NPRM that an hours' guarantee is necessary to protect the integrity of the H-2B program and to protect the interests of both workers and employers in the program, we invited the public to suggest alternative guarantee systems that may better serve the goals of the guarantee. In particular, the Department sought comments on whether a 4-week increment is the best period of time for measuring the three-fourths guarantee or whether a shorter or longer time period would be more appropriate.

Many small businesses expressed concerns about the guarantee. They were particularly concerned about the impact of the weather on their ability to meet the guarantee and their ability to meet the guarantee in the event of unforeseen events like oil spills or health department or conservation closures that, for example, can make the harvesting and processing of crabs

impossible. Numerous other employers similarly stated that if a guarantee remains in the Final Rule, it should be spread over the entire certification period, as it is in the H-2A regulations. They noted that this would provide flexibility and enhance their ability to meet the guarantee without cost, because often the loss of demand for work in one period is shifted to another point in the season, but such a guarantee would still deter egregious cases of employers misstating their need for H-2B employees. A number of commenters also suggested that the guarantee should be based upon pay for three-fourths of the hours, rather than three-fourths of the hours, so that employers could take credit for any overtime paid at time-and-a-half. After careful consideration of all comments received, we decided to retain the three-fourths guarantee of the hours, but lengthen the increment over which the guarantee is measured from 4 weeks to 12 weeks, if the period of employment covered by the job order is 120 days or more and to 6 weeks, if the period of employment covered by the job order is less than 120 days.

The NPRM continued to reflect our commitment to ensuring that U.S. workers have priority for H-2B job opportunities by proposing that employers hire qualified U.S. workers referred by the SWA or who respond to recruitment until 3 days before the date of need or the last H-2B worker departs for the workplace for the certified job opportunity, whichever is later. We believed that this proposal would increase the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer. The proposal would have required the employer to inform the appropriate SWA(s) in writing of the later departure so that the SWA would know when to stop referring potential U.S. workers to the employer.

We received many comments from employers and their advocates arguing that accepting U.S. applicants until 3 days before the date of need would be unworkable for employers. Some of these commenters suggested that we require the SWA to keep the job order posted for 30 days (instead of the current 10), while others recommended changing the closing date from 3 days to 30 days or 60 days before the date of need. We carefully reviewed all comments and weighed these concerns against our mandate to ensure that U.S. workers rather than foreign workers be employed whenever possible. As a result, we changed the day through which employers must accept SWA referrals of qualified U.S. applicants

from 3 days to 21 days before the date of need. The Department believes that increasing the number of days before the date of need that referrals are cut off as well as removing the clause or the date that the last H-2B worker departs for the job opportunity will alleviate a number of employer concerns without compromising our obligation to U.S. workers. In addition, this change takes into consideration the USCIS requirement that H-2B workers not enter the United States until 10 days before the date of need, providing employers the certainty that their H-2B workers will have sufficient time to obtain their visas and eliminating the employer concern that an H-2B worker could be displaced by a U.S. worker after beginning inbound travel.

Employers and small businesses generally opposed our proposed provisions that would require an employer to provide, pay, or reimburse the worker in the first workweek the cost of transportation and subsistence from the place from which the worker has come to the place of employment, and for H-2B workers' visa, visa processing, and other related consular fees including those fees mandated by the government (but not for passport expenses or other charges primarily for the benefit of the workers). Employers and small businesses asserted that paying such fees would be too costly and that transportation costs should be the responsibility of the employee or paid at the discretion of the employer. A number of commenters suggested that the Department adopt the H-2A provision requiring that workers must complete at least 50 percent of the work contract to be reimbursed for inbound transportation and subsistence expenses. After careful consideration of all comments, we have made two changes. While we will continue to require employers to provide inbound transportation and subsistence to H-2B workers and to U.S. workers who are not reasonably able to return to their residence within the same workday, the Final Rule now provides that employers may arrange and pay for the transportation and subsistence directly, advance at a minimum, the most economical and reasonable common carrier cost, or reimburse a worker's reasonable costs, after the worker completes 50 percent of the period of employment covered by the job order if the employer has not previously reimbursed such costs. We also continue in the Final Rule to require employers to provide return transportation and subsistence from the place of employment; however, these

obligations have been revised to stipulate that an employer is only required to provide return transportation and subsistence if the worker completes the period of employment covered by the job order or if the worker is dismissed from employment for any reason by the employer before the end of the period. In addition, the Final Rule continues to provide that if a worker has contracted with a subsequent employer that has agreed to provide or pay for the worker's transportation to the subsequent employer's worksite, the subsequent employer must provide or pay for such expenses; otherwise, if this agreement has not been made, the employer must provide or pay for that transportation and subsistence. The Final Rule also continues to require employers to reimburse all visa, visa processing, and other related consular fees in the first workweek.

We received several comments from employers noting the need to have a stable workforce throughout their certified period of need. Employers were concerned that after expending significant resources to hire H-2B workers, these workers could be displaced to hire U.S. workers referred by the SWA who may not report for work, or might fail to complete the contract period. One employer requested that we consider new provisions that would allow an employer to hire H-2B workers if the hired U.S. workers become unavailable. We considered these comments and agreed to address the circumstances where an employer's U.S. workers fail to report to work or quit before the end of the certified period of employment by providing the CO the authority to issue a redetermination based on the unavailability of U.S. workers. While we have provided a means by which employers may request a new determination, we strongly encourage employers to make an additional effort to voluntarily contact the SWA for additional referrals for qualified U.S. workers.

Finally, the Small Business Administration's Office of Advocacy and several industry groups requested an exemption from the job order obligations for man-made catastrophic events such as an oil-spill or controlled flooding that is wholly outside of the employer's control. The Department proposed that a CO could only terminate the employer's obligations under the guarantee in the event of fire, weather, or another Act of God. The Department agreed with commenters that this provision should be expanded to allow a CO to terminate an

employer's job order based upon these man-made catastrophes.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. The rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a Federal intergovernmental mandate or a Federal private sector mandate. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector that is not voluntary. A decision by a private entity to obtain an H-2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

SWAs are mandated to perform certain activities for the Federal Government under the H-2B program, and receive grants to support the performance of these activities. Under the 2008 Final Rule the SWA role was changed to accommodate the attestation-based process. The current regulation requires SWAs to accept and place job orders into intra- and interstate clearance, review referrals, and verify employment eligibility of the applicants who apply to the SWA to be referred to the job opportunity. Under the Final Rule the SWA will continue to play a significant and active role. The Department continues to require that employers submit their job orders to the SWA having jurisdiction over the area of intended employment as is the case in the current regulation, with the added requirement that the SWA review the job order prior to posting it. The Final Rule further requires that the employer provide a copy of the *Application for Temporary Employment Certification* to the SWA; however, this is simply a copy for disclosure purposes and would require no additional information collection or review activities by the SWA. The Department will also continue to require SWAs to place job orders into clearance, as well as provide employers with referrals received in connection with the job opportunity. Additionally, the Final Rule requires SWAs to contact labor organizations where union representation is customary in the occupation and area of intended employment. The Department recognizes that SWAs may experience a slight increase in their workload in terms of review, referrals, and employer guidance. However, the Department is

eliminating the employment verification responsibilities the SWA has under the current regulations. The elimination of workload created by the employment verification requirement will allow the SWAs to apply those resources to the additional recruitment requirements under this rule.

SWA activities under the H-2B program are currently funded by the Department through grants provided under the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*, and directly through appropriated funds for administration of the Department's foreign labor certification program.

D. Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

We have determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA. We have similarly concluded that this Final Rule is a major rule requiring review by the Congress under the SBREFA because it will likely result in an annual effect on the economy of \$100 million.

E. Executive Order 13132—Federalism

We have reviewed this Final Rule in accordance with E.O. 13132 on federalism and have determined that it does not have federalism implications. The Final Rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, we have determined that this Final Rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

F. Executive Order 13175—Indian Tribal Governments

We reviewed this Final Rule under the terms of E.O. 13175 and determined it not to have tribal implications. The Final Rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. As a result, no tribal summary impact statement has been prepared.

G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency

Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681) requires us to assess the impact of this Final Rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale. We have assessed this Final Rule and determined that it will not have a negative effect on families.

H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

The Final Rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

I. Executive Order 12988—Civil Justice

The Final Rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has developed the Final Rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the Final Rule carefully to eliminate drafting errors and ambiguities.

J. Plain Language

We drafted this Final Rule in plain language.

K. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the U.S. Department of Labor (the Department) conducts a preclearance consultation process to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)).

This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l).

The information collected is mandated in this Final Rule at Title 20 CFR 655.8, 655.9, 655.11, 655.12, 655.13, 655.15, 655.16, 655.17, 655.20, 655.32, 655.33, 655.35, 655.40, 655.42,

655.43, 655.45, 655.46, 655.47, 655.48, 655.56, 655.57, 655.60, 655.61, 655.62, 655.70, 655.71, 655.72, 655.73, and Title 29 CFR 503.16, 503.17, 503.43, and 503.51. In accordance with the PRA (44 U.S.C. 3501) information collection requirements, which must be implemented as a result of this regulation, a clearance package containing proposed changes to the already approved collection was submitted to OMB on March 18, 2011, as part of the proposed rule to reform the H-2B program for hiring temporary non-agricultural aliens. The public was given 60 days to comment on this information collection.

The Department did not receive any comments specifically related to this section. The Department did receive several comments suggesting that it collect information about how many U.S. workers and H-2B workers an employer hires as a result of its participation in this program and how many of the H-2B workers were hired from abroad as opposed to from within the United States. The Department agrees that this would be valuable information and has decided to amend ETA Form 9142 to collect from the employer the number of H-2B and U.S. workers it actually hired from within the U.S. or from abroad based on its last H-2B labor certification application, if applicable.

The forms used to comply with this Final Rule include those that were required under the 2008 Final Rule, except that ETA Form 9142, Appendix B was modified to reflect the assurances and obligations of the H-2B employer as required under the compliance-based system proposed in the NPRM and retained in this Final Rule. Also, a new form was created for registering as an H-2B employer—the ETA Form 9155, *H-2B Registration*—was developed at the time of the NPRM in compliance with the new provisions first proposed in the NPRM and retained in the Final Rule, and was available for public comment.

The Department has made changes to this Final Rule after receiving comments to the NPRM. In addition to the change discussed above, the Department has also made changes to the forms for consistency with other changes to the Final Rule and for clarity. However, these changes do not impact the overall annual burden hours for the H-2B program information collection. The total costs associated with the form, as defined by the PRA, are zero dollars per employer for ETA Forms 9141, 9142, and 9155.

This Final Rule utilizes the information collection, which OMB first

approved on November 21, 2008 under OMB control number 1205–0466. The Department has simultaneously submitted with this Final Rule an information collection containing the revised ETA Forms 9141 and ETA 9142, and the new ETA Form 9155. The ETA Form 9141 has a public reporting burden estimated to average 1 hour per response or application filed. The ETA Form 9142 with Appendix B.1 has a public reporting burden estimated to average 1 hour per response or application filed. Additionally, the ETA Form 9155 has a public reporting burden estimated to average 1 hour per response or application filed.

For an additional explanation of how the Department calculated the burden hours and related costs, the PRA packages for these information collections may be obtained from the RegInfo.gov Web site at <http://www.reginfo.gov/public/do/PRAMain> or by contacting the Department at: Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

29 CFR Part 503

Administrative practice and procedure, Employment, Foreign Workers, Housing, Housing standards, Immigration, Labor, Nonimmigrant workers, Penalties, Transportation, Wages.

Accordingly, the Department of Labor amends 20 CFR part 655 and adds 29 CFR part 503 as follows:

Title 20—Employees' Benefits

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. 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), 1182(m), (n) and (t), 1184(c), (g), and

(j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. In subpart A, revise §§ 655.1 through 655.6 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

Sec.

- 655.1 Scope and purpose of subpart A.
- 655.2 Authority of the agencies, offices, and divisions in the Department of Labor.
- 655.3 Territory of Guam.
- 655.4 Special procedures.
- 655.5 Definition of terms.
- 655.6 Temporary need.

* * * * *

§ 655.1 Scope and purpose of subpart A.

The Immigration and Nationality Act (INA) at 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H–2B workers. DHS regulations at 8 CFR 214.2(h)(6)(iv) provide that an employer's petition to employ nonimmigrant workers on H–2B visas for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor (Secretary).

(a) *Purpose.* The temporary labor certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and who will

be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that

(2) The employment of the H–2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the H–2B visa category, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b). It also establishes obligations with respect to the terms and conditions of the temporary labor certification with which H–2B employers must comply, as well as their obligations to H–2B 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 labor certification.

§ 655.2 Authority of the agencies, offices, and divisions in the Department of Labor.

(a) *Authority and role of the Office of Foreign Labor Certification (OFLC).* The Secretary has delegated her authority to make determinations under this subpart, pursuant to 8 CFR 214.2(h)(6)(iv), to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to OFLC. Determinations on an *Application for Temporary Employment Certification* in the H–2B program are made by the Administrator, OFLC who, in turn, may delegate this responsibility to designated staff members, e.g., a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division (WHD).* Pursuant to its authority under the INA, 8 U.S.C. 1184(c)(14)(B), DHS has delegated to the Secretary certain investigatory and law enforcement functions with respect to terms and conditions of employment in the H–2B program. The Secretary has, in turn, delegated that authority to WHD. The regulations governing WHD investigation and enforcement functions, including those related to the enforcement of temporary labor certifications, issued under this subpart, may be found in 29 CFR part 503.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy under § 655.73 or under 29 CFR 503.24.

§ 655.3 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, except that an employer seeking certification for a job opportunity on Guam must obtain a

prevailing wage from the Department in accordance with § 655.10 of this subpart. The U.S. Department of Labor (Department or DOL) does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas, or enforce compliance with the provisions of the H–2B visa program, in the Territory of Guam. Under DHS regulations, administration of the H–2B temporary labor certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

§ 655.4 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities, the Administrator, OFLC has the authority to establish, continue, revise, or revoke special procedures in the form of variances for processing certain H–2B applications. Employers must request and demonstrate in writing to the Administrator, OFLC that special procedures are necessary. Before making determinations under this section, the Administrator, OFLC may consult with affected employers and worker representatives. Special procedures in place on the effective date of this regulation, including special procedures currently in effect for handling applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers, will remain in force until modified or withdrawn by the Administrator, OFLC.

§ 655.5 Definition of terms.

For purposes of this subpart:

Act means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

Administrator, Wage and Hour Division (WHD) means the primary official of the WHD, or the Administrator's designee.

Agent. (1) *Agent* means a legal entity or person who:

(i) Is authorized to act on behalf of an employer for temporary nonagricultural 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 an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted 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.

Agricultural labor or services means those duties and occupations defined in subpart B of this part.

Applicant means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (ETA Form 9142 and the appropriate appendices).

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved ETA Form 9142 and the appropriate appendices, a valid wage determination, as required by § 655.10, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary labor certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Area of substantial unemployment means a contiguous area with a population of at least 10,000 in which there is an average unemployment rate equal to or exceeding 6.5 percent for the 12 months preceding the determination of such areas made by the ETA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth

of the U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of ALJs assigned to the Department and designated by the Chief ALJ to be members of BALCA.

Certifying Officer (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H-2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under this subpart.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Corresponding employment. (1) *Corresponding employment* means the employment of workers who are not H-2B workers by an employer that has a certified H-2B *Application for Temporary Employment Certification* when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, except that workers in the following two categories are not included in corresponding employment:

(i) Incumbent employees continuously employed by the H-2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H-2B workers during the 52 weeks prior to the period of employment certified on the *Application for Temporary Employment Certification* and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer's payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the

employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or

(ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H-2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause.

(2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H-2B workers as listed on the *Application for Temporary Employment Certification*.

Department of Homeland Security (DHS) means the Federal Department having jurisdiction over certain immigration-related functions, acting through its agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. 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. The terms employee and worker are used interchangeably in this subpart.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

Employer-client means an employer that has entered into an agreement with

a job contractor and that is not an affiliate, branch or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Employment and Training

Administration (ETA) means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Full-time means 35 or more hours of work per week.

H-2B Petition means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2B nonimmigrant workers. The *H-2B Petition* includes the approved *Application for Temporary Employment Certification* and the Final Determination letter.

H-2B Registration means the OMB-approved ETA Form 9155, submitted by an employer to register its intent to hire H-2B workers and to file an *Application for Temporary Employment Certification*.

H-2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Job offer means the offer made by an employer or potential employer of H-2B workers to both U.S. and H-2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means one or more openings for full-time employment with

the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 29 CFR part 503 and this subpart that is posted between and among the State Workforce Agencies (SWAs) on their job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

Layoff means any involuntary separation of one or more U.S. employees without cause.

Metropolitan Statistical Area (MSA) means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro 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 Prevailing Wage Center (NPWC) means that office within OFLC from which employers, agents, or attorneys who wish to file an *Application for Temporary Employment Certification* receive a prevailing wage determination (PWD).

NPWC Director means the OFLC official to whom the Administrator, OFLC has delegated authority to carry out certain NPWC operations and functions.

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications. For purposes of this subpart, the NPC receiving a request for an *H-2B Registration* and an *Application for Temporary Employment Certification* is the Chicago NPC whose address is published in the **Federal Register**.

NPC Director means the OFLC official to whom the Administrator, OFLC has

delegated authority for purposes of certain Chicago NPC operations and functions.

Non-agricultural labor and services means any labor or services not considered to be agricultural labor or services as defined in subpart B of this part. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Occupational employment statistics (OES) survey means the program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual wage estimates for occupations at the State and MSA levels.

Offered wage means the wage offered by an employer in an H-2B job order. The offered wage must equal or exceed the highest of the prevailing wage or Federal, State or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in § 655.10, that is the subject of the *Application for Temporary Employment Certification*. The PWD is made on ETA Form 9141, *Application for Prevailing Wage Determination*.

Professional athlete is defined in 8 U.S.C. 1182(a)(5)(A)(iii)(II), and means an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of the Department of Homeland Security means the chief official of the U.S. Department of Homeland Security (DHS) or the Secretary of DHS's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

State Workforce Agency (SWA) means a State government agency that receives funds under the Wagner-Peyser Act (29

U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Strike means 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 means:

(1) Where an employer has violated 29 CFR part 503, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

- (i) Substantial continuity of the same business operations;
- (ii) Use of the same facilities;
- (iii) Continuity of the work force;
- (iv) Similarity of jobs and working conditions;
- (v) Similarity of supervisory personnel;
- (vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (vii) Similarity in machinery, equipment, and production methods;
- (viii) Similarity of products and services; and
- (ix) The ability of the predecessor to provide relief.

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

United States (U.S.) means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States Citizenship and Immigration Services (USCIS) means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H-2B workers to perform temporary non-agricultural work in the U.S.

United States worker (U.S. worker) means a worker who is:

- (1) A citizen or national of the U.S.;
- (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C.

1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD) means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

Wages mean all forms of cash remuneration to a worker by an employer in payment for personal services.

§ 655.6 Temporary need.

(a) An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A).

(b) The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B). Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.

(c) A job contractor will only be permitted to seek certification if it can demonstrate through documentation its own temporary need, not that of its employer-client(s). A job contractor will only be permitted to file applications based on a seasonal need or a one-time occurrence.

■ 3. In subpart A, add §§ 655.7 through 655.9 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers)

	*	*	*	*	*
Sec.					
655.7	Persons and entities authorized to file.				
655.8	Requirements for agents.				
655.9	Disclosure of foreign worker recruitment.				
	*	*	*	*	*

§ 655.7 Persons and entities authorized to file.

(a) *Persons authorized to file.* In addition to the employer applicant, a request for an *H-2B Registration* or an *Application for Temporary Employment*

Certification may be filed by an attorney or agent, as defined in § 655.5.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *H-2B Registration and Application for Temporary Employment Certification* and all documentation submitted to the Department.

§ 655.8 Requirements for agents.

An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide:

(a) A copy of the agent agreement or other document demonstrating the agent's authority to represent the employer; and

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration, if the agent is required under MSPA, at 29 U.S.C. 1801 *et seq.*, to have such a certificate, identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.9 Disclosure of foreign worker recruitment.

(a) The employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers under this *Application for Temporary Employment Certification*. These agreements must contain the contractual prohibition against charging fees as set forth in § 655.20(p).

(b) The employer, and its attorney or agent, as applicable, must also provide the identity and location of all persons and entities hired by or working for the recruiter or agent referenced in paragraph (a) of this section, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H-2B job opportunities offered by the employer.

(c) The Department will maintain a publicly available list of agents and recruiters who are party to the agreements referenced in paragraph (a) of this section, as well as the persons and entities referenced in paragraph (b) of this section and the locations in which they are operating.

■ 4a. In subpart A add an undesignated center heading before § 655.10 to read as follows:

Prefiling Procedures

■ 4b. In § 655.10, revise paragraphs (a), (c) through (e), (h), and (i), and add paragraphs (j) and (k), to read as follows:

§ 655.10 Prevailing wage.

(a) *Offered wage.* The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H-2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

* * * * *

(c) *Request for PWD.* (1) An employer must request and receive a PWD from the NPWC before filing the job order with the SWA.

(2) The PWD must be valid on the date the job order is posted.

(d) *Multiple worksites.* If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the opportunity within the area of intended employment, the prevailing wage is the highest applicable wage among all the worksites.

(e) *NPWC action.* The NPWC will provide the PWD, indicate the source, and return the Application for Prevailing Wage Determination (ETA Form 9141) with its endorsement to the employer.

* * * * *

(h) *Validity period.* The NPWC must specify the validity period of the prevailing wage, which in no event may be more than 365 days and no less than 90 days from the date that the determination is issued.

(i) *Professional athletes.* In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage. 8 U.S.C. 1182(p)(2).

(j) *Retention of documentation.* The employer must retain the PWD for 3 years from the date of issuance or the date of a final determination on the *Application for Temporary Employment Certification*, whichever is later, and submit it to a CO if requested by a Notice of Deficiency, described in § 655.31, or audit, as described in § 655.70, or to a WHD representative during a WHD investigation.

(k) *Guam.* The requirements of this paragraph apply to any request filed for an H-2B job opportunity on Guam.

■ 5. Revise § 655.11 to read as follows:

§ 655.11 Registration of H-2B employers.

All employers that desire to hire H-2B workers must establish their need for services or labor is temporary by filing an *H-2B Registration* with the Chicago NPC.

(a) *Registration filing.* An employer must file an *H-2B Registration*. The *H-2B Registration* must be accompanied by documentation evidencing:

(1) The number of positions that will be sought in the first year of registration;

(2) The time period of need for the workers requested;

(3) That the nature of the employer's need for the services or labor to be performed is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined at 8 CFR 214.2(h)(6)(ii)(B) and § 655.6 (or in the case of job contractors, a seasonal need or one-time occurrence); and

(4) For job contractors, the job contractor's own seasonal need or one-time occurrence, such as through the provision of payroll records.

(b) *Original signature.* The *H-2B Registration* must bear the original signature of the employer (and that of the employer's attorney or agent if applicable). If and when the *H-2B Registration* is permitted to be filed electronically, the employer will satisfy this requirement by signing the *H-2B Registration* as directed by the CO.

(c) *Timeliness of registration filing.* A completed request for an *H-2B Registration* must be received by no less than 120 calendar days and no more than 150 calendar days before the employer's date of need, except where the employer submits the *H-2B Registration* in support of an emergency filing under § 655.17.

(d) *Temporary need.* (1) The employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). A job contractor must also demonstrate through documentation its own seasonal need or one-time occurrence.

(2) The employer's need will be assessed in accordance with the definitions provided by the Secretary of DHS and as further defined in § 655.6.

(e) *NPC review.* The CO will review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors:

(1) The job classification and duties qualify as non-agricultural;

(2) The employer's need for the services or labor to be performed is temporary in nature, and for job

contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;

(3) The number of worker positions and period of need are justified; and

(4) The request represents a bona fide job opportunity.

(f) *Mailing and postmark requirements.* Any notice or request

pertaining to an *H-2B Registration* sent by the CO to an employer requiring a response will be mailed to the address provided on the *H-2B Registration* using methods to assure next day delivery, including electronic mail. The employer's response to the notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date specified by the CO or by the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(g) *Request for information (RFI).* If the CO determines the *H-2B Registration* cannot be approved, the CO will issue an RFI. The RFI will be issued within 7 business days of the CO's receipt of the *H-2B Registration*. The RFI will:

(1) State the reason(s) why the *H-2B Registration* cannot be approved and what supplemental information or documentation is needed to correct the deficiencies;

(2) Specify a date, no later than 7 business days from the date the RFI is issued, by which the supplemental information or documentation must be sent by the employer;

(3) State that, upon receipt of a response to the RFI, the CO will review the *H-2B Registration* as well as any supplemental information and documentation and issue a Notice of Decision on the *H-2B Registration*. The CO may, at his or her discretion, issue one or more additional RFIs before issuing a Notice of Decision on the *H-2B Registration*; and

(4) State that failure to comply with an RFI, including not responding in a timely manner or not providing all required documentation within the specified timeframe, will result in a denial of the *H-2B Registration*.

(h) *Notice of Decision.* The CO will notify the employer in writing of the final decision on the *H-2B Registration*.

(1) Approved *H-2B Registration.* If the *H-2B Registration* is approved, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will notify the employer that it is eligible to seek H-2B workers in the occupational classification for the anticipated number of positions and period of need stated

on the approved *H-2B Registration*. The CO may approve the *H-2B Registration* for a period of up to 3 consecutive years.

(2) *Denied H-2B Registration*. If the *H-2B Registration* is denied, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will:

(i) State the reason(s) why the *H-2B Registration* is denied;

(ii) Offer the employer an opportunity to request administrative review under § 655.61 within 10 business days from the date the Notice of Decision is issued and state that if the employer does not request administrative review within that period the denial is final.

(i) *Retention of documents*. All employers filing an *H-2B Registration* are required to retain any documents and records not otherwise submitted proving compliance with this subpart. Such records and documents must be retained for a period of 3 years from the date of certification of the last *Application for Temporary Employment Certification* supported by the *H-2B Registration*, if approved, or 3 years from the date the decision is issued if the *H-2B Registration* is denied or 3 years from the day the Department receives written notification from the employer withdrawing its pending *H-2B Registration*.

(j) *Transition period*. In order to allow OFLC to make the necessary changes to its program operations to accommodate the new registration process, OFLC will announce in the **Federal Register** a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications.

■ 6. In subpart A, add §§ 655.12 and 655.13 to read as follows:

§ 655.12 Use of registration of H-2B employers.

(a) Upon approval of the *H-2B Registration*, the employer is authorized for the specified period of up to 3 consecutive years from the date the *H-2B Registration* is approved to file an *Application for Temporary Employment Certification*, unless:

(1) The number of workers to be employed has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers) from the initial year;

(2) The dates of need for the job opportunity have changed by more than a total of 30 calendar days from the initial year for the entire period of need;

(3) The nature of the job classification and/or duties has materially changed; or

(4) The temporary nature of the employer's need for services or labor to be performed has materially changed.

(b) If any of the changes in paragraphs (a)(1) through (4) of this section apply, the employer must file a new *H-2B Registration* in accordance with § 655.11.

§ 655.13 Review of PWDs.

(a) *Request for review of PWDs*. Any employer desiring review of a PWD must make a written request for such review to the NPWC Director within 7 business days from the date the PWD is issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) *NPWC review*. Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review shall issue a Final Determination letter; that letter may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.

(c) *Request for review by BALCA*. Any employer desiring review of the NPWC Director's decision on a PWD must make a written request for review of the determination by BALCA within 10 business days from the date the Final Determination letter is issued.

(1) The request for BALCA review must be in writing and addressed to the NPWC Director who made the final determinations. Upon receipt of a request for BALCA review, the NPWC will prepare an appeal file and submit it to BALCA.

(2) The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD was based.

(3) BALCA will handle appeals in accordance with § 655.61.

■ 7. In subpart A, add an undesignated center heading above § 655.15 to read as follows:

Application for Temporary Employment Certification Filing Procedures

■ 8. Revise § 655.15 to read as follows:

§ 655.15 Application filing requirements.

All registered employers that desire to hire H-2B workers must file an *Application for Temporary Employment*

Certification with the NPC designated by the Administrator, OFLC. Except for employers that qualify for emergency procedures at § 655.17, employers that fail to register under the procedures in § 655.11 and/or that fail to submit a PWD obtained under § 655.10 will not be eligible to file an *Application for Temporary Employment Certification* and their applications will be returned without review.

(a) *What to file*. A registered employer seeking H-2B workers must file a completed *Application for Temporary Employment Certification* (ETA Form 9142 and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in § 655.16, and copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunities and all information required, as specified in §§ 655.8 and 655.9.

(b) *Timeliness*. A completed *Application for Temporary Employment Certification* must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.

(c) *Location and method of filing*. The employer must submit the *Application for Temporary Employment Certification* and all required supporting documentation to the NPC. At a future date the Department may also permit an *Application for Temporary Employment Certification* to be filed electronically in addition to or instead of by mail. Notice of such procedure will be published in the **Federal Register**.

(d) *Original signature*. The *Application for Temporary Employment Certification* must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is so represented). If and when an *Application for Temporary Employment Certification* is permitted to be filed electronically, the employer will satisfy this requirement by signing the *Application for Temporary Employment Certification* as directed by the CO.

(e) *Requests for multiple positions*. Certification of more than one position may be requested on the *Application for Temporary Employment Certification* as long as all H-2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(f) *Separate applications*. Only one *Application for Temporary Employment Certification* may be filed for worksite(s)

within one area of intended employment for each job opportunity with an employer for each period of employment. Except where otherwise permitted under § 655.4, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H-2B program.

(g) *One-time occurrence.* Where a one-time occurrence lasts longer than 1 year, the CO will instruct the employer on any additional recruitment requirements with respect to the continuing validity of the labor market test or offered wage obligation.

(h) *Information dissemination.* Information received in the course of processing a request for an *H-2B Registration*, an *Application for Temporary Employment Certification* or program integrity measures such as audits may be forwarded from OFLC to WHD, or any other Federal agency as appropriate, for investigative and/or enforcement purposes.

■ 9. Add § 655.16 to read as follows:

§ 655.16 Filing of the job order at the SWA.

(a) *Submission of the job order.* (1) The employer must submit the job order to the SWA serving the area of intended employment at the same time it submits the *Application for Temporary Employment Certification* and a copy of the job order to the NPC in accordance with § 655.15. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit the job order to any one of the SWAs having jurisdiction over the anticipated worksites, but must identify the receiving SWA on the copy of the job order submitted to the NPC with its *Application for Temporary Employment Certification*. The employer must inform the SWA that the job order is being placed in connection with a concurrently submitted *Application for Temporary Employment Certification* for H-2B workers.

(2) In addition to complying with State-specific requirements governing job orders, the job order submitted to the SWA must satisfy the requirements set forth in § 655.18.

(b) *SWA review of the job order.* The SWA must review the job order and ensure that it complies with criteria set forth in § 655.18. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO at the NPC of the noted deficiencies within 6 business days of receipt of the job order.

(c) *Intrastate and interstate clearance.* Upon receipt of the Notice of Acceptance, as described in § 655.33,

the SWA must promptly place the job order in intrastate clearance and provide to other states as directed by the CO.

(d) *Duration of job order posting and SWA referral of U.S. workers.* Upon receipt of the Notice of Acceptance, any SWA in receipt of the employer's job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.40(c), and must refer to the employer in a manner consistent with § 655.47 all qualified U.S. workers who apply for the job opportunity or on whose behalf a job application is made.

(e) *Amendments to a job order.* The employer may amend the job order at any time before the CO makes a final determination, in accordance with procedures set forth in § 655.35.

■ 10. Revise § 655.17 to read as follows:

§ 655.17 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period(s) for filing an *H-2B Registration* and/or an *Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.

(b) *Employer requirements.* The employer requesting a waiver of the required time period(s) must submit to the NPC a request for a waiver of the time period requirement, a completed *Application for Temporary Employment Certification* and the proposed job order identifying the SWA serving the area of intended employment, and must otherwise meet the requirements of § 655.15. If the employer did not previously apply for an *H-2B Registration*, the employer must also submit a completed *H-2B Registration* with all supporting documentation, as required by § 655.11. If the employer did not previously apply for a PWD, the employer must also submit a completed PWD request. The employer's waiver request must 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 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. A denial of a previously submitted *H-2B Registration* in accordance with the procedures set forth in § 655.11 does

not constitute good and substantial cause necessitating a waiver under this section.

(c) *Processing of emergency applications.* The CO will process the emergency *H-2B Registration* and/or *Application for Temporary Employment Certification* and job order in a manner consistent with the provisions of this subpart and make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.50. If the CO grants the waiver request, the CO will forward a Notice of Acceptance and the approved job order to the SWA serving the area of intended employment identified by the employer in the job order. If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53.

■ 11. Add §§ 655.18 and 655.19 to read as follows:

§ 655.18 Job order assurances and contents.

(a) *General.* Each job order placed in connection with an *Application for Temporary Employment Certification* must at a minimum include the information contained in paragraph (b) of this section. In addition, by submitting the *Application for Temporary Employment Certification*, an employer agrees to comply with the following assurances with respect to each job order:

(1) Prohibition against preferential treatment. The employer's job order 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-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(2) Bona fide job requirements. Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

(b) *Contents.* In addition to complying with the assurances in paragraph (a) of this section, the employer's job order must meet the following requirements:

(1) State the employer's name and contact information;

(2) Indicate that the job opportunity is a temporary, full-time position, including the total number of job openings the employer intends to fill;

(3) Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) Indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(5) Specify the wage that the employer is offering, intends to offer, or will provide to H-2B workers, or, in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an employer), the range of wage offers, and ensure that the wage offer equals or exceeds the highest of the prevailing wage or the Federal, State, or local minimum wage;

(6) If applicable, specify that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(7) If applicable, state that on-the-job training will be provided to the worker;

(8) State that the employer will use a single workweek as its standard for computing wages due;

(9) Specify the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent;

(10) If the employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided;

(11) State that the employer will make all deductions from the worker's paycheck required by law. Specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;

(12) Detail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order, consistent with § 655.20(j)(1)(i);

(13) State that the employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, if the worker completes the certified period of employment or is dismissed from employment for any reason by the employer before the end of the period, consistent with § 655.20(j)(1)(ii);

(14) If applicable, state that the employer will provide daily transportation to and from the worksite;

(15) State that the employer will reimburse the H-2B worker in the first workweek for all visa, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H-2B worker (but need not include passport expenses or other charges primarily for the benefit of the worker);

(16) State that the employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.20(k);

(17) State the applicability of the three-fourths guarantee, offering the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period, if the period of employment covered by the job order is 120 or more days, or each 6-week period, if the period of employment covered by the job order is less than 120 days, in accordance with § 655.20(f); and

(18) Instruct applicants to inquire about the job opportunity or send applications, indications of availability, and/or resumes directly to the nearest office of the SWA in the State in which the advertisement appeared and include the SWA contact information.

§ 655.19 Job contractor filing requirements.

(a) Provided that a job contractor and any employer-client are joint employers, a job contractor may submit an *Application for Temporary Employment Certification* on behalf of itself and that employer-client.

(b) A job contractor must have separate contracts with each different employer-client. Each contract or agreement may support only one *Application for Temporary Employment Certification* for each employer-client job opportunity within a single area of intended employment.

(c) Either the job contractor or its employer-client may submit an ETA Form 9141, *Application for Prevailing Wage Determination*, describing the job opportunity to the NPWC. However, each of the joint employers is separately responsible for ensuring that the wage offer listed on the *Application for Temporary Employment Certification*, ETA Form 9142, and related recruitment at least equals the prevailing wage rate determined by the NPWC and that all other wage obligations are met.

(d)(1) A job contractor that is filing as a joint employer with its employer-client must submit to the NPC a completed *Application for Temporary Employment Certification*, ETA Form 9142, that clearly identifies the joint employers (the job contractor and its employer-client) and the employment relationship (including the actual worksite), in accordance with the instructions provided by the Department. The *Application for Temporary Employment Certification* must bear the original signature of the job contractor and the employer-client and be accompanied by a recruitment report bearing both joint employers' signatures and the contract or agreement establishing the employers' relationship related to the workers sought.

(2) By signing the *Application for Temporary Employment Certification*, each employer independently attests to the conditions of employment required of an employer participating in the H-2B program and assumes full responsibility for the accuracy of the representations made in the application and for all of the responsibilities of an employer in the H-2B program.

(e)(1) Either the job contractor or its employer-client may place the required job order and conduct recruitment as described in § 655.16 and §§ 655.42–46. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the NPC with the *Application for Temporary Employment Certification*, ETA Form 9142.

(2) The job order and all recruitment conducted by joint employers must satisfy the content requirements identified in § 655.18 and § 655.41. Additionally, in order to fully apprise applicants of the job opportunity and

avoid potential confusion inherent in a job opportunity involving two employers, joint employer recruitment must clearly identify both employers (the job contractor and its employer-client) by name and must clearly identify the worksite location(s) where workers will perform labor or services.

(3)(i) Provided that all of the employer-clients' job opportunities are in the same occupation and area of intended employment and have the same requirements and terms and conditions of employment, including dates of employment, a job contractor may combine more than one of its joint employer employer-clients' job opportunities in a single advertisement. Each advertisement must fully apprise potential workers of the job opportunity available with each employer-client and otherwise satisfy the advertising content requirements required for all H-2B-related advertisements, as identified in § 655.41. Such a shared advertisement must clearly identify the job contractor by name, the joint employment relationship, and the number of workers sought for each job opportunity, identified by employer-client name and location (e.g. 5 openings with Employer-Client 1 (worksite location), 3 openings with Employer-Client 2 (worksite location)).

(ii) In addition, the advertisement must contain the following statement: "Applicants may apply for any or all of the jobs listed. When applying, please identify the job(s) (by company and work location) you are applying to for the entire period of employment specified." If an applicant fails to identify one or more specific work location(s), that applicant is presumed to have applied to all work locations listed in the advertisement.

(f) If an application for joint employers is approved, the NPC will issue one certification and send it to the job contractor. In order to ensure notice to both employers, a courtesy copy of the certification cover letter will be sent to the employer-client.

(g) When submitting a certified *Application for Temporary Employment Certification* to USCIS, the job contractor should submit the complete ETA Form 9142 containing the original signatures of both the job contractor and employer-client.

■ 12. In subpart A, add an undesignated center heading before § 655.20 to read as follows:

Assurances and Obligations

■ 13. Revise § 655.20 to read as follows:

§ 655.20 Assurances and obligations of H-2B employers.

An employer employing H-2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions with respect to its H-2B workers and any workers in corresponding employment:

(a) *Rate of pay.* (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and the employer must demonstrate that they are normal and usual for non-H-2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece rate is no less than the normal rate paid by non-H-2B employers to workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." 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.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay; any such deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter including any agents or employees of these entities, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification*.

(d) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, consistent with § 655.5, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and

requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

(f) *Three-fourths guarantee.* (1) 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 in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any. See the exception in paragraph (y) of this section.

(2) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date 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 job order and all extensions thereof are in effect.

(4) The 12-week periods (6-week periods if the period of employment covered by the job order is less than 120 days) to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first

12-week period (or 6-week period, as appropriate) also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 12 weeks and 6 days (or 6 weeks and 6 days, as appropriate)). The final 12-week period (or 6-week period, as appropriate) includes any time remaining after the last full 12-week period (or 6-week period) ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 32-week period (a period greater than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 315 hours ($12 \text{ weeks} \times 35 \text{ hours/week} = 420 \text{ hours} \times 75 \text{ percent} = 315$) in the first 12-week period, at least 315 hours in the second 12-week period, and at least 210 hours ($8 \text{ weeks} \times 35 \text{ hours/week} = 280 \text{ hours} \times 75 \text{ percent} = 210$) in the final partial period. If the job order is for a 16-week period (less than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 157.5 hours ($6 \text{ weeks} \times 35 \text{ hours/week} = 210 \text{ hours} \times 75 \text{ percent} = 157.5$) in the first 6-week period, at least 157.5 hours in the second 6-week period, and at least 105 hours ($4 \text{ weeks} \times 35 \text{ hours/week} = 140 \text{ hours} \times 75 \text{ percent} = 105$) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee.

(7) 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. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 12-week period (6-week period if the period of employment covered by the job order is less than 120 days) during the period of the job order the employer affords the U.S. or H-2B worker less employment than that required under paragraph (f)(1) of this section, 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 has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in an 12-week period (or 6-week period, as appropriate) if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) 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 (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 12-week period (or 6-week period, as appropriate) of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, 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, or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H-2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in

the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: Records showing the nature, amount and location(s) 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 in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

(vi) If piece rates are used, the units produced daily;

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address and FEIN.

(j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the job order (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and

reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in § 655.173 of subpart B of this part. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: The cost of transportation and subsistence incurred by the worker; the amount reimbursed; and the dates of reimbursement. Note that the FLSA applies independently of the H-2B requirements and imposes obligations on employers regarding payment of wages.

(ii) Transportation from the place of employment. If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return 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 that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) *Employer-provided transportation.* All employer-provided transportation must comply with all

applicable Federal, State, and local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) *Disclosure.* All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H-2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

(k) *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.

(l) *Disclosure of job order.* The employer must provide to an H-2B worker if outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent approved modifications. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H-2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language common to a significant portion of the workers if they are not fluent in English.

(n) *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, discharge, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or

this subpart, or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H-2B labor certification or employment, including payment of the employer's attorney or agent fees, application and H-2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved *Application for Temporary Employment Certification*. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2B workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: "Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent 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, attorneys' fees, agent fees, application fees, or petition fees."

(q) *Prohibition against preferential treatment of foreign 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-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be 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 hired workers and rejected applicants as required by § 655.56.

(s) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in §§ 655.40–655.46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all qualified U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified U.S. worker who applies to the employer for the job opportunity, until 21 days before the date of need.

(u) *No strike or lockout.* There is no strike or lockout at any of the employer's worksites within the area of intended employment for which the employer is requesting H-2B certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S.

worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H-2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer will contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite), employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job.

(x) *Area of intended employment and job opportunity.* The employer must not place any H-2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification*.

(y) *Abandonment/termination of employment.* Upon the separation from employment of worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification*, the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of such separation of an H-2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H-2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, 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 (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 12-week period (or 6-week period, as appropriate) preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment specified on the *Application for Temporary Employment Certification*, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), neither the employer nor the employer's agents or attorneys may hold or confiscate workers' passports, visas, or other immigration documents.

(aa) *Disclosure of foreign worker recruitment.* The employer, and its attorney or agent, as applicable, must comply with § 655.9 by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers, and the identity and location of the persons or entities hired by or working for the agent or recruiter and any of the agents or employees of those persons and entities, to recruit foreign workers. Pursuant to § 655.15(a), the agreements and information must be filed with the *Application for Temporary Employment Certification*.

§§ 655.21–655.24 [Removed and Reserved]

■ 13. Remove and reserve §§ 655.21 through 655.24.

■ 14. In subpart A, add an undesignated center heading before § 655.30 to read as follows:

Processing of an Application for Temporary Employment Certification

■ 15. In subpart A, revise §§ 655.30 through 655.35 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers)

* * * * *

Sec.

655.30 Processing of an application and job order.

655.31 Notice of deficiency.

655.32 Submission of a modified application or job order.

655.33 Notice of acceptance.

655.34 Electronic job registry.

655.35 Amendments to an application or job order.

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§ 655.30 Processing of an application and job order.

(a) *NPC review.* The CO will review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO to an employer requiring a response will be mailed to the address provided in the *Application for Temporary Employment Certification* using methods to assure next day delivery, including electronic mail. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date or the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(c) *Information dissemination.* OFLC may forward information received in the course of processing an *Application for Temporary Employment Certification* and program integrity measures to WHD, or any other Federal agency, as appropriate, for investigation and/or enforcement purposes.

§ 655.31 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and/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 business days from the CO's receipt of the *Application for Temporary Employment Certification*. If applicable, the Notice of Deficiency will include job order deficiencies identified by the SWA under § 655.16. The CO will send a copy of the Notice of Deficiency to the SWA serving the area of intended employment identified by the employer on its job order, and if applicable, to the employer's attorney or agent.

(b) *Notice content.* The Notice of Deficiency will:

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance and state the modification needed for the CO to issue a Notice of Acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 10 business days from the date of the Notice of Deficiency. The Notice will state the modification

needed for the CO to issue a Notice of Acceptance;

(3) Offer the employer an opportunity to request administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61. The notice will inform the employer that it must submit a written request for review to the Chief ALJ of DOL within 10 business days from the date the Notice of Deficiency is issued by facsimile or other means normally assuring next day delivery, and that the employer must simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the *Application for Temporary Employment Certification*. The notice will inform the employer that the denial of the *Application for Temporary Employment Certification* is final, and cannot be appealed. The Department will not further consider that *Application for Temporary Employment Certification*.

§ 655.32 Submission of a modified application or job order.

(a) *Review of a modified Application for Temporary Employment Certification or job order.* Upon receipt of a response to a Notice of Deficiency, including any modifications, the CO will review the response. The CO may issue one or more additional Notices of Deficiency before issuing a Notice of Decision. The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the *Application for Temporary Employment Certification*.

(b) *Acceptance of a modified Application for Temporary Employment Certification or job order.* If the CO accepts the modification(s) to the *Application for Temporary Employment Certification* and/or job order, the CO will issue a Notice of Acceptance to the employer. The CO will send a copy of the Notice of Acceptance to the SWA instructing it to make any necessary modifications to the not yet posted job order and, if applicable, to the employer's attorney or agent, and follow the procedure set forth in § 655.33.

(c) *Denial of a modified Application for Temporary Employment Certification or job order.* If the CO finds

the response to Notice of Deficiency unacceptable, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.51.

(d) *Appeal from denial of a modified Application for Temporary Employment Certification or job order.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* and/or job order are the same as for appealing the denial of a non-modified *Application for Temporary Employment Certification* outlined in § 655.61.

(e) *Post acceptance modifications.* Irrespective of the decision to accept the *Application for Temporary Employment Certification*, the CO may require modifications to the job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions as set forth in § 655.18. The employer must make such modification, or certification will be denied under § 655.53. The employer must provide all workers recruited in connection with the job opportunity in the *Application for Temporary Employment Certification* with a copy of the modified job order no later than the date work commences, as approved by the CO.

§ 655.33 Notice of acceptance.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and job order are complete and meet the requirements of this subpart, the CO will notify the employer in writing within 7 business days from the date the CO received the *Application for Temporary Employment Certification* and job order or modification thereof. A copy of the Notice of Acceptance will be sent to the SWA serving the area of intended employment identified by the employer on its job order and, if applicable, to the employer's attorney or agent.

(b) *Notice content.* The notice will:

(1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.40–655.46, including any additional recruitment ordered by the CO under § 655.46;

(2) State that such employer-conducted recruitment is in addition to the job order being circulated by the SWA(s) and that the employer must conduct recruitment within 14 calendar days from the date the Notice of

Acceptance is issued, consistent with § 655.40;

(3) Direct the SWA to place the job order into intra- and interstate clearance as set forth in § 655.16 and to commence such clearance by:

(i) Sending a copy of the job order to other States listed as anticipated worksites in the *Application for Temporary Employment Certification* and job order, if applicable; and

(ii) Sending a copy of the job order to the SWAs for all States designated by the CO for interstate clearance;

(4) Instruct the SWA to keep the approved job order on its active file until the end of the recruitment period as defined in § 655.40(c), and to transmit the same instruction to other SWAs to which it circulates the job order in the course of interstate clearance;

(5) Where the occupation or industry is traditionally or customarily unionized, direct the SWA to circulate a copy of the job order to the following labor organizations:

(i) The central office of the State Federation of Labor in the State(s) in which work will be performed; and

(ii) The office(s) of local union(s) representing employees in the same or substantially equivalent job classification in the area(s) in which work will be performed;

(6) Advise the employer, as appropriate, that it must contact the appropriate designated community-based organization(s) with notice of the job opportunity; and

(7) Require the employer to submit a report of its recruitment efforts as specified in § 655.48.

§ 655.34 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.33, the CO will place for public examination a copy of the job order posted by the SWA on the Department's electronic job registry, including any amendments or required modifications approved by the CO.

(b) *Length of posting on electronic job registry.* The Department will keep the job order posted on the electronic job registry until the end of the recruitment period, as set forth in § 655.40(c).

(c) *Conclusion of active posting.* Once the recruitment period has concluded the job order will be placed in inactive status on the electronic job registry.

§ 655.35 Amendments to an application or job order.

(a) *Increases in number of workers.* The employer may request to increase

the number of workers noted in the *H-2B Registration* by no more than 20 percent (50 percent for employers requesting fewer than 10 workers). All requests for increasing the number of workers must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

(b) *Minor changes to the period of employment.* The employer may request minor changes to the total period of employment listed on its *Application for Temporary Employment Certification* and job order, for a period of up to 14 days, but the period of employment may not exceed a total of 9 months, except in the event of a one-time occurrence. All requests for minor changes to the total period of employment must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

(c) *Other amendments to the Application for Temporary Employment Certification and job order.* The employer may request other amendments to the *Application for Temporary Employment Certification* and job order. All such requests must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job

order and update the electronic job registry.

(d) Amendments after certification are not permitted. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

§§ 655.36–655.39 [Added and Reserved]

■ 16. Add and reserve §§ 655.36 through 655.39.

■ 17–18. Add an undesignated center heading and §§ 655.40 through 655.48 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Post-Acceptance Requirements

Sec.

- 655.40 Employer-conducted recruitment.
- 655.41 Advertising requirements.
- 655.42 Newspaper advertisements.
- 655.43 Contact with former U.S. employees.
- 655.44 [Reserved]
- 655.45 Contact with bargaining representative, posting and other contact requirements.
- 655.46 Additional employer-conducted recruitment.
- 655.47 Referrals of U.S. workers.
- 655.48 Recruitment report.

* * * * *

Post-Acceptance Requirements

§ 655.40 Employer-conducted recruitment.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *Application for Temporary Employment Certification*. U.S. Applicants can be rejected only for lawful job-related reasons.

(b) *Employer-conducted recruitment period.* Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.42–655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.

(c) *U.S. worker referrals.* Employers must continue to accept referrals of all U.S. applicants interested in the position until 21 days before the date of need.

(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 worker is being recruited so that the

worker incurs little or no cost. Employers cannot provide potential H–2B workers with more favorable treatment 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. The employer must accept and hire any applicants who are qualified and who will be available.

(f) *Recruitment report.* The employer must prepare a recruitment report meeting the requirements of § 655.48.

§ 655.41 Advertising requirements.

(a) All recruitment conducted under §§ 655.42–655.46 must contain terms and conditions of employment that are not less favorable than those offered to the H–2B workers and, at a minimum, must comply with the assurances applicable to job orders as set forth in § 655.18(a).

(b) All advertising must contain the following information:

(1) The employer's name and contact information;

(2) The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(3) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) A statement that the job opportunity is a temporary, full-time position including the total number of job openings the employer intends to fill;

(5) If applicable, a statement that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(6) If applicable, a statement indicating that on-the-job training will be provided to the worker;

(7) The wage that the employer is offering, intends to offer or will provide to the H–2B workers, or in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an employer), the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage;

(8) If applicable, any board, lodging, or other facilities the employer will offer

to workers or intends to assist workers in securing;

(9) All deductions not required by law that the employer will make from the worker's paycheck, including, if applicable, reasonable deduction for board, lodging, and other facilities offered to the workers;

(10) A statement that transportation and subsistence from the place where the worker has come to work for the employer to the place of employment and return transportation and subsistence will be provided, as required by § 655.20(j)(1);

(11) If applicable, a statement that work tools, supplies, and equipment will be provided to the worker without charge;

(12) If applicable, a statement that daily transportation to and from the worksite will be provided by the employer;

(13) A statement summarizing the three-fourths guarantee as required by § 655.20(f); and

(14) 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, the SWA contact information, and, if applicable, the job order number.

§ 655.42 Newspaper advertisements.

(a) The employer must place an advertisement (which may be 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 appropriate to the occupation and the workers likely to apply for the job opportunity.

(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.

(c) The newspaper advertisements must satisfy the requirements in § 655.41.

(d) The employer must maintain copies of newspaper pages (with date of publication and full copy of the advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication furnished by the newspaper containing the text of the printed advertisements and the dates of publication, consistent with the document retention requirements in

§ 655.56. If the advertisement was required to be placed in a language other than English, the employer must maintain a translation and retain it in accordance with § 655.56.

§ 655.43 Contact with former U.S. employees.

The employer must contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite), employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. The employer must maintain documentation sufficient to prove such contact in accordance with § 655.56.

§ 655.44 [Reserved]

§ 655.45 Contact with bargaining representative, posting and other contact requirements.

(a) If there is a bargaining representative for any of the employer's employees in the occupation and area of intended employment, the employer must provide written notice of the job opportunity, by providing a copy of the *Application for Temporary Employment Certification* and the job order, and maintain documentation that it was sent to the bargaining representative(s). An employer governed by this paragraph must include information in its recruitment report that confirms that the bargaining representative(s) was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

(b) If there is no bargaining representative, the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers. Electronic posting, such as displaying the notice prominently on any internal or external Web site that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must meet the requirements under § 655.41 and be posted for at least 15 consecutive business days. The employer must

maintain a copy of the posted notice and identify where and when it was posted in accordance with § 655.56.

(c) If appropriate to the occupation and area of intended employment, as indicated by the CO in the Notice of Acceptance, the employer must provide written notice of the job opportunity to a community-based organization, and maintain documentation that it was sent to any designated community-based organization. An employer governed by this paragraph must include information in its recruitment report that confirms that the community-based organization was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

§ 655.46 Additional employer-conducted recruitment.

(a) *Requirement to conduct additional recruitment.* The employer may be instructed by the CO to conduct additional recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there may be U.S. workers who are qualified and who will be available for the work, including but not limited to where the job opportunity is located in an Area of Substantial Unemployment.

(b) *Nature of the additional employer-conducted recruitment.* The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but is not limited to, posting on the employer's Web site or another Web site, contact with additional community-based organizations, additional contact with State One-Stop Career Centers, and other print advertising, such as using a professional, trade or ethnic publication where such a publication is appropriate for the occupation and the workers likely to apply for the job opportunity.

(c) *Proof of the additional employer-conducted recruitment.* The CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the additional recruitment requirements were met. Documentation must be maintained as required in § 655.56.

§ 655.47 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 who are qualified and will be available for employment.

§ 655.48 Recruitment report.

(a) *Requirements of the recruitment report.* The employer must prepare, sign, and date a recruitment report. The recruitment report must be submitted by a date specified by the CO in the Notice of Acceptance and contain the following information:

(1) The name of each recruitment activity or source (e.g., job order and the name of the newspaper);

(2) 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's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;

(3) Confirmation that former U.S. employees were contacted, if applicable, and by what means;

(4) Confirmation that the bargaining representative was contacted, if applicable, and by what means, or that the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the H-2B workers;

(5) Confirmation that the community-based organization designated by the CO was contacted, if applicable;

(6) If applicable, confirmation that additional recruitment was conducted as directed by the CO; and

(7) If applicable, for each U.S. worker who applied for the position but was not hired, 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 throughout the recruitment period. The updated report need not be submitted to the Department, but must be made available in the event of a post-certification audit or upon request by DOL.

§ 655.49 [Added and Reserved]

■ 19. Add and reserve § 655.49.

■ 20. Add an undesignated center heading before § 655.50 to read as follows:

Labor Certification Determinations

■ 21. Revise § 655.50 to read as follows:

§ 655.50 Determinations.

(a) *Certifying Officers (COs).* The Administrator, OFLC is the Department's National CO. The Administrator, OFLC and the CO(s), by virtue of delegation from the Administrator, OFLC, have the authority to certify or deny *Applications for*

Temporary Employment Certification under the H-2B nonimmigrant classification. If the Administrator, OFLC directs that certain types of temporary labor certification applications or a specific *Application for Temporary Employment Certification* under the H-2B nonimmigrant classification be handled by the OFLC's National Office, the Director of the NPC will refer such applications to the Administrator, OFLC.

(b) *Determination*. Except as otherwise provided in this paragraph, the CO will make a determination either to certify or deny the *Application for Temporary Employment Certification*. The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

■ 22–23. In subpart A, add §§ 655.51 through 655.57 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers)

* * * * *

Sec.

655.51 Criteria for certification.

655.52 Approved certification.

655.53 Denied certification.

655.54 Partial certification.

655.55 Validity of temporary labor certification.

655.56 Document retention requirements of H-2B employers.

655.57 Request for determination based on nonavailability of U.S. workers.

* * * * *

§ 655.51 Criteria for certification.

(a) The criteria for certification include whether the employer has a valid *H-2B Registration* to participate in the H-2B program and has complied with all of the requirements necessary to grant the labor certification.

(b) In making a determination whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason.

(c) A certification will not be granted to an employer that has failed to comply with one or more sanctions or remedies imposed by final agency actions under the H-2B program.

§ 655.52 Approved certification.

If a temporary labor certification is granted, the CO will send the approved *Application for Temporary Employment Certification* and a Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if applicable, to the employer's attorney or agent. If and when the *Application for Temporary Employment Certification* will be permitted to be electronically filed, the employer must sign the certified *Application for Temporary Employment Certification* as directed by the CO. The employer must retain a signed copy of the *Application for Temporary Employment Certification*, as required by § 655.56.

§ 655.53 Denied certification.

If a temporary labor certification is denied, the CO will send the Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if applicable, to the employer's attorney or agent. The Final Determination letter will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.61; and

(c) State that if the employer does not request administrative review in accordance with § 655.61, the denial is final and the Department will not accept any appeal on that *Application for Temporary Employment Certification*.

§ 655.54 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of H-2B workers or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*. The number of workers certified will be reduced by one for each referred U.S. worker who is qualified and who will be available at the time and place needed to perform the services or labor and who has not been rejected for lawful job-related reasons. If a partial labor certification is issued, the CO will amend the *Application for Temporary Employment Certification* and then return it to the employer with a Final Determination letter, with a copy to the employer's attorney or agent, if

applicable. The Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H-2B workers requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(b) If applicable, address the availability of U.S. workers in the occupation;

(c) Offer the employer an opportunity to request administrative review of the partial certification under § 655.61; and

(d) State that if the employer does not request administrative review in accordance with § 655.61, the partial certification is final and the Department will not accept any appeal on that *Application for Temporary Employment Certification*.

§ 655.55 Validity of temporary labor certification.

(a) *Validity period*. A temporary labor certification is valid only for the period as approved on the *Application for Temporary Employment Certification*. The certification expires on the last day of authorized employment.

(b) *Scope of validity*. A temporary labor certification is valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification*, including any approved modifications. The temporary labor certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 655.56 Document retention requirements of H-2B employers.

(a) *Entities required to retain documents*. All employers filing an *Application for Temporary Employment Certification* requesting H-2B workers are required to retain the documents and records proving compliance with 29 CFR part 503 and this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention*. The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification*, or from the date of adjudication if the *Application for Temporary Employment Certification* is denied, or 3 years from the day the Department receives the letter of withdrawal provided in accordance with § 655.62. For the purposes of this section, records and

documents required to be retained in connection with an *H-2B Registration* must be retained in connection with all of the *Applications for Temporary Employment Certification* that are supported by it.

(c) *Documents and records to be retained by all employer applicants.* All employers filing an *H-2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records to the Department and other Federal agencies in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in § 655.16;

(ii) Advertising as specified in §§ 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in § 655.43;

(iv) Contact with bargaining representative(s), or a copy of the posting of the job opportunity, if applicable, as specified in § 655.45(a) or (b); and

(v) Additional employer-conducted recruitment efforts as specified in § 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with § 655.48, such as evidence of nonapplicability of contact with former workers as specified in § 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in § 655.48;

(5) Records of each worker's earnings, hours offered and worked, location(s) of work performed, and other information as specified in § 655.20(i);

(6) If appropriate, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 655.20(j).

(7) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification*, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.20(r);

(8) Evidence of contact with any former U.S. worker in the occupation at the place of employment in the *Application for Temporary Employment Certification*, including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment*

Certification, as specified in § 655.20(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 655.20(r);

(9) The written contracts with agents or recruiters as specified in §§ 655.8 and 655.9, and the list of the identities and locations of persons hired by or working for the agent or recruiter and these entities' agents or employees, as specified in § 655.9;

(10) Written notice provided to and informing OFLC that an *H-2B* worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification*, as specified in § 655.20(y);

(11) The *H-2B Registration*, job order and a copy of the *Application for Temporary Employment Certification*. If and when the *Application for Temporary Employment Certification* and *H-2B Registration* is permitted to be electronically filed, a printed copy of each adjudicated *Application for Temporary Employment Certification*, including any modifications, amendments or extensions will be signed by the employer as directed by the CO and retained;

(12) The *H-2B Petition*, including all accompanying documents; and

(13) Any collective bargaining agreement(s), individual employment contract(s), or payroll records from the previous year necessary to substantiate any claim that certain incumbent workers are not included in corresponding employment, as specified in § 655.5.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 29 CFR part 503 and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

§ 655.57 Request for determination based on nonavailability of U.S. workers.

(a) *Standards for requests.* If a temporary labor certification has been partially granted or denied, based on the CO's determination that qualified U.S. workers are available, and, on or after 21 calendar days before the date of need, some or all of those qualified U.S. workers are, in fact no longer available, the employer may request a new temporary labor certification determination from the CO. Prior to making a new determination the CO will promptly ascertain (which may be through the SWA or other sources of

information on U.S. worker availability) whether specific qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment with 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request. An employer may appeal a denial of such a determination in accordance with procedures contained in § 655.61.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO by electronic mail or other appropriate means and must be accompanied by a signed statement confirming the employer's assertion. In addition, unless the employer has provided to the CO notification of abandonment or termination of employment as required by § 655.20(y), the employer's signed statement must include the name and contact information of each U.S. worker who became unavailable and must supply the reason why the worker has become unavailable.

(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 qualified or who are likely to become available, the CO will grant the employer's request for a new determination. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being qualified because of lawful job-related reasons.

§§ 655.58–655.59 [Added and Reserved]

■ 24. Add and reserve §§ 655.58 through 655.59.

■ 25. Add an undesignated center heading before § 655.60 to read as follows:

Post Certification Activities

■ 26. Revise § 655.60 to read as follows:

§ 655.60 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances. A request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with

documentation showing why 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. The CO will not grant an extension where the total work period under that *Application for Temporary Employment Certification* and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.61. The H-2B employer's assurances and obligations under the temporary labor certification will continue to apply during the extended period of employment. The employer must immediately provide to its workers a copy of any approved extension.

■ 27. In subpart A, add §§ 655.61 through 655.63 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers)

* * * * *

Sec.
655.61 Administrative review.
655.62 Withdrawal of an Application for Temporary Employment Certification.
655.63 Public disclosure.

* * * * *

§ 655.61 Administrative review.

(a) *Request for review.* Where authorized in this subpart, employers may request an administrative review before the BALCA of a determination by the CO. In such cases, the request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 business days from the date of determination;

(2) Must clearly identify the particular determination for which review is sought;

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the CO's determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued.

(b) *Appeal file.* Upon the receipt of a request for review, the CO will, within 7 business days, assemble and submit the Appeal File using means to ensure same day or next day delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and

Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) *Briefing schedule.* Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or next day delivery, a brief in support of the CO's decision.

(d) *Assignment.* The Chief ALJ may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) *Review.* The BALCA must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the CO's determination; or

(2) Reverse or modify the CO's determination; or

(3) Remand to the CO for further action.

(f) *Decision.* The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

§ 655.62 Withdrawal of an Application for Temporary Employment Certification.

Employers may withdraw an *Application for Temporary Employment Certification* after it has been accepted and before it is adjudicated. The employer must request such withdrawal in writing.

§ 655.63 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary nonagricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§ 655.64 [Added and Reserved]

■ 28. Add and reserve § 655.64.

§ 655.65 [Removed and Reserved]

■ 29. Remove and reserve § 655.65.

§§ 655.66–655.69 [Added and Reserved]

■ 30. Add and reserve §§ 655.66 through 655.69.

■ 31. Add an undesignated center heading before § 655.70 to read as follows:

Integrity Measures

■ 32. In subpart A, revise §§ 655.70 through 655.73 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers)

* * * * *

Sec.
655.70 Audits.
655.71 CO-ordered assisted recruitment.
655.72 Revocation.
655.73 Debarment.

* * * * *

§ 655.70 Audits.

The CO may conduct audits of adjudicated temporary labor certification applications.

(a) *Discretion.* The CO has the sole discretion to choose the applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will send an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. 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:

(i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.71 in future filings of H-2B temporary labor certification applications for a period of up to 2 years, or

(ii) In a revocation of the certification and/or debarment from the H-2B program and any other foreign labor certification program administered by the Department.

(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 a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.71 CO-ordered assisted recruitment.

(a) *Requirement of assisted recruitment.* If, as a result of audit or

otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future *Application for Temporary Employment Certification*.

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a temporary labor certification, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.61 apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.41 through 655.47 and may consist of, but is not limited to, one or more of the following:

(1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the *Application for Temporary Employment Certification*;

(2) Designating the sources where the employer must recruit for U.S. workers, including newspapers and other publications, and directing the employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisement and/or job order;

(4) Requiring the employer to notify the CO and the SWA in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO, in addition to providing a copy of the job order;

(7) Requiring the employer to provide proof of all SWA referrals made in response to the job order;

(8) Requiring the employer to submit any proof of contact with all referrals and past U.S. workers; and/or

(9) Requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) *Failure to comply.* If an employer materially fails to comply with requirements ordered by the CO under

this section, the certification will be denied and the employer and/or its attorney or agent may be debarred under § 655.73.

§ 655.72 Revocation.

(a) *Basis for DOL revocation.* The Administrator, OFLC may revoke a temporary labor certification approved under this subpart, if the Administrator, OFLC finds:

(1) The issuance of the temporary labor certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in § 655.73(d);

(2) The employer substantially failed to comply with any of the terms or conditions of the approved temporary labor certification. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.73(d) and (e);

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (under § 655.73), or law enforcement function under 29 CFR part 503 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 with the respect to the H-2B program.

(b) *DOL procedures for revocation.*

(1) *Notice of Revocation.* If the Administrator, OFLC makes a determination to revoke an employer's temporary labor certification, the Administrator, OFLC will send to the employer (and its attorney or agent, if applicable) a Notice of Revocation. The notice will contain a detailed statement of the grounds for the revocation and 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 10 business days from the date the Notice of Revocation is issued, the notice is the final agency action and will take effect immediately at the end of the 10-day period.

(2) *Rebuttal.* If the employer timely submits rebuttal evidence, the Administrator, OFLC will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal according to the procedures of § 655.61. 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 Administrator, OFLC after the review of rebuttal evidence, according to the appeal procedures of § 655.61. 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 labor certification is revoked, the Administrator, OFLC will send a copy of the final agency action to DHS and the Department of State.

(c) *Employer's obligations in the event of revocation.* If an employer's temporary labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other expenses;

(2) The workers' outbound transportation expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

§ 655.73 Debarment.

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under this subpart to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, OFLC finds that the employer committed the following violations:

(1) Willful misrepresentation of a material fact in its *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*;

(2) Substantial failure to meet any of the terms and conditions of its *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the DOS during the visa application process.

(b) *Debarment of an agent or attorney.* If the Administrator, OFLC finds, under this section, that an attorney or agent committed a violation as described in paragraphs (a)(1) through (3) of this section or participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less

than 1 year or more than 5 years from the date of the final agency decision.

(d) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(e) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H-2B Registration, Application for Temporary Employment Certification*, or *H-2B Petition*, the factors that the Administrator, OFLC may consider include, but are not limited to, the following:

- (1) Previous history of violation(s) under the H-2B program;
- (2) The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);
- (3) The gravity of the violation(s);
- (4) 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); and
- (5) Whether U.S. workers have been harmed by the violation.

(f) *Violations.* Where the standards set forth in paragraphs (d) and (e) in this section are met, debarable violations would include but would not be limited to one or more acts of commission or omission which involve:

- (1) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2B workers and/or workers in corresponding employment;
- (2) 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;
- (3) Failure to comply with the employer's obligations to recruit U.S. workers;
- (4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;
- (5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under this subpart or 29 CFR part 503;

(6) Failure to comply with the Notice of Deficiency process under this subpart;

(7) Failure to comply with the assisted recruitment process under this subpart;

(8) Impeding an investigation of an employer under 29 CFR part 503 or an audit under this subpart;

(9) Employing an H-2B 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;

(10) A violation of the requirements of § 655.20(o) or (p);

(11) A violation of any of the provisions listed in § 655.20(r);

(12) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(13) Fraud involving the *H-2B Registration, Application for Temporary Employment Certification* or the *H-2B Petition*; or

(14) A material misrepresentation of fact during the registration or application process.

(g) *Debarment procedure.* (1) Notice of Debarment. If the Administrator, OFLC makes a determination to debar an employer, attorney, or agent, the Administrator, OFLC 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 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 is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an rebuttal evidence or a request for a hearing stays the debarment pending the outcome of the appeal as provided in paragraphs (g)(2)–(6) of this section.

(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 Administrator, OFLC will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the party should be debarred, the Administrator, OFLC will inform the party of its right to request a debarment hearing according to the procedures in this section. The party must request a hearing within 30

calendar days after the date of the Administrator, OFLC's final determination, or the Administrator OFLC's determination will be the final agency order and the debarment will take effect at the end of the 30-day period.

(3) Hearing. The recipient of a Notice of Debarment seeking to challenge the debarment must 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 Administrator, OFLC after review of rebuttal evidence submitted under paragraph (g)(2) of this section. To obtain a debarment hearing, the recipient must, within 30 days of the date of the Notice or the final determination, file a written request with the Chief ALJ, United States Department of Labor, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy on the Administrator, OFLC. 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 timely filed. Within 10 business days of receipt of the request for a hearing, the Administrator, OFLC 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 Administrator, OFLC'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 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 is 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 the 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 the 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.

(h) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to debar under this section or under 29 CFR 503.24. When considering debarment, OFLC and the WHD will 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 and DOS promptly.

(i) *Debarment from other foreign labor programs.* Upon debarment under this subpart or 29 CFR 503.24, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§§ 655.74–655.76, 655.80, and 655.81 [Removed and Reserved]

■ 33. In subpart A, remove and reserve §§ 655.74 through 655.76, 655.80, and 655.81.

§§ 655.82–655.99 [Added and Reserved]

■ 34. In subpart A, add and reserve §§ 655.82 through 655.99.

Title 29—Labor

■ 35. Add part 503 to read as follows:

PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY NONIMMIGRANT NON-AGRICULTURAL WORKERS ADMITTED UNDER SECTION 214(c)(1) OF THE IMMIGRATION AND NATIONALITY ACT

Subpart A—General Provisions

Sec.

- 503.0 Introduction.
- 503.1 Scope and purpose.
- 503.2 Territory of Guam.
- 503.3 Coordination among Governmental agencies.
- 503.4 Definition of terms.
- 503.5 Temporary need.
- 503.6 Waiver of rights prohibited.
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Subpart B—Enforcement

- 503.15 Enforcement.
- 503.16 Assurances and obligations of H–2B employers.
- 503.17 Documentation retention requirements of H–2B employers.
- 503.18 Validity of temporary labor certification.
- 503.19 Violations.
- 503.20 Sanctions and remedies—general.
- 503.21 Concurrent actions.
- 503.22 Representation of the Secretary.
- 503.23 Civil money penalty assessment.
- 503.24 Debarment.
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Subpart C—Administrative Proceedings

- 503.40 Applicability of procedures and rules.

Procedures Related to Hearing

- 503.41 Administrator, WHD's determination.
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- 503.44 General.
- 503.45 Service of pleadings.
- 503.46 Commencement of proceeding.
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- 503.48 Conduct of proceeding.

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- 503.49 Consent findings and order.

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- 503.50 Decision and order of Administrative Law Judge.

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- 503.51 Procedures for initiating and undertaking review.
- 503.52 Responsibility of the Office of Administrative Law Judges (OALJ).
- 503.53 Additional information, if required.
- 503.54 Submission of documents to the Administrative Review Board.
- 503.55 Final decision of the Administrative Review Board.

Record

- 503.56 Retention of official record.

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c) and 8 CFR 214.2(h).

Subpart A—General Provisions

§ 503.0 Introduction.

The regulations in this part cover the enforcement of all statutory and regulatory obligations, including requirements under 8 U.S.C. 1184(c) and 20 CFR part 655, Subpart A, applicable to the employment of H–2B workers admitted under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(ii)(b), 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 A.

§ 503.1 Scope and purpose.

(a) *Statutory standard.* 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H–2B workers. DHS regulations 8 CFR 214.2(h)(6)(iv) provide that a petition to bring nonimmigrant workers on H–2B visas into the U.S. for temporary nonagricultural employment may not be approved by the Secretary of DHS unless the petitioner has applied for and received a temporary labor certification from the U.S. Secretary of Labor (Secretary). The temporary labor certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and 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 foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certifications under 8 U.S.C. 1184(c) has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), which in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an H–2B employer related to the temporary labor certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment, and assuring program integrity. The

regulations pertaining to the issuance, denial, and revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, Subpart A.

(c) *Role of the Wage and Hour Division (WHD).* DHS, effective January 18, 2009, under section 214(c)(14)(B) of the INA, 8 U.S.C. 1184(c)(14)(B), has delegated to the Secretary certain investigatory and law enforcement functions to carry out the provisions under 8 U.S.C. 1184(c). The Secretary has delegated these functions to the WHD. In general, matters concerning the rights of H-2B workers and workers in corresponding employment under this part and the employer's obligations are enforced by the WHD, including whether employment was offered to U.S. workers as required under 20 CFR part 655, Subpart A, or whether U.S. workers were laid off or displaced in violation of program requirements. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certifications, and to seek remedies for violations, including recovery of unpaid wages and reinstatement of improperly laid off or displaced U.S. workers.

(d) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, and the regulations in this part apply to the employment of any H-2B worker and any worker in corresponding employment as the result of an *Application for Temporary Employment Certification* filed with the Department on or after April 23, 2012.

§ 503.2 Territory of Guam.

This part does not apply to temporary employment in the Territory of Guam. The Department does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H-2B visas, or enforce compliance with the provisions of the H-2B visa program in the Territory of Guam. Under DHS regulations, 8 CFR 214.2(h)(6)(v), administration of the H-2B temporary labor certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

§ 503.3 Coordination among Governmental agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA)

regarding noncompliance with H-2B statutory or regulatory labor standards will be immediately forwarded to the appropriate WHD office for suitable action under the regulations in this part.

(b) Information received in the course of processing registrations and applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H-2B program, may be forwarded to other agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is sought will be cited in a single debarment proceeding. OFLC and the WHD will coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

§ 503.4 Definition of terms.

For purposes of this part:

Act means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

Administrator, Wage and Hour Division (WHD) means the primary official of the WHD, or the Administrator's designee.

Agent. (1) *Agent* means a legal entity or person who:

(i) Is authorized to act on behalf of an employer for temporary nonagricultural 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 an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted 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.

Agricultural labor or services means those duties and occupations defined in 20 CFR 655.100.

Applicant means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (ETA Form 9142 and the appropriate appendices).

Application for Temporary Employment Certification means the

Office of Management and Budget (OMB)-approved ETA Form 9142 and the appropriate appendices, a valid wage determination, as required by 20 CFR 655.10, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary labor certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted 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 (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H-2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under 20 CFR part 655, Subpart A.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Corresponding employment. (1) *Corresponding employment* means the employment of workers who are not H-2B workers by an employer that has a certified H-2B *Application for Temporary Employment Certification*

when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, except that workers in the following two categories are not included in corresponding employment:

(i) Incumbent employees continuously employed by the H-2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H-2B workers during the 52 weeks prior to the period of employment certified on the *Application for Temporary Employment Certification* and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer's payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or

(ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H-2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause.

(2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H-2B workers as listed on the application.

Department of Homeland Security (DHS) means the Federal Department having jurisdiction over certain immigration-related functions, acting through its agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. 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. The terms "employee" and "worker" are used interchangeably in this part.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

Employment and Training Administration (ETA) means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Full-time means 35 or more hours of work per week.

H-2B Petition means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2B nonimmigrant workers. The *H-2B Petition* includes the approved *Application for Temporary Employment Certification* and the Final Determination letter.

H-2B Registration means the OMB-approved ETA Form 9155, submitted by an employer to register its intent to hire H-2B workers and to file an *Application for Temporary Employment Certification*.

H-2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a

temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Job offer means the offer made by an employer or potential employer of H-2B workers to both U.S. and H-2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 29 CFR part 655, Subpart A and this subpart that is posted between and among the SWAs on their job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

Layoff means any involuntary separation of one or more U.S. employees without cause.

Metropolitan Statistical Area (MSA) means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications.

Non-agricultural labor and services means any labor or services not

considered to be agricultural labor or services as defined in 20 CFR part 655, Subpart B. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Offered wage means the wage offered by an employer in an H-2B job order. The offered wage must equal or exceed the highest of the prevailing wage or Federal, State or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in 20 CFR 655.12, which is the subject of the *Application for Temporary Employment Certification*.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the U.S. DHS or the Secretary of DHS's designee.

State Workforce Agency (SWA) means a State government agency that receives funds under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest. (1) *Successor in interest* means where an employer has violated 20 CFR part 655, Subpart A or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

- (i) Substantial continuity of the same business operations;
- (ii) Use of the same facilities;
- (iii) Continuity of the work force;
- (iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(vii) Similarity in machinery, equipment, and production methods;

(viii) Similarity of products and services; and

(ix) The ability of the predecessor to provide relief.

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

United States (U.S.) means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States Citizenship and Immigration Services (USCIS) means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H-2B workers to perform temporary nonagricultural work in the U.S.

United States worker (U.S. worker) means a worker who is:

- (1) A citizen or national of the U.S.;
- (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD) means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

Wages mean all forms of cash remuneration to a worker by an employer in payment for personal services.

§ 503.5 Temporary need.

(a) An employer seeking certification under 20 CFR part 655, Subpart A must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A).

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an

intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B).

§ 503.6 Waiver of rights prohibited.

A person may not seek to have an H-2B worker, a worker in corresponding employment, or any other person, including but not limited to a U.S. worker improperly rejected for employment or improperly laid off or displaced, waive or modify any rights conferred under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part. Any agreement by an employee purporting to waive or modify any rights given to said person under these provisions will be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary will be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

§ 503.7 Investigation authority of Secretary.

(a) *Authority of the Administrator, WHD.* The Secretary of Homeland Security has delegated to the Secretary, under 8 U.S.C. 1184(c)(14)(B), authority to perform investigative and enforcement functions. The Administrator, WHD will perform all such functions.

(b) *Conduct of investigations.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part, either under a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, worksite, vehicles, structure, facility, place and records (and make transcriptions, photographs, scans, videos, photocopies, or use any other means to record the content of the records or preserve images of places or objects), question any person, or gather any information, in whatever form, as may be appropriate.

(c) *Confidential investigation.* The WHD will conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part to the Secretary by advising any local office of the SWA, ETA, WHD or any other authorized representative of the Secretary. The office or person

receiving such a report will refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 503.8 Accuracy of information, statements, data.

Information, statements, and data submitted in compliance with 8 U.S.C. 1184(c) or the regulations in this part are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S., knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, will be fined not more than \$250,000 or imprisoned not more than 5 years, or both.

Subpart B—Enforcement

§ 503.15 Enforcement.

The investigation, inspection, and law enforcement functions that carry out the provisions of 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part pertain to the employment of any H-2B worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced.

§ 503.16 Assurances and obligations of H-2B employers.

An employer employing H-2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions with respect to its H-2B workers and any workers in corresponding employment:

(a) *Rate of pay.* (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and the employer must demonstrate that they are normal and usual for non-H-2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece rate is no less than the normal rate paid by non-H-2B employers to workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." 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.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay; any such deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those required by law, such as taxes payable by workers that are required to be

withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter, including any agents or workers, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification*.

(d) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, consistent with § 503.4, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

(f) *Three-fourths guarantee.* (1) 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 in each 12-week

period (each 6-week period if the period of employment covered by the job order is less than 120 days) beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any. See the exception in paragraph (y) of this section.

(2) For purposes of this paragraph (f) a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date 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 job order and all extensions thereof are in effect.

(4) The 12-week periods to which the guarantee applies (6-week periods if the period of employment covered by the job order is less than 120 days) to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 12-week period (or 6-week period, as appropriate) also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 12 weeks and 6 days (or 6 weeks and 6 days, as appropriate)). The final 12-week period (or 6-week period, as appropriate) includes any time remaining after the last full 12-week period (or 6-week period) ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 32-week period (a period greater than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 315 hours ($12 \text{ weeks} \times 35 \text{ hours/week} = 420 \text{ hours} \times 75 \text{ percent} = 315$) in the first 12-week period, at least 315 hours in the second 12-week period, and at least 210 hours

($8 \text{ weeks} \times 35 \text{ hours/week} = 280 \text{ hours} \times 75 \text{ percent} = 210$) in the final partial period. If the job order is for a 16-week period (less than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 157.5 hours ($6 \text{ weeks} \times 35 \text{ hours/week} = 210 \text{ hours} \times 75 \text{ percent} = 157.5$) in the first 6-week period, at least 157.5 hours in the second 6-week period, and at least 105 hours ($4 \text{ weeks} \times 35 \text{ hours/week} = 140 \text{ hours} \times 75 \text{ percent} = 105$) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee.

(7) 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. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 12-week period (6-week period if the period of employment covered by the job order is less than 120 days) during the period of the job order the employer affords the U.S. or H-2B worker less employment than that required under paragraph (f)(1) of this section, 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 has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in an 12-week period (or 6-week period, as appropriate) if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) 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 (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 12-week period (or 6-week period, as appropriate) of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, 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 or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H-2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: records showing the nature, amount, and location(s) 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 in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

(vi) If piece rates are used, the units produced daily;

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address and FEIN.

(j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the job order (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in 20 CFR 655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: the costs of transportation and subsistence incurred

by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the Fair Labor Standards Act (FLSA) applies independently of the H-2B requirements and imposes obligations on employers regarding payment of wages.

(ii) Transportation from the place of employment. If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return 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 that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State, and local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) Disclosure. All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H-2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

(k) *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.

(l) *Disclosure of job order.* The employer must provide to an H-2B worker outside of the U.S. no later than

the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent approved modifications. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H-2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language common to a significant portion of the workers if they are not fluent in English.

(n) *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, discharge, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H-2B labor certification or employment, including payment of the employer's attorney or agent fees, application and H-2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved *Application for Temporary Employment Certification*. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2B workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: "Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent 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, attorneys' fees, agent fees, application fees, or petition fees."

(q) *Prohibition against preferential treatment of foreign 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-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and

through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be 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 hired workers and rejected applicants as required by § 503.17.

(s) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in 20 CFR 655.40 through 655.46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all qualified U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified U.S. worker who applies to the employer for the job opportunity, until 21 days before the date of need.

(u) *No strike or lockout.* There is no strike or lockout at any of the employer's worksites within the area of intended employment for which the employer is requesting H-2B certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H-2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer will contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite), employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job.

(x) *Area of intended employment and job opportunity.* The employer must not place any H-2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification*.

(y) *Abandonment/termination of employment.* Upon the separation from employment of worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification*, the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of such separation of an H-2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H-2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, 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 (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 12-week period (or 6-week period, as appropriate) preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment specified on the *Application for Temporary Employment Certification*, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), neither the employer nor the

employer's agents or attorneys may hold or confiscate workers' passports, visas, or other immigration documents.

(aa) *Disclosure of foreign worker recruitment.* The employer, and its attorney or agent, as applicable, must comply with 20 CFR 655.9 by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers, and the identity and location of the persons or entities hired by or working for the agent or recruiter, and any of the agents or employees of those persons and entities, to recruit foreign workers. Pursuant to 20 CFR 655.15(a), the agreements and information must be filed with the *Application for Temporary Employment Certification*.

(bb) *Cooperation with investigators.* The employer must cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's authority pursuant to 8 U.S.C. 1184(c).

§ 503.17 Document retention requirements of H-2B employers.

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H-2B workers are required to retain the documents and records proving compliance with 20 CFR part 655, Subpart A and this part, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention.* The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of adjudication if the *Application for Temporary Employment Certification* is denied or 3 years from the day the Department receives the letter of withdrawal provided in accordance with 20 CFR 655.62.

(c) *Documents and records to be retained by all employer applicants.* All employers filing an *H-2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in 20 CFR 655.16;

(ii) Advertising as specified in 20 CFR 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in 20 CFR 655.43;

(iv) Contact with bargaining representative(s), copy of the posting of the job opportunity, and contact with community-based organizations, if applicable, as specified in 20 CFR 655.45(a), (b) and (c); and

(v) Additional employer-conducted recruitment efforts as specified in 20 CFR 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with 20 CFR 655.48, such as evidence of nonapplicability of contact with former workers as specified in 20 CFR 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in 20 CFR 655.48;

(5) Records of each worker's earnings, hours offered and worked, and other information as specified in § 503.16(i);

(6) If appropriate, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 503.16(j).

(7) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification*, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 503.16(r);

(8) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment in the *Application for Temporary Employment Certification*, including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment Certification*, as specified in § 503.16(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 503.16(r);

(9) The written contracts with agents or recruiters, as specified in 20 CFR 655.8 and 655.9, and the list of the identities and locations of persons hired by or working for the agent or recruiter and these entities' agents or employees, as specified in 20 CFR 655.9;

(10) Written notice provided to and informing OFLC that an H-2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification*, as specified in § 503.16(y);

(11) The *H-2B Registration*, job order, and the *Application for Temporary Employment Certification*;

(12) The approved *H-2B Petition*, including all accompanying documents; and

(13) Any collective bargaining agreement(s), individual employment contract(s), or payroll records from the previous year necessary to substantiate any claim that certain incumbent workers are not included in corresponding employment, as specified in § 503.4.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 20 CFR part 655, Subpart A and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

§ 503.18 Validity of temporary labor certification.

(a) *Validity period.* A temporary labor certification is valid only for the period of time between the beginning and ending dates of employment, as approved on the *Application for Temporary Employment Certification*. The certification expires on the last day of authorized employment.

(b) *Scope of validity.* A temporary labor certification is valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification*. The temporary labor certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 503.19 Violations.

(a) *Types of violations.* Pursuant to the statutory provisions governing enforcement of the H-2B program, 8 U.S.C. 1184(c)(14)(A), a violation exists under this part where the Administrator, WHD, through investigation, determines that there has been a:

(1) Willful misrepresentation of a material fact on the *H-2B Registration*, *Application for Temporary Employment Certification*, or *H-2B Petition*;

(2) Substantial failure to meet any of the terms and conditions of the *H-2B Registration*, *Application for Temporary Employment Certification*, or *H-2B Petition*. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the Department of State during the visa application process.

(b) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(c) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H-2B Registration, Application for Temporary Employment Certification*, or *H-2B Petition*, the factors that the Administrator, WHD may consider include, but are not limited to, the following:

- (1) Previous history of violation(s) under the H-2B program;
- (2) The number of H-2B 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) 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); and
- (5) Whether U.S. workers have been harmed by the violation.

(d) *Employer acceptance of obligations.* The provisions of this part become applicable upon the date that the employer's *Application for Temporary Employment Certification* is accepted. The employer's submission of and signature on the approved *H-2B Registration*, Appendix B of the *Application for Temporary Employment Certification*, and *H-2B Petition* constitute the employer's representation that the statements on the forms are accurate and that it knows and accepts the obligations of the program.

§ 503.20 Sanctions and remedies—general.

Whenever the Administrator, WHD determines that there has been a violation(s), as described in § 503.19, such action will be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Institute administrative proceedings, including for: The recovery of unpaid wages (including recovery of prohibited recruitment fees paid or impermissible deductions from pay, and recovery of wages due for improperly placing workers in areas of employment

or in occupations other than those identified on the *Application for Temporary Employment Certification* and for which a prevailing wage was not obtained); the enforcement of provisions of the job order, 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced; or debarment for no less than 1 or no more than 5 years.

(b) The remedies referenced in paragraph (a) of this section will be sought either directly from the employer, or from its successor in interest, or from the employer's agent or attorney, as appropriate.

§ 503.21 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 503.1(b) and in 20 CFR part 655, Subpart A. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 503.1(c). The taking of any one of the actions referred to above will not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.73 or under § 503.24.

§ 503.22 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, will represent the Administrator, WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and the regulations in this part.

§ 503.23 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation that meets the standards described in § 503.19. Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the *H-2B Registration, Application for Temporary Employment Certification*, or *H-2B Petition*, constitutes a separate violation. Civil money penalty amounts for such violations are determined as set forth in paragraphs (b) to (e) of this section.

(b) Upon determining that an employer has violated any provisions of § 503.16 related to wages, impermissible deductions or prohibited fees and

expenses, the Administrator, WHD may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s), not to exceed \$10,000 per violation.

(c) Upon determining that an employer has terminated by layoff or otherwise or has refused to employ any worker in violation of § 503.16(r), (t), or (v), within the periods described in those sections, the Administrator, WHD may assess civil money penalties that are equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed \$10,000 per violation. No civil money penalty will be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(d) The Administrator, WHD may assess civil money penalties in an amount not to exceed \$10,000 per violation for any other violation that meets the standards described in § 503.19.

(e) In determining the amount of the civil money penalty to be assessed under paragraph (d) of this section, the Administrator, WHD will consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties will be reserved for willful failures to meet any of the conditions of the *Application for Temporary Employment Certification* and *H-2B Petition* that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part;

(2) The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants 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. 1184(c), 20 CFR part 655, Subpart A, and the regulations in this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

§ 503.24 Debarment.

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under 20 CFR part 655, Subpart A to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, WHD finds that the employer committed a violation that meets the standards of § 503.19. Where these standards are met, debarable violations would include but not be limited to one or more acts of commission or omission which involve:

(1) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H-2B workers and/or workers in corresponding employment;

(2) 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;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under 20 CFR part 655, Subpart A or this part;

(6) Impeding an investigation of an employer under this part;

(7) Employing an H-2B 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;

(8) A violation of the requirements of § 503.16(o) or (p);

(9) A violation of any of the provisions listed in § 503.16(r);

(10) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(11) Fraud involving the *H-2B Registration, Application for Temporary Employment Certification*, or *H-2B Petition*; or

(12) A material misrepresentation of fact during the registration or application process.

(b) *Debarment of an agent or attorney.* If the Administrator, WHD finds, under this section, that an agent or attorney committed a violation as described in paragraph (a) of this section or participated in an employer's violation,

the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) *Debarment procedure.* If the Administrator, WHD makes a determination to debar an employer, attorney, or agent, the Administrator, WHD 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 inform the party subject to the notice of its right to request a debarment hearing and the timeframe under which such rights must be exercised under § 503.43. If the party does not request a hearing within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 503.43(e).

(e) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction debar under 20 CFR 655.73 or under this part. When considering debarment, OFLC and the WHD will 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 and DOS promptly.

(f) *Debarment from other labor certification programs.* Upon debarment under this part or 20 CFR 655.73, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§ 503.25 Failure to cooperate with investigators.

(a) No person will interfere or refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's investigative or enforcement authority under 8 U.S.C. 1184(c). 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.

(b) Where an employer (or employer's agent or attorney) interferes or does not cooperate with an investigation

concerning the employment of an H-2B worker or 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-2B workers giving rise to the investigation. In addition, WHD may take such action as appropriate where the failure to cooperate meets the standards in § 503.19, including initiating proceedings for the debarment of the employer from future certification for up to 5 years, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action will not bar the taking of any additional action.

§ 503.26 Civil money penalties—payment and collection.

Where a civil money penalty is assessed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty must be received by the Administrator, WHD within 30 calendar days of the date of the final order. The person assessed the penalty will remit the amount ordered to the Administrator, WHD by certified check or by money order, made payable to the Wage and Hour Division, United States Department of Labor. The remittance will be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings**§ 503.40 Applicability of procedures and rules.**

The procedures and rules contained in this subpart prescribe the administrative appeal process that will be applied with respect to a determination to assess civil money penalties, to debar, to enforce provisions of the job order or obligations under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part, or to the collection of monetary relief due as a result of any violation.

Procedures Related to Hearing**§ 503.41 Administrator, WHD's determination.**

(a) Whenever the Administrator, WHD decides to assess a civil money penalty, to debar, or to impose other appropriate administrative remedies, including for the recovery of monetary relief, the party against which such action is taken

will be notified in writing of such determination.

(b) The Administrator, WHD's determination will be served on the party by personal service or by certified mail at the party's last known address. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

§ 503.42 Contents of notice of determination.

The notice of determination required by § 503.41 will:

(a) Set forth the determination of the Administrator, WHD, including:

(1) The amount of any monetary relief due; or

(2) Other appropriate administrative remedies; or

(3) The amount of any civil money penalty assessment; or

(4) Whether debarment is sought and the term; and

(5) The reason or reasons for such determination.

(b) Set forth the right to request a hearing on such determination;

(c) Inform the recipient(s) of the notice that in the absence of a timely request for a hearing, received by the Chief ALJ within 30 calendar days of the date of the determination, the determination of the Administrator, WHD will become final and not appealable;

(d) Set forth the time and method for requesting a hearing, and the related procedures for doing so, as set forth in § 503.43, and give the addresses of the Chief ALJ (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served); and

(e) Where appropriate, inform the recipient(s) of the notice that the Administrator, WHD will notify OFLC and DHS of the occurrence of a violation by the employer.

§ 503.43 Request for hearing.

(a) Any party desiring review of a determination issued under § 503.41, including judicial review, must make a request for such an administrative hearing in writing to the Chief ALJ at the address stated in the notice of determination. In such a proceeding, the Administrator will be the plaintiff, and the party will be the respondent. If such a request for an administrative hearing is timely filed, the Administrator, WHD's determination will be inoperative unless and until the case is dismissed or the ALJ issues an order affirming the decision.

(b) No particular form is prescribed for any request for hearing permitted by

this section. However, any such request will:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party believes such determination is in error;

(5) Be signed by the party making the request or by the agent or attorney of such party; and

(6) Include the address at which such party or agent or attorney desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief ALJ, at the address stated in the Administrator, WHD's notice of determination, no later than 30 calendar days after the date of the determination. A party which fails to meet this 30-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the ALJ.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service within the time set forth in paragraph (c) of this section. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the party or its attorney or agent, must be filed within 25 days.

(e) The determination will 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.

(f) Copies of the request for a hearing will be sent by the party or attorney or agent to the WHD official who issued the notice of determination on behalf of the Administrator, WHD, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

Rules of Practice

§ 503.44 General.

(a) Except as specifically provided in the regulations in this part and to the extent they do not conflict with the provisions of 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 will 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 will guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 503.45 Service of pleadings.

(a) Under this part, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the ALJ may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any ALJ proceeding must be served on the attorneys for the Administrator, WHD. One copy must be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-2716, Washington, DC 20210, and one copy must be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following service and includes the last day of the period unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

§ 503.46 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1184(c)(14) and the regulations in this part will be commenced upon receipt of a timely request for hearing filed in accordance with § 503.43.

§ 503.47 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1184(c)(14) and the regulations in this part will be captioned in the name of the person requesting such hearing, and will be styled as follows:

In the Matter of ____, Respondent.

(b) For the purposes of such administrative proceedings the Administrator, WHD will be identified as plaintiff and the person requesting such hearing will be named as respondent.

§ 503.48 Conduct of proceeding.

(a) Upon receipt of a timely request for a hearing filed under and in accordance with § 503.43, the Chief ALJ will promptly appoint an ALJ to hear the case.

(b) The ALJ will notify all parties of the date, time and place of the hearing. Parties will be given at least 30 calendar days notice of such hearing.

(c) The ALJ may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement must be served upon each other party. Post-hearing briefs will not be permitted except at the request of the ALJ. When permitted, any such brief must be limited to the issue or issues specified by the ALJ, will be due within the time prescribed by the ALJ, and must be served on each other party.

Procedures Before Administrative Law Judge**§ 503.49 Consent findings and order.**

(a) *General.* At any time after the commencement of a proceeding under this part, but before 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 will 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 will also provide:

(1) That the order will 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 will 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 attorney or agent 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 therefore, the ALJ, within 30 days thereafter, will, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures**§ 503.50 Decision and order of Administrative Law Judge.**

(a) The ALJ will prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator, WHD.

(b) The decision of the ALJ will include a statement of the findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision will also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD. The reason or reasons for such order will be stated in the decision.

(c) In the event that the Administrator, WHD assesses back wages for wage violation(s) of § 503.16 based upon a PWD obtained by the Administrator from OFLC during the investigation and the ALJ determines that the Administrator's request was not warranted, the ALJ will remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the ALJ, the ALJ will accept as final and accurate the wage determination obtained from OFLC or, in the event the party filed a timely appeal under 20 CFR 655.13 the final wage determination resulting from that process. Under no circumstances will the ALJ determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The decision will be served on all parties.

(e) The decision concerning civil money penalties, debarment, monetary relief, and/or other administrative remedies, when served by the ALJ will constitute the final agency order unless the ARB, as provided for in § 503.51, determines to review the decision.

Review of Administrative Law Judge's Decision**§ 503.51 Procedures for initiating and undertaking review.**

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ will, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition will be served on all parties and on the ALJ.

(b) No particular form is prescribed for any petition for the ARB's review permitted by this part. However, any such petition will:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the ALJ decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Include as an attachment the ALJ's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

(c) If the ARB does not issue a notice accepting a petition for review of the decision within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(d) 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 will be served upon the ALJ and upon all parties to the proceeding.

§ 503.52 Responsibility of the Office of Administrative Law Judges (OALJ).

Upon receipt of the ARB's notice under § 503.51, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

§ 503.53 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify the parties of:

(a) The issue or issues raised;

(b) The form in which submissions will be made (*i.e.*, briefs, oral argument); and

(c) The time within which such presentation will be submitted.

§ 503.54 Submission of documents to the Administrative Review Board.

All documents submitted to the ARB will be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue NW., Room S-5220, Washington, DC 20210. An original and two copies of all documents must be filed. Documents are not deemed filed with the ARB until actually received by the ARB. All documents, including documents filed by mail, must be received by the ARB either on or before the due date. Copies of all documents filed with the ARB

must be served upon all other parties involved in the proceeding.

§ 503.55 Final decision of the Administrative Review Board.

The ARB's final decision will be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

Record**§ 503.56 Retention of official record.**

The official record of every completed administrative hearing provided by the regulations in this part will 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.

Signed in Washington, this 6th day of February 2012.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

Nancy Leppink,

Deputy Administrator, Wage and Hour Division.

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