Sunshine Act Meetings

Federal Register
Vol. 52, No. 104
Monday, June 1, 1987

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., June 9, 1987.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED: Discussion of Off-Exchange Issues.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12481 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., June 9, 1987.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Judicial Session.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12482 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., June 23, 1987.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Application of the MidAmerica Commodity Exchange for designation as a contract market in Australian Dollar Futures.

Application of the Coffee Sugar Cocoa Exchange for designation as a contract market in Inflation Rate options.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12483 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., June 23, 1987.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb. 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12484 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., June 30, 1987.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED: Part 9, Commission review of Exchange Disciplinary, Access Denial and other Adverse Action, final rules.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12485 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., June 30, 1987.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 87–12486 Filed 5–28–87; 2:59 pm]
BILLING CODE 6351–01–M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

TIME AND DATE: 2:00 PM (Eastern Time) Monday, June 9, 1987.

PLACE: Clarence M. Mitchell, Jr., Conference Room No. 200–C on the 2nd Floor of the Columbia Plaza Office Building, 2401 "E" Street, NW., Washington, DC 20507.

STATUS: Part will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

Open

1. Announcement of Notation Vote(s).
2. Report on Commission Operations (Optional).
3. Proposed FY 1988 Qualification Criteria for the Tribal Employment Rights Office Program.
4. Proposed FY 1988 Funding Principles for State and Local Fair Employment Practices Agencies.
5. Proposed Federal Sector Complaint Processing Manual.
6. Proposed Annual Report on the Employment of Minorities, Women and Individuals with Handicaps in the Federal Government for Fiscal Year 1985.
7. Proposed Annual Report on the Coordination of Federal Equal Employment Opportunity Programs for Fiscal Year 1986.

Closed

Litigation Authorization; General Counsel Recommendations.

Note.—Any mater not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.)

Please telephone (202) 634–6748 at all times for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Cynthia C. Matthews, Executive Officer at (202) 634–6748.

Dated: May 28, 1987.

Cynthia C. Matthews,
Executive Officer, Executive Secretariat.

[FR Doc. 87–12494 Filed 5–28–87 3:39 pm]
BILLING CODE 6750–05–M

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of June 1, 1987:

A closed meeting will be held on Tuesday, June 2, 1987, at 2:30 p.m.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has cretified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10),

permit consideration of the scheduled matters at a closed meeting.

Commissioner Fleischman, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, June 2, 1987, at 2:30 p.m., will be:

Formal orders of investigation.
Institution of administrative proceedings of an enforcement nature.
Settlement of administrative proceedings of an enforcement nature.
To amend injunctive action.
Institution of injunctive actions.
Settlement of injunctive action.
Regulatory matter regarding financial Opinion.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Brent Taylor at (202) 272–2014.

Jonathan G. Katz,

Secretary.

May 27, 1987.

[FR Doc. 87–12459 Filed 5–28–87; 11:51 am]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 52, No. 104
Monday, June 1, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 700

[OPTS-260002; FRL 3157-2]

Proposed Fees for Processing Premanufacture Notices, Exemption Applications and Notices, and Significant New Use Notices

Correction

In proposed rule document 87-8780 beginning on page 12940 in the issue of Monday, April 20, 1987, make the following corrections:

1. On page 12942, in the third column, in the third complete paragraph, in the 2nd line "section"was misspelled. Also in the 11th line "$400 million" should read "$40 million".

S 700.49 [Corrected]

2.On page 12944, in S 700.49, in the third column, in the fourth line the section reference "S 700.45(d)" should read "S 700.45(b)".Q03

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council Meeting

Correction

In notice document 87-11591 beginning on page 19203 in the issue of Thursday, May 21, 1987, make the following correction:

On page 19203, in the second column, in the 24th line, "June 19" should read "June 29".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

Records and Testimony; Freedom of Information Act

Correction

In proposed rule document 87-10788 beginning on page 17780 in the issue of Tuesday, May 12, 1987, make the following corrections:

§ 2.16 [Corrected]

1. On page 17783, in the third column, in § 2.16(c)(2)(iii), in the fourth line, insert "a" after "and".

§ 2.17 [Corrected]

2. In the same column, in § 2.17(a), in the fourth line, "one" should read "no".

§ 2.20 [Corrected]

3. On page 17785, in § 2.20(f), in the third column, in the 10th line, "217" should read "2.17".

BILLING CODE 1505-01-D

Federal Register

Monday
June 1, 1987

Part II

Department of Labor

Employment and Training Administration
Wage and Hour Division

20 CFR Parts 654 and 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States; Interim Final Rule; Request for Comments

29 CFR Part 501

Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act; Interim Final Rule; Request for Comments

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 654 and 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States

AGENCY: Employment and Training Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) is amending its regulations for the certification of nonimmigrant aliens for temporary employment in agriculture and logging in the United States. These amendments will conform the regulations to the requirements of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA). The amendments incorporate the provisions specified by the statute into the present regulatory framework, and make other procedural and technical changes deemed necessary to efficiently carry out the Secretary of Labor's responsibilities under the INA.

DATES:

Effective date: The interim final rule is effective on June 1, 1987. Applications for temporary alien agricultural labor certification filed on or after that date will be processed pursuant to the interim final rule.

Comments: The comment period in this rulemaking is being reopened through July 31, 1987. Comments on the May 5, 1987, proposed rule (52 FR 16770) will be considered as part of this rulemaking. Comments on the interim final rule must be submitted by mail and be received on or before July 31, 1987.

ADDRESS: *Send written comments to:* Assistant Secretary of Labor, Employment and Training Administration, Room N4456, 200 Constitution Avenue, NW., Washington, DC 20210; Attention: Director, U.S. Employment Service.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas M. Bruening, Telephone (202) 535-0163.

SUPPLEMENTARY INFORMATION:

I. History of This Rulemaking

On May 5, 1987, there was published in the **Federal Register** a proposed rule to implement the Department of Labor's responsibilities under the temporary alien agricultural labor certification program, as set out at sections 101(a)(15)(H)(ii)(a), 214(c), and 216 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (IRCA), 100 Stat. 3359. 52 FR 16770. Under that program job opportunities are certified for nonimmigrant alien workers ("H-2A" workers) to perform agricultural labor or services of a temporary or seasonal nature in the United States. Written comments on the proposed rule were invited through May 19, 1987.

The H-2A-related amendments to INA made by IRCA apply to petitions and applications filed under INA sections 214(c) and 216 on or after the effective date of June 1, 1987. IRCA section 301(d), 8 U.S.C. 1186 note. Section 301(e) of IRCA requires that "[n]otwithstanding any other provision of law, final regulations to implement . . . [sections 101(a)(15)(H)(ii)(a) and 216 of the Immigration and Nationality Act] shall first be issued, on an interim or other basis, not later than the effective date." 8 U.S.C. 1186 note.

To the extent feasible, given the constraints of time and the statutory mandate to issue final regulations by June 1, 1987, the comments received on the proposed rule have been considered and some changes have been made in this interim final rule. When changes have been made, other than minor technical or typographical changes, they are discussed in this preamble.

While the comments received during the comment period on the proposed rule continue to be considered, the Department of Labor is publishing this final rule on an interim basis. The comment period is being reopened through July 31, 1987, with comments invited on the interim final rule. A final rule will be published at a later date. The preamble to that final rule will discuss the comments received on the proposed rule and the interim final rule, and, where appropriate, the interim final rule will be amended.

II. Statutory and Regulatory Background

Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). The Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*), as amended by the Immigration Reform and Control Act of 1986 (IRCA) (Pub. L. 99-603), provides that the Attorney General may not approve such a petition from an employer for employment of nonimmigrant H-2A alien workers in agriculture unless the petitioner has applied to the Secretary of Labor (Secretary) for a labor certification showing that: (1) There are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The amendments to the INA made by IRCA codify DOL's role in the temporary alien agricultural labor certification process. Prior to 1987, many of the responsibilities of the Department of Labor (DOL) specified in IRCA were carried out under the requirement in the INA at 8 U.S.C. 1184(c) that the Attorney General consult with appropriate agencies of the Government concerning the importation of nonimmigrant workers, and under INS regulations governing the reliance placed by INS on the advice of DOL relative to U.S. worker availability and adverse effect. See 8 CFR 214.2(h)(3)(i) (1986). Pursuant to INS regulations, DOL promulgated regulations at 20 CFR Part 655, Subpart C, for the certification of temporary employment of nonimmigrant aliens in agriculture and logging in the United States. The amendments in this document contain changes to the labor certification process as mandated by IRCA and revise certain current procedures deemed necessary by DOL to carry out its statutory responsibilities. DOL's regulations governing the H-2A program apply to all employer applications submitted on or after June 1, 1987. Applications for temporary alien agricultural labor certification submitted before June 1, 1987, are governed by the H-2 regulations in 20 CFR Part 655, Subpart C (1986). (The INS, through its regulations at 8 CFR Part 214, will continue to be responsible for the final approval of petitions for the admission of nonimmigrant aliens, including H-2A workers.)

III. Contents of Regulations

Following is a section-by-section summary of the primary components of the regulations in this new Subpart B of 20 CFR Part 655. Major differences between the H-2 agricultural regulations and the H-2A interim final regulations are identified and discussed. The interim final H-2A regulations are arranged as follows: Sections 655.0-655.000 describes broadly the concepts behind the temporary alien labor certification programs; Subpart A

continues to provide regulations for occupations other than agriculture and logging; Subpart B covers H–2A agricultural work; and Subpart C continues to cover non–H–2A temporary agricultural work and logging.

A. Sections 655.0–655.000 and 655.91–655.93: Statutory and Regulatory Background

These sections describe the statutory and regulatory standards behind the H–2 and the H–2A regulations; the construction given by DOL to the factors impacting upon the Secretary's responsibilities and determinations; and the delegation of authority for program operation to certain officials. A provision in the H–2A program allows DOL to have some flexibility in permitting exceptions to general procedures in the certification process to recognize unique circumstances and characteristics for some agricultural employer/worker situations. DOL has determined this is needed based on past experiences with such occupations as sheepherding and custom combine occupations and available information which indicates that flexibility will be needed to efficiently handle the applications of employers who may be seeking H–2A certification as the result of IRCA. To avoid unnecessary delay and to provide greater flexibility in making such determinations, the consultation process for establishment of special procedures has been made nonmandatory. Based on the similarity of occupations, the interim final rule has been changed to clarify DOL's intent that the special procedures in place for sheepherding may be applied by DOL to occupations in the range production of other livestock.

B. Section 655.100: General Description of Subpart and Definitions of Terms

In this section, a general description of Subpart B is provided along with definitions for terms used in the subpart. In this interim final rule, the definition of "United States worker" has been changed from the proposed rule to delete the separate reference to special agricultural workers (SAWs) as provided for under sections 210 and 210A of the INA, as amended by IRCA. 8 U.S.C. 1161 and 1162; see H.R. Conf. Rep. No. 99–1000, 99th Cong., 2d Sess. 97 (1986). The remaining language is broad enough to include SAWs as U.S. workers, making a separate reference unnecessary.

Further, consistent with section § 274a.11 of the INS regulations (8 CFR 274a.11), an individual who claims to be eligible, and who intends to apply or has applied, for benefits pursuant to section 245A or 210 of the INA or section 202 of IRCA, and who attests to that fact on INS Form I–9 and provides the documentation of identity required by 8 CFR 274a.11, is a "U.S. worker" for work contract periods ending no later than September 1, 1987. See 52 FR 16226 (May 1, 1987). These workers are given such limited work authorization by INS as part of the legalization, SAW, and Cuban/Haitian entrant adjustment application programs. *Id.*

To reflect DOL's intent, "eligible worker" is defined in the interim final rule as "U.S. worker".

The definitions also include a new definition for "agricultural labor or services of a temporary or seasonal nature," consistent with the INA. As mandated by the INA, "agricultural labor or services" consists of "agricultural labor" as defined in section 3121(g) of the Internal Revenue Code of 1954 (29 U.S.C. 3121(g)); and "agriculture" as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)).

The phrase "of a temporary or seasonal nature" is defined consistently with the phrase "on a seasonal or other temporary basis", as defined by DOL in the regulations implementing the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). See 29 CFR 500.20. Given the interconnection between the various programs administered by DOL in the area of agricultural labor and services, and the fact that many agricultural employers and workers will have to deal with both the MSPA and H–2A programs in securing a labor force during an agricultural season, it is appropriate to have a single definition, consistent with a coordinated approach toward compliance and enforcement. This will not be a problem for much of agriculture, which uses workers on a seasonal basis.

These regulations reflect the present administrative interpretation of the word "temporary" under the H–2 provision and are consistent with the common meaning of the word "temporary." One would expect that the same word would have the same meaning within a single sentence—*i.e.*, that "temporary" would have the same meaning in both sections 101(a)(15)(H)(ii) (a) and (b) of the INA. 8 U.S.C. 1101(a)(15)(H)(ii) (a) and (b). There is nothing in either the language of the statute or the legislative history that would lead DOL to question this otherwise self-evident proposition. Therefore, the definition of temporary for H–2A workers is the same as that for H–2 workers: Less than 12 months. It may be that there are unusual circumstances where a "temporary" job might last 12 months or longer. Nevertheless, a blanket assumption that all jobs are "temporary" simply because the alien will not be permitted to occupy a job—any job—for more than three years, for example, appears to DOL to be an interpretation not supported by the statute.

A policy to have a blanket three-year provision, for example, would threaten the integrity of the INA which already has a provision for *immigrant* visas for *permanent* positions. 8 U.S.C. 1153(a)(6). Because the number of these so-called "sixth preference" visas is strictly limited (10 percent of each year's total visa quota), employers would be strongly tempted to call a permanent position temporary in order to fill it with an H–2A worker. As one court has said,

> The INS's present interpretation of [H–2] prevents the likelihood of so-called "temporary" workers from entering this country permanently under the less rigorous standard of [H–2], rather than applying properly as immigrants under the more stringent [sixth] preference classification[.]

Volt Technical Services Corporation v. *Immigration and Naturalization Service*, 648 F. Supp 578, 581 (S.D.N.Y. 1986).

In some situations the employer's need may create a temporary job opportunity in an employment situation which may otherwise have been permanent in nature. Where the employer can show clearly that the need for the H–2A worker's services or labor is of a short, identified length, limited by an identified event located in time, the job opportunity is temporary. *Volt Technical Services Corp.* v. *Immigration and Naturalization Service*, 648 F. Supp. at 580. For example, a temporary job opportunity could be created because the incumbent has fallen ill or is otherwise unavailable for a short, identified period of less than one year, or an extra hand is needed during a busy period.

In view of all these factors, in order to determine whether a particular job opportunity is "temporary" within the meaning of section 101(a)(15)(H)(ii)(a) of the INA, DOL must focus upon the employer's need. If an employer makes a *bona fide* application showing that it needs to fill a job opportunity on a temporary basis, the work is "of a temporary or seasonal nature." It is irrelevant whether the job is for three weeks to harvest berries or for six months to replace a sick worker or for a year to help handle an unusually large agricultural contract. What is relevant to the temporary alien agricultural labor certification determination is the employer's assessment—*evaluated, as*

required by statute, by DOL—of its need for a short-term (as opposed to permanent) employee. The issue to be decided is whether the employer has demonstrated a *temporary need for a worker* in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary.

This interpretation is supported in part by administrative and judicial interpretations of the H–2 provision. As was stated in the leading case of *In re Artee*, 18 I. & N. Dec. 355 (1982),

> [i]t is not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.

Id. at 367. In *Artee*, the INS reversed a long-standing rule that the functional nature of the duties of the job controlled its characterization in favor of determining that eligibility for an H–2 visa was controlled by "the intent of the petitioner and the beneficiary concerning the time that the individual would be employed." *Id.* See also *In re Ord*, 18 I. & N. Dec. 285 (1982).

This position has been affirmed by the courts. Thus, in *Wilson* v. *Smith*, 587 F. Supp. (D.D.C. 1984), the court held that a "housekeeper/child caretaker" was a "temporary" worker because the parents only needed child care until the child was old enough for day care, stating that

> Plaintiffs have made a plausible case for their assertion that their need for live-in help is temporary, based on their daughter's youth . . . . The Wilsons have credibly established that their need will end in the "near, definable future."

Id. at 473 (quoting *Artee*). The court did not focus on whether those engaged in child care occupy a permanent job function, although they arguably do so since child care could be said to last at least until children enter high school. What the court based its ruling on was its determination that the parents only needed the "housekeeper/child caretaker" until their child entered day care.

Similarly, in *Volt Technical Services Corporation* v. *Immigration and Naturalization Service, supra*, the court adopted the *Artee* standard: a temporary job is one where "it is clearly shown that the petitioner's need for the beneficiary's services or labor is of a short, identified length, limited by an identified event located in time." 648 F. Supp. at 580. In doing so, the court recognized that aliens could be hired as engineers—a permanent job description—if they were hired by a temporary help service "to fill a specific contract with a client and the beneficiaries entered the United States with the understanding that their employment was to be of a temporary period." *Id.* at 581.

Finally, in *North American Industries, Inc.* v. *Feldman*, 722 F. 2d 893 (1st Cir. 1983), the court discussed at some length the position of a man who programmed and operated computerized lathes and high-speed gear cutters. The underlying job was permanent. Indeed, the issue in the case was whether the alien, having held the position as an H–2 worker on a temporary basis, could apply to hold it on a permanent basis using a "sixth preference" visa. See 8 U.S.C. 1153(a)(6); and *Volt Technical Services Corporation* v. *Immigration and Naturalization Service*, 648 F. Supp 578, 581 (S.D.N.Y. 1986). As in the other cases cited above, the First Circuit noted that "the INS has conceded that the needs of an employer should determine whether a position offered an alien is temporary or permanent." *Id.* at 900 (citing *Artee*); see also *Hess* v. *Esperdy*, 234 F. Supp. 909 (S.D.N.Y. 1964); 9 *Foreign Affairs Manual* § 41.55, note 17.

DOL understands that focusing on the employer's need may encourage numerous applications by employers to DOL and that it is often very difficult to distinguish between temporary and permanent jobs. Nevertheless, DOL believes a one-year limitation reflects Congress' intent and will be administratively feasible. Based on all the factors, DOL believes that the word "temporary" in 8 U.S.C. 1101(a)(15)(H)(ii)(a) refers to any job opportunity covered by the H–2A regulations where the employer needs a worker for a limited period of time.

One should note, however, that the longer the employer needs a "temporary" worker, the more likely it would seem that the job has in fact become a permanent one. Thus, DOL will take a careful look at repeated temporary alien agricultural labor certification applications for the same job, and will approve applications where the job opportunity would be filled by an H–2A worker for a cumulative period, including past and future certifications (and extensions), of 12 months or more only in extraordinary circumstances.

Of course, with respect to truly "seasonal" employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certifications for job opportunities recurring annually in the same occupation.

C. Section 655.101: Applications

1. General

This section prescribes the general parameters within which an employer seeking H–2A workers must file an application with the appropriate Regional Administrator (RA) of the Employment and Training Administration; the roles of agents and associations in the process; certain minimum general requirements regarding job offers; the general time frame within which the certification process is conducted; amendments and modifications to applications; and provisions governing emergency situations and "first-time" potential H–2A employers.

Employers' agents and joint employer associations may submit "master" applications for temporary alien agricultural labor certification covering virtually identical job opportunities with the certification fee charged for a certification, not an application, however. DOL is exploring the possible development of a new application form for this program.

The interim final rule specifically requires that the application state the total number of workers to be employed in the agricultural labor or service activity, as well as the number of job opportunities for which the employer seeks H–2A workers to make up for a shortage of U.S. workers. This will assist the RA in making determinations on such issues as U.S. worker shortfalls ("new determinations") and availability, emergency certifications, recruitment efforts, and shortages of local U.S. workers.

2. Major Differences From H–2 Agricultural Regulations

a. *Dates.* IRCA provides that applications may not be required to be filed more than 60 days prior to the employer's date of need for workers. These regulations, therefore, provide that the applications be filed with the RA a minimum of 60 calendar days before the first date of need. This permits time for review of the application, time for an employer to submit an amended application (if necessary), and adequate time for the recruitment of U.S. workers, with a certification determination no later than 20 calendar days before the employer's date of need for workers. See 8 U.S.C. 1186(c) (1) and (3)(A). Employers are encouraged, but not required, to file their applications early, nevertheless, since delay in submitting an acceptable application can result in a delay in recruiting and a delay in issuance of the

temporary alien agricultural labor certification.

DOL has determined that the application shall be filed directly with the RA to permit the RA to review the application within the seven calendar days provided by IRCA and to allow adequate time to recruit U.S. workers. Under IRCA, DOL must make the certification determination no later than 20 calendar days before the date of need, provided that the employer has complied with DOL certification criteria, including recruitment of U.S. workers.

b. *Minor amendments.* Minor, technical amendments to certification applications may be requested and made before the certification determination. Current procedures allow for this, but existing regulations do not cover it.

c. *Local office recruitment.* Duplicate applications are to be submitted to the local State employment service (ES) office at the time they are filed with the RA. DOL has determined that the local office must begin recruitment of local workers before the RA accepts for consideration the application in order to maximize local recruitment and permit intrastate and interstate clearance orders to be prepared and ready for interstate submittal when the RA approves an employer's application as acceptable for consideration. The interim final rule adds language to § 655.101(c)(2), restating this requirement.

d. *Fees.* A fee requirement has been adopted for certification of H–2A workers. For each certification, an employer would pay a fee of $100 plus $10 per H–2A job opportunity certified, with a maximum total fee of $1,000 for each employer's certification.

In the case of an application filed by a joint employer association, a separate fee for each employer-member will be required. Thus, each employer-member of the joint employer association would pay $100 plus $10 per H–2A worker certified to that employer up to a $1,000 maximum for each employer-member. The proposed rule would also have required a fee for the joint employer association, but the interim final rule does not do so. Since the association is not benefiting directly from the services of the H–2A workers, it is reasonable not to charge a separate fee for the joint employer association. Associations acting as agents, and not joint or sole employers, pay no fees.

Applications for temporary alien agricultural labor certification must contain an assurance that the fee will be paid within the prescribed time period after the issuance of the temporary alien agricultural labor certification. A bill for the fee will be included with the temporary alien agricultural labor certification determination. Failure to pay the fee in a timely manner is a substantial violation for which certification may be withheld in future years. The interim final rule has changed the timeliness requirement to permit the payment of the fee up to 30 days after the date of the temporary alien agricultural labor certification, rather than seven days as in the proposed rule. This would be in line with billing cycles in the private sector.

DOL is authorized by IRCA to require a fee to recover reasonable costs of processing applications for certification. 8 U.S.C. 1186(a)(2). In establishing the fee, DOL conducted studies of estimated time and costs involved in ETA Regional Office processing of H–2 agricultural applications under the INA prior to amendment by IRCA.

For the purposes of this study, processing included regional office review of applications for compliance with legal and regulatory requirements, preparation of notices to applicants giving the results of the review, and activities related to arriving at and rendering a certification determination near the employer's date of need. This study did not include, however, the costs of processing by the State employment service agencies, post-certification activities and post-denial activities at all levels, ETA national office activities, DOL Office of the Solicitor activities, and DOL Office of Administrative Law Judges activities. DOL believes that the fee structure is fair and reasonable.

Fees are not charged for extensions or shortfall determinations. 8 CFR 655.106 (c)(3) and (h). Fees are charged for first-time user and emergency temporary alien agricultural labor certifications. 8 CFR 655.101 (c)(5) and (f)(2)).

Since the fee is a new addition to the temporary alien agricultural labor certification program, DOL is inviting specific comments on the level of the fee and on the fee-charging mechanisms, and is inviting recommendations for reasonable alternatives.

D. Section 655.102: Contents of Job Offers

1. General

This section presents DOL's policy of requiring equivalent benefits for U.S. and alien workers, and lists the minimum benefits, wages and working conditions which must be offered when an H–2A certification is requested.

2. Major Differences From H–2 Agricultural Regulations

a. *Housing.* Employers are given the option to secure rental or public accommodation housing, or other substantially similar class of habitation, for their workers. Such housing must meet appropriate health and safety standards. See 8 U.S.C. 1186(c)(4).

b. *Range housing.* Different housing standards shall apply to all workers engaged in the range production of livestock. See 8 U.S.C. 1186(c)(4).

c. *Workers' compensation.* The employer must provide the RA with specific information on State workers' compensation or comparable insurance coverage. See 8 U.S.C. 1186 (b)(3).

d. *Qualifications.* Bona fide occupational qualifications specified by an employer will be reviewed in the context of their normal use by non–H–2A employers in the same or comparable occupations and crops. See 8 U.S.C. 1186(c)(3)(A).

e. *Positive recruitment.* Positive recruitment has been included as a requirement to these regulations. INA section 216(b)(4) requires employers under the H–2A program to make positive recruitment efforts within a multistate area of traditional or expected labor supply where the Secretary finds that there are a significant number of able, willing, and qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. 8 U.S.C. 1186(b)(4). The regulations delegate specific positive recruitment determinations to the ETA Regional Administrators (RAs). Positive recruitment is performed contemporaneously with recruitment through the interstate clearance system. *Id.* There are provisions relating to positive recruitment at 20 CFR 655.102(d), 655.103 (d) and (f), 655.105(a), and 655.106(b)(1)(v).

At § 655.102(d), the employer is required to submit with the job offer a positive recruitment plan. This will ensure compliance with IRCA's positive recruitment provisions. It will facilitate coordination between the employer and the RA; the RA will be made aware of the employer's planned efforts, and can advise the employer of any modifications which will have to be made to the plan.

At § 655.103(d), the employer is required to assure that the positive recruitment will be performed along with recruitment through the interstate clearance system.

Section 655.103(f) requires the employer to assure that it will engage in

positive recruitment of U.S. workers to an extent (with respect to both location and effort) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of intended employment. This includes efforts to recruit through farm labor contractors. It is reasonable and appropriate to consider, among other things, the recruitment efforts made by other agricultural employers located in the area of intended employment, who are relying solely on the availability of U.S. workers, and the efforts made by the employer to obtain H–2A workers. See H.R. Rept. No. 99–682(I), 99th Cong., 2d Sess. 80–81 (July 16, 1986). It is likely that there will be a significant number of able, willing, and qualified U.S. workers in areas where such local non-H–2A agricultural employers recruit. Of course, the employer would not be required to go to such areas to positively recruit where it can reasonably demonstrate that the U.S. agricultural workers have already been recruited to work elsewhere or are otherwise unavailable. In addition, the regulation avoids an unnecessary burden on small employers by requiring employers only to meet the recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of intended employment.

Section 655.105(a) sets forth positive recruitment requirements which may possibly be required after the employer's application is accepted for consideration. Thus, as part of the notice which the RA sends to the employer, the RA may require the employer to conduct positive recruitment in other areas of expected labor supply. However, the RA must first obtain current information from a State employment service (ES) agency that there are a significant number of able, willing, and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. The interim final rule clarifies the proposed rule, in permitting the RA to take into account sources of current information in addition to the State ES agency. Further, the RA must take into account recent recruiting efforts in those areas and attempt to avoid requiring employers to engage in futile recruitment in out-of-state areas where there are a significant number of local employers attempting to recruit workers with similar occupational qualifications An employer is permitted to terminate all positive recruitment on the date the H–2A workers depart for the employer's place of work. The interim final rule has been clarified by explicitly requiring the employer to conduct positive recruitment for U.S. workers during the period from the date of application until the H–2A workers leave for the place of employment at a degree and of the same kind as the potential H–2A employer made to obtain the H–2A workers.

In § 655.106(b)(1)(v), the RA is required to take into account, in determining whether to grant a application for temporary alien agricultural labor certification, whether the employer has satisfactorily complied with the positive recruitment requirements of the regulations.

3. Other Changes

a. *Meals.* The interim final rule differs from the proposed rule by permitting employers without centralized cooking and eating facilities the option of providing the workers with three daily meals option of providing cooking facilities.

b. *Transportation.* The interim final rule clarifies the language in the the proposed rule by stating explicitly that the employer is not required to pay more than the most reasonable and economical common carrier cost for the worker's transportation to the place of employment; and that advancing transportation is required only when local non-H–2A agricultural employers "in the occupation" do so. Further, consistent with DOL's intent, the interim final rule provides that transportation between required housing and the worksite is required for workers who are eligible for housing (*i.e.,* those workers who are not reasonably able to return to their residence within the same day).

The interim final rule has been clarified with respect to transportation (for this discussion, this includes subsistence) from the place of employment at the completion of the work contract period. The phrase "without intervening employment" has been clarified to read "disregarding intervening employment".

This provision means that the employer must offer to pay for (or provide) the worker's transportation home, or wherever the worker began the series of jobs culminating at the current place of employment. If the worker has obtained a subsequent job, but the subsequent employer has not offered to pay for (in advance or by reimbursement) the worker's transportation from the current place of employment to the other employer's place of employment, the current employer must offer to pay for (or provide) such transportation expenses. However, where the subsequent employer has offered to pay for (or provide), in advance or by reimbursement, the worker's transportation from the current place of employment to the subsequent employer's place of employment, the current employer is not required to pay for (or provide) such transportation.

H–2A workers may be authorized to go on from "criteria" employment (*i.e.,* job opportunities certified by DOL pursuant to this program) to other criteria employment. Therefore, in the case of an H–2A worker, each employer (a so-called "criteria" employer) will be offering to pay for (or provide) the H–2A worker's transportation to and from the place of employment (see § 655.102(b)(5)(i)), provided that the worker completes his/her work obligations under the work contract. This effectively places the requirement on the H–2A worker's final criteria employer to pay for (or provide) the H–2A worker's transportation "home".

U.S. workers, however, may go on from "criteria" employment (*i.e.,* where they have H–2A co-workers in the same agricultural activity) to either criteria or non-criteria employment. The following thus applies to U.S. Worker employment:

(1) If the U.S. worker's subsequent employer is a criteria employer, the subsequent employer must offer to pay for (or provide) the U.S. worker's transportation from the current place of employment to the subsequent place of employment and the current employer is not required to pay for (or provide) such transportation. The transportation "home" requirement is assumed by the next criteria employer.

(2) If the U.S. worker's subsequent employer is a non-criteria employer and that subsequent employer offers to pay for (or provide) the U.S. worker's transportation from the current place of employment to the subsequent place of employment, the current employer is not required to pay for (or provide) such transportation. The transportation "home" requirement in 20 CFR Part 655, Subpart B, is not assumed by the non-criteria employer, and unless that subsequent employer offers to pay for (or provide) transportation "home" or to further employment, it is the worker's responsibility to obtain such transportation from some other source. Workers are informed in writing in job orders concerning offers of transportation.

(3) If the U.S. worker's subsequent employer is a non-criteria employer and that subsequent employer does not offer to pay for (or provide) the U.S. worker's transportation from the current place of employment to the subsequent place of

employment, the current employer is required to pay for (or provide) such transportation. As above, the transportation "home" requirement in 20 CFR Part 655, Subpart B, is not assumed by the non-criteria employer, and unless that subsequent employer offers to pay for (or provide) transportation "home" or to further employment, it is the worker's responsibility to obtain such transportation from some other source. Workers are informed in writing in job orders concerning offers of transportation.

(4) If the U.S. worker has no subsequent employer, the current employer must offer to pay for (or provide) the worker's transportation home, or wherever the worker began the series of jobs culminating at the current place of employment.

c. *Abandonment of employment; termination for cause.* The interim final rule adds a clarification to the proposed rule to state clearly that a worker terminated for cause or who has abandoned the employment is not entitled to the guarantee of work for three-fourths of the work contract period.

d. *Examination of records.* The interim final rule clarifies the proposed rule, by requiring that the worker's representative who may examine the employer's earnings and hours records must be "designated" by the worker. This is designed to protect the worker's privacy, and to protect the employer from making disclosures to unauthorized persons.

e. *Contract impossibility.* The interim final rule clarifies the proposed rule by providing that the employer must offer transportation "home" to the worker, and that reimbursement to the worker for the worker's transportation and subsistence expenses coming to the place of employment must be offered, notwithstanding whether the contract termination for impossibility occurred prior to completion of 50 percent of the originally offerred work contract period (see § 655.102 (b)(5)(i) and (b)(12)).

E. Section 655.103: Assurances

This section lists assurances which an employer must make with an H–2A application. Changes from H–2 requirements are a reduced paperwork burden, a retaliation prohibition, an agreement to engage in positive recruitment at least to the same extent as non-H–2A employers in the same or comparable occupations and crops, and an agreement to pay the certification fee. Consistent with the eligibility of H–2A and U.S. workers for legal assistance (IRCA § 305), the interim final rule adds another act for which retaliation is prohibited: consultation with an employee of a legal assistance program or an attorney.

F. Section 655.104: Determinations Based on Acceptability of H–2A Applications

1. General

This section describes the actions that are to be taken by the local office and by the RA when an H–2A application is received. Procedures are prescribed for the RA to follow when a filed application is not accepted for consideration, and what an employer may do to seek further review if an application is not accepted for consideration. See 8 U.S.C. 1186(c)(2).

2. Major Differences From H–2 Agricultural Regulations

a. *Deficiencies.* The RA is expected to notify the employer of any deficiencies in the application within seven calendar days and provide five calendar days for amendment and resubmittal. See 8 U.S.C. 1186(c)(2).

b. *Review.* In addition to the present option open to such employers to seek expedited review before an administrative law judge, the employer is given an opportunity to request a *de novo* hearing when an application is not accepted for consideration. See 8 U.S.C. 1186 (c)(2)(B) and (e)(1).

c. *Delayed notices.* If the RA's notice that the application is not acceptable for consideration is not made within seven calendar days, the recruitment of U.S. workers will be accomplished on an expedited basis within the time available until 20 calendar days before the date of need. DOL has determined that it would not be reasonable to delay an employer's certification to a date later than 20 calendar days before the date of need due to delays which are not attributable to the employer.

G. Section 655.105: Recruitment Period

This section describes the recruitment activity that must be conducted after an application is accepted for consideration. The only significant change from the H–2 agricultural regulations is the positive recruitment required of employers, described above. See 8 U.S.C. 1186(b)(4).

The interim final rule requires, at § 655.105(a), that the notice of the application's acceptance for consideration be sent by means normally assuring next-day delivery.

H. Section 655.106: Determinations Based on U.S. Worker Availability

1. General

This section describes the process that occurs after an application has been accepted for consideration and the requirements for recruitment of U.S. workers have been completed. Factors the RA must take into account when arriving at a certification determination are presented, as are obligations that continue for an employer after the temporary alien agricultural labor certification has been granted. Matters related to requests for new determinations because of U.S. worker shortfall and extensions of certification periods also are addressed.

2. Major Differences From H–2 Agricultural Regulations

a. *Referrals of U.S. workers.* Referrals of U.S. workers to employers and the subsequent determination of the availability of such workers must be based on the referral of workers who have been made aware of the terms and conditions of and qualifications for the job, and who have indicated, by accepting referral to the job, that they meet the qualifications required and are able, willing, and eligible to take such a job.

b. *New grounds for denial.* The RA may not certify if the employer has substantially violated a material term or condition of a labor certification within the past two years (see also § 655.110); not complied with workers' compensation requirements; or not complied with positive recruitment requirements. See 8 U.S.C. 1186(b) (2), (3), and (4).

c. *Labor disputes.* The RA will subtract from affirmative certification decisions the numbers of job opportunities open because of a strike or other labor dispute involving a work stoppage, or because of a lockout. This reflects current DOL operating procedure, but is not in current regulations. See 8 U.S.C 1186(b)(1). The interim final rule clarifies the proposed rule by indicating that the RA will consider information from sources in addition to the State ES agency regarding strikes and lockouts.

d. *Fifty-percent rule.* Generally, the employer must hire qualified U.S. workers who apply for employment before fifty-percent of the work contract period has expired. The employer is not required to terminate H–2A workers when this happens, but the INA provides that the employer may do so without application of the "¾ guarantee" to the H–2A worker. The

proposed rule differed from the H–2 agricultural labor certification regulations in order to comply with IRCA. 8 U.S.C. 1186(c)(3)(i). The interim final rule differs from the proposed rule by requiring that an employer be excused from the "¾ guarantee" only if the RA "certifies" that an H–2A worker has been displaced due to the hiring of a U.S. worker under the "fifty-percent rule." RA certification is called for in the INA, but did not appear in the proposed rule.

3. Other changes

a. *Shortfalls.* Procedures for requesting a new certification determination because of U.S. worker shortfall, quits, or terminations are presented (§ 655.106(h)). While these procedures are required because of IRCA, they represent an extension of current DOL policies in the application and interpretation of the present regulations. See 8 U.S.C. 1186 (c)(3)(A)(ii) and (e)(2). The interim final rule clarifies the proposed rule provision, and provides specifically for expeditious handling of requests for new determinations. Deleted from the interim final rule is the provision counting as available some workers who had voluntarily quit a job opportunity with the employer. Added to the interim final rule is the requirement that the RA's shortfall determination be sent by means normally assuring next-day delivery.

b. *Extensions.* The proposed rule has been modified in this interim final rule to provide that for short-term (*i.e.*, two weeks or less) extensions of temporary alien agricultural labor certifications, the employer need apply only to INS. For longer extensions, DOL would review employer documentation and make the decision. An employer could not come to DOL for an extension after receipt of an extension from INS; a new application and labor market test would be required in such instances.

c. *Transfers.* The interim final rule rearranges sentences in § 655.106(c)(2)(i), to indicate more clearly that joint employer associations may transfer workers among members, as long as central records are kept.

d. *Withholding U.S. workers.* INA prohibits persons from withholding U.S. workers under certain circumstances. 8 U.S.C. 1186(c)(3)(vii). The interim final rule modifies the proposed rule's implementation of the statute, by providing for backup interviews by the ETA regional office, if the local office's investigation under this provision did not include such interviews. See 8 CFR 655.106(g)(2), *infra.* Suspension of the 50-percent rule pursuant to this provision will not take place "until" (rather than "unless" as in the proposed rule) such interviews take place. See § 655.106(g)(4), *infra.*

e. *Modifications.* The interim final rule provides that where the job offer does not contain the minimum benefits, wages, and working conditions required by § 655.102(b), the RA, with the concurrence of the Director, U.S. Employment Service, may require modifications. This ensures that the workers will be protected, while allowing for consistency in determinations.

I. Section 655.107: Adverse Effect Wage Rates (AEWRs)

1. Introduction

DOL, through its own knowledge, informed experience, and judgment, has found for many years that the presence of alien workers in agriculture depresses the wages of similarly employed U.S. workers. In order to ensure that the wages of similarly employed U.S. workers are not adversely affected, DOL is continuing in these H–2A regulations its past policy and practice of requiring covered agricultural employers to offer and pay their U.S. and H–2A workers no less than the applicable hourly adverse effect wage rate (AEWR), as determined by the Director, U.S. Employment Service (USES).

Further, the H–2A regulations, as did the H–2 regulations, provide that employers applying for temporary alien agricultural labor certifications must agree to comply with all employment-related laws. If the employment is covered by a wage standard applicable under any federal or State minimum wage law, the employer must comply with that law. See, *e.g.*, 29 U.S.C. 206(a); and 20 CFR 653.501 (d)(4) and (e)(1) (1986). If the prevailing wage for the occupation in the labor market of intended employment is higher, the employer must offer and pay that wage. Thus, a worker in employment under the H–2A program must be paid at the highest of the applicable wage rates, whether that highest rate is the AEWR, the prevailing wage, or the Federal or State statutory minimum wage. See *Limoneira Co.* v. *Wirtz*, 327 F. 2d 499 (9th Cir. 1964), *aff'g*, 225 F. Supp. 961 (S.D. Cal. 1963); see also *Elton Orchards, Inc.* v. *Brennan*, 508 F. 2d 493 (1st Cir. 1974); and *Flecha* v. *Quiros*, 567 F. 2d 1154, 1156 (1st Cir. 1977). These decisions acknowledge DOL's discretion in the area of AEWRs and form a basis for construing DOL's H–2A regulations.

Although continuing its basic past policy of requiring the payment of the AEWR, prevailing wage, or statutory minimum wage, whichever is highest, DOL is revising its procedures for calculating and establishing AEWRs in these H–2A regulations. First, DOL is publishing AEWRs for all States (except Alaska), as opposed to the current procedures of publishing AEWRs only for those States (currently 14) for which DOL has determined on a State-by-State basis that adverse impact has resulted from the employment of alien labor. Second, DOL is changing the method of calculating AEWRs, by basing these AEWRs on the level of actual average hourly agricultural wages for each State.

2. Purpose of AEWRs

The AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant alien workers must offer to and pay their U.S. and alien workers, if prevailing wages are below the AEWR. The AEWR is a wage floor, and the existence of an AEWR does not prevent the worker from seeking a higher wage or the employer from paying a higher wage.

The purpose of an AEWR, as described by the U.S. Court of Appeals for the Fifth Circuit, is "to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers." It is a "method of avoiding wage deflation." *Williams* v. *Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000; see *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (5th Cir. 1976); see also *Production Farm Management* v. *Brock*, 767 F. 2d 1368 (9th Cir. 1985); *Limoneira Co.* v. *Wirtz*, 225 F. Supp. 961 (S.D. Cal. 1963), *aff'd*, 327 F. 2d 499 (9th Cir. 1964); *Dona Ana County Farm and Livestock Bureau* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961); and 20 CFR 655.0 (1986). The purpose of an AEWR is to ensure that the wages of similarly employed U.S. workers will not be adversely affected by the importation of alien workers.

The IRCA amendments to the INA do not change the role and effect of DOL's policies to protect the wages of similarly employed U.S. agricultural workers from the adverse effect which may result from the employment of alien workers. Under the H–2A program, as under the H–2 program before it,

> [t]he common purpose [of the program is] . . . to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force.

Rogers v. *Larsen*, 563 F. 2d 617, 626 (3rd Cir. 1977); *Flecha* v. *Quiros*, 567 F. 2d 1154 (1st Cir. 1977). As stated by the U.S. Court of Appeals for the First Circuit, the purpose of the INA and temporary foreign worker regulations are "to provide a manageable scheme . . . that is fair to both sides." *Flecha* v. *Quiros*, 567 F. 2d at 1156.

> We start with a given, that it has always been a Congressional policy to prefer domestic workers in all fields. However, it is also necessary to consider would-be employers, although in case of conflict, wide leeway favoring domestic workers is given the U.S. Secretary [of Labor]. *Elton Orchards, Inc.* v. *Brennan*, 1 Cir., 1974, 508 F. 2d 493. . . .

Id., 567 F. 2d at 1155. Thus, the methodology for computing an AEWR must recognize the need to balance the goals of supplying an adequate labor force to employers and protecting the jobs of U.S. workers.

3. History of AEWRs

For a number of decades, DOL has computed and published AEWRs for the temporary employment of nonimmigrant alien workers for agricultural employment under various admission programs. *See* H. N. DELLON, "Foreign Agricultural Workers and the Prevention of Adverse Effect", 17 *Labor Law Journal* 739 (1966). Mr. Dellon's article notes that as far back as 1953, employers seeking to import foreign nationals to work in various crop activities (in that case, under the Bracero Program) were required to pay not less than a wage established by DOL. Eventually, AEWRs began to be set periodically on a Statewide basis. See *Dona Ana County Farm & Livestock Bureau, Inc.* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961).

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

Beginning in 1968, these AEWRs were computed by adjusting the previous year's Statewide AEWR by the same percentage as the percentage change in the Statewide annual average wage rates for field and livestock workers, as surveyed by the United States Department of Agriculture (USDA); and were set through rulemaking amending the H–2 agricultural worker regulations. See 41 FR 25018 (June 22, 1976); and 43 FR 10306, 10310 (March 10, 1978); see also 20 CFR 602.10b(a)(1) (1977).

The regulations for the H–2 agricultural worker program were consolidated and substantially revised in 1978, after an extended comment period and six public hearings (May and June 1977). 20 CFR Part 655, Subpart C, 43 FR 10306 (March 10, 1978). As part of that rulemaking, DOL's methodology for computing AEWRs, as well as alternative methodologies for computing AEWRs were discussed and considered. 43 FR at 10310–10311. The methodology was set out in the regulations for the H–2 agricultural worker program. 20 CFR 655.207, 43 FR at 10317.

DOL continued to study the AEWR after the 1977–78 rulemaking. An Advance Notice of Proposed Rulemaking was published in 1979, and six additional public hearings were held. 44 FR 59890 (October 16, 1979). Various alternative methodologies were presented for public comment; the public responded to the alternatives and additional methodologies were suggested as part of the rulemaking record. A proposed rule (with a four-month comment period) was published in 1980, and a final rule was published in 1981. 46 FR 4568 (January 16, 1981); 45 FR 29854 (May 6, 1980); and 45 FR 15914 (March 11, 1980). The final rule would have established a single, nationwide, AEWR at the level of the previous year's national annual average hourly wage for piece-rate-paid hired agricultural workers, as computed by USDA surveys. However, as part of a general review of agency regulations, and to consider fully the impact of the new methodology, it was withdrawn prior to its effective date. 46 FR 32437 (June 23, 1981); and 46 FR 19110 (March 27, 1981).

In 1981 USDA substantially reduced its number of surveys and ceased compiling annual average field and livestock worker wage rates, as well as the survey data which would have been used in the rule withdrawn in 1981. Various interim methodologies were utilized until USDA reestablished its surveys and DOL reestablished the 1968–1981 methodology. These were accompanied by further rulemaking, and opportunity for and consideration of public comments. See, *eg.*, 51 FR 20516 (June 5, 1986); 51 FR 15915 (April 29, 1986); 51 FR 12872 (April 16, 1986); 50 FR 47636 (November 19, 1985); 49 FR 31784 (August 8, 1984); 49 FR 30208 (July 27, 1984); 48 FR 40168 (September 2, 1983); 48 FR 33684 (July 22, 1983); 48 FR 232 (January 4, 1983); 47 FR 52198 (November 19, 1982); and 47 FR 37980 (August 27, 1982).

4. Discretion in Setting AEWRs

DOL has "broad discretion" to set AEWRs in accordance with "any of a number of reasonable formulas. . . ." *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299, 303–304 (5th Cir. 1976); *Florida Fruit & Vegetable Association, Inc.* v. *Donovan*, 583 F. Supp. 268 (S.D. Fla. 1984), *aff'd sub nom, Florida Fruit & Vegetable Association, Inc.* v. *Brock*, 771 F. 2d 1455 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1524 (1986); *Shoreham Cooperative Apple Producers' Association, Inc.* v. *Donovan*,764 F. 2d 135 (2d Cir. 1985); *Virginia Agricultural Growers' Association, Inc.* v. *Donovan*, 774 F. 2d 90 (4th Cir. 1985); *accord, Rowland* v. *Marshall*, 650 F. 2d 28 (4th Cir. 1981) (*per curiam*); *Williams* v. *Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000; *Flecha* v. *Quiros*, 567 F. 2d 1154 (1st Cir. 1977); *Limoneira Co.* v. *Wirtz*, 225 F. Supp. 961 (S.D. Cal. 1963), *aff'd*, 327 F. 2d 499 (9th Cir. 1964); and *Dona Ana County Farm & Livestock Bureau, Inc.* v. *Goldberg*, 200 F. Supp. 210 (D.D.C. 1961); see also *Production Farm Management* v. *Brock*, 767 F. 2d 1368 (9th Cir. 1985).

This is an area in which DOL has "great discretion to reach a number of different results rather than an area of pure statutory interpretation as to which there is in theory only a single answer". See *Building & Construction Trades' Department, AFL–CIO* v. *Donovan*, 712 F. 2d 611, 619 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). DOL, therefore, is promulgating the regulation described below for setting AEWRs under the H–2A program.

Congress has recognized as early as 1961 that the Secretary had the authority to set special rates where alien workers were involved. H.R. Rep. No. 274 (on H.R. 2010), 87th Cong., 1st Sess. 9 (1961). Similar language appeared in the Senate debate on H.R. 2010, which was enacted as Pub. L. 87–345.

However, the INA as amended by IRCA raises to a statutory level the previous regulatory standard preventing the importation of temporary foreign agricultural workers (now H–2A) from adversely affecting the wages of similarly employed U.S. workers. However, no particular methodology for implementing it is fixed by statute. Indeed, the legislative history indicates that Congress had examined DOL's H–2 agricultural worker regulations in great detail, but did not enact any particular AEWR methodology.

While the AEWR methodology in the H–2A rule differs from the methodology used to set AEWRs under the H–2 agricultural worker program, it is within DOL's discretion to make such a change. As the U.S. Court of Appeals for the D.C. Circuit has stated, "prior administrative practice carries much less weight when reviewing an action taken in the area of

discretion, when little more than a clear statement is needed, than when reviewing an action in the field of interpretation, where it is thought that the agency's own contemporaneous interpretation of one of its enabling statutes is reliable evidence of what Congress intended." *Building & Construction Trades' Department, AFL–CIO* v. *Donovan*, 712 F. 2d at 619. In any event, even if the establishment of a new AEWR methodology were to be found an act of interpretation rather than an act of discretion, this rulemaking would constitute DOL's contemporaneous interpretation of a recent statute, *i.e.*, the Immigration Reform and Control Act of 1986 (IRCA).

5. New AEWR Methodology

a. *General.* DOL is setting the AEWRs in each year for the H–2A program at a level equal to the previous year's annual regional average hourly wage rates for field and livestock workers (combined), as computed by USDA quarterly wage surveys. This is the data series by which AEWRs under the H–2 agricultural worker program currently are indexed. USDA publishes the data for the 48 contiguous States and Hawaii by nineteen agricultural regions, which consist of one or more States.

Based on information provided by representatives of employers and workers, DOL has concluded that the universe of employers who may seek H–2A workers could expand considerably as the result of IRCA. Therefore, DOL has also determined to compute and publish on an annual basis AEWRs for all the States included in the USDA survey of wage rates for field and livestock workers (combined), *i.e.*, the forty-eight contiguous States and Hawaii. In addition, a separate rate for Florida sugarcane has been discontinued.

This AEWR methodology is adopted as a result of DOL's consideration of the INA as amended by IRCA, and with full knowledge and consideration of the administrative record developed in earlier rulemaking activities regarding AEWRs, as published in the **Federal Register.** See "3. *History of AEWRs*", above.

b. *Reasons for Establishing a Different Methodology.* DOL has carefully reviewed its current AEWR methodology in light of the probable expansion of the H–2A program under IRCA to new growers in new crops and new States. In examining the application of the present methodology to new States, certain anomalies have become apparent. Specifically, there would be wide variations between States in terms of the relationship of the AEWR to average hourly earnings of field and livestock workers in those States, ranging from five percent lower in Oregon to ninety-one percent higher in Alabama. These variations cannot be explained readily in economic terms, such as impact of the use of illegal aliens, degree of mechanization, *etc.* For example, in Minnesota, where there is little hand-harvesting of crops, the AEWR would be eighty-six percent higher than the average hourly wage rate showing up in USDA data; in California, with extensive hand-harvesting and use of illegals, the AEWR would be only five percent higher.

Thus, while the current methodology has been successfully defended where the program has been used, in a limited number of States, DOL sees a need to implement a superior methodology which will better achieve program objectives under the expected program expansion under IRCA.

c. *Rationale for New Methodology.* Based on its own knowledge, expertise, informed experience, and judgment, DOL has determined that the USDA survey is the best available "barometer" for measuring actual farm wages on a nationwide basis. Given the probability that the H–2A program will be more expansive in States where H–2 agricultural workers now are imported, and will expand to other States where H–2 agricultural workers had not recently been sought, this methodology would permit DOL to establish AEWRs which are equal to regional average wages in traditional and new "user" States.

The new methodology is a basic extension of the DOL practice of over two decades of establishing AEWRs at or above average hourly wages in agriculture. DOL believes that Congress endorsed this basic concept in its passage of IRCA.

In passing IRCA, Congress incorporated into statutory law the longstanding regulatory requirement that the employment of temporary nonimmigrant alien labor "not adversely affect the wages . . . of workers in the United States similarly employed." 8 U.S.C. 1101(a)(15)(H)(ii)(a); see 8 CFR 214.2(h)(3)(i) (1987). By incorporating such a provision in the statute, it is clear that Congress was intimately conversant with the DOL implementation of the previous regulatory requirements and aware of the DOL system of AEWRs.

Prior to selecting the methodology for setting AEWRs, DOL considered various alternative options. These ranged from: (1) The setting of AEWRs at the level of prevailing wages in the local area and occupations and then indexing those prevailing wages over time by the average hourly earnings in agriculture; to (2) the setting of such AEWRs only for prevailing wages below average agricultural wages and only in those instances where a high penetration of H–2A workers already had occurred, with no effective indexing over time.

Given implicit Congressional approval of the longstanding DOL AEWR concept, DOL has determined that the most effective way of establishing simple, durable AEWRs over time, without encountering the anomalies under the present methodology, is to set AEWRs under the H–2A program equal to the regional average wages in traditional and new "user" States. This methodology provides an adequate wage floor for protecting similarly employed U.S. workers and automatically provides the indexing needed to prevent adverse wage impacts over time, as the AEWRs will increase as average hourly wages increase. Further, the methodology is not unlike that adopted, but withdrawn for futher study, in the 1979–81 rulemaking, albeit using a more applicable USDA data series and setting AEWRs on the more reflective regional, rather than national basis. See "3. History of AEWRs", above; see also 46 FR 4568 (January 16, 1981); *cf.*, 46 FR 32437 (June 23, 1981).

It is not expected that the H–2A AEWRs will result in a reduction of earnings of U.S. workers employed in the crops and occupations where there have been H–2 agricultural certifications. DOL believes that, because of labor market conditions and already established prevailing wage rates, the earnings of workers in the traditional user States will generally continue at or close to the levels in the previous year. DOL will strictly enforce the requirement that H–2A employers pay their U.S. and H–2A workers no less than the greater of the AEWR or the local prevailing wage for each agricultural activity, as established in the previous year. In the fourteen States where H–2 certifications have been granted in recent years, DOL expects that these earnings will approximate those under the previous year's AEWRs.

DOL acknowledges that the establishment of an AEWR methodology is a complex issue. DOL therefore invites specific comments on the methodology and is inviting recommendations for reasonable alternatives that both provide adequate protections for U.S. workers and avoid introducing excess rigidities in agricultural labor markets.

d. *Publishing AEWRs for Forty-nine States.* The expansion of AEWR coverage to all States included in the USDA survey, *i.e.,* the forty-eight contiguous States and Hawaii, is being adopted for various reasons. As indicated above, it is expected that the H–2A program will expand to most States under IRCA. A basic congressional premise for temporary foreign worker programs under IRCA and previous legislation is that the unregulated use of aliens in agriculture would have an adverse impact on the wages of U.S. workers, absent protection. This premise is supported by the basic economic laws of supply and demand, as recognized by the court in *Production Farm Management* v. *Donovan,* 767 F. 2d 1368 (9th Cir. 1985). This has been confirmed by DOL's longstanding actual experience and administrative actions (see discussion of agricultural wage regulation going back to 1950's, cited in "3. *History of AEWRs*", above).

Further, DOL has recognized adverse effect in agriculture, beyond the current fourteen States in the past. For example, in 1970 AEWRs were published for forty-eight contiguous States (see 20 CFR 602.10b(a)(1) (1970)). In addition, DOL has consistently calculated AEWRs for all States, under the current methodology, even though it has not always published them.

Establishing and publishing AEWRs for all States covered by the USDA survey benefits both employers and workers. It aids the former in planning for actual operating costs, without the uncertainty of how long the regulatory process will take adding a new State to the list of AEWR States. Similarly, it provides immediate protection to workers, rather than waiting until a regulatory change is effected. Finally, it provides ease of administration and cost savings to the government, by avoiding the cumbersome and time-consuming process of amending the regulation for each new State.

Since AEWRs are being published for all States (except Alaska, for which USDA data are not available), this rulemaking subsumes the proposed rules published in the **Federal Register** on December 10, 1985, and April 6, 1986, where DOL announced its intention of adding Montana, Idaho, and Oregon to the list of States for which AEWRs were published annually under the H–2 program, and those rulemaking actions are now completed. See 51 FR 28599 (August 8, 1986); 51 FR 11942 (April 8, 1986); 51 FR 7084 (February 28, 1986); 50 FR 50311 (December 10, 1985). Of course, the rulemaking records, including all comments received, on those proposed rules have been added to the rulemaking record and taken into consideration in this rulemaking.

The interim final rule has clarified the language from the proposed rule, to state explicitly that USDA figures on a regional basis (some regions are single-state) will be used to set AEWRs, and to permit an Alaska AEWR, should USDA provide data on that State.

e. *1987 H–2A AEWRs.* Pursuant to the requirements of 20 CFR 655.107(a), the 1987 AEWRS for the H–2A program, computed according to the new methodology, are published in the table below.

TABLE: ADVERSE EFFECT WAGE RATES (AEWRS) COMPUTED UNDER H–2A METHODOLOGY *

State	1987 AEWR
Alabama	$3.73
Arizona	4.43
Arkansas	4.05
California	5.17
Colorado	5.19
Connecticut	4.17
Delaware	4.17
Florida	4.66
Georgia	3.73
Hawaii	6.43
Idaho	4.15
Illinois	4.38
Indiana	4.38
Iowa	4.10
Kansas	4.61
Kentucky	3.79
Louisiana	4.05
Maine	4.17
Maryland	4.17
Massachusetts	4.17
Michigan	3.91
Minnesota	3.91
Mississippi	4.05
Missouri	4.10
Montana	4.15
Nebraska	4.61
Nevada	5.19
New Hampshire	4.17
New Jersey	4.17
New Mexico	4.43
New York	4.17
North Carolina	4.02
North Dakota	4.61
Ohio	4.38
Oklahoma	4.49
Oregon	4.52
Pennsylvania	4.17
Rhode Island	4.17
South Carolina	3.73
South Dakota	4.61
Tennessee	3.79
Texas	4.49
Utah	5.19
Vermont	4.17
Virginia	4.02
Washington	4.52
West Virginia	3.79
Wisconsin	3.91
Wyoming	4.15

* These are AEWRs for the H–2A program. AEWRs for the H–2 agricultural program (20 CFR Part 655, Subpart C), were published at 52 FR 15399 (April 28, 1987).

J. *Section 655.108: Temporary Alien Agricultural Labor Certification Applications Involving Fraud or Willful Misrepresentation.*

This section describes actions required when matters involving fraud or willful misrepresentation involving an H–2A certification are surfaced.

K. *Section 655.110: Employer Penalties for Noncompliance With Terms and Conditions of Temporary Alien Agricultural Labor Certifications.*

This section describes sanctions that may be levied against an employer for a substantial violation of a condition of labor certification. The sanctions are required by the INA, as amended by IRCA, and those provisions of the INA are incorporated into the regulations. See 8 U.S.C. 1186(b)(2). A definition for a "substantial" violation is provided.

A special procedure which enables the RA to take corrective action when a less than substantial violation exists is also provided. DOL has determined this is necessary in order to administratively correct situations where U.S. worker recruitment and retention may be impacted negatively, but total denial of certification is excessively severe, and, therefore, not appropriate. The interim final rule clarifies the proposed rule by specifically describing administrative or *de novo* review of failures by employers to comply with the corrective action.

The term "employer's representative" has been changed to "employer's agent" in the interim final rule, since the latter is a defined term, and clearly states DOL's intent.

L. *Section 655.111: Petition for Higher Meal Charges.*

This section having to do with petitions for higher meal charges is practically identical to the corresponding section in the current regulations.

M. *Section 655.112: Administrative Review and De Novo Hearing Before an Administrative Law Judge.*

This section describes the process involved when an employer wishes to pursue an administrative law judge review or *de novo* hearing of a denial of

a labor certification or rejection of an application. The process for the admininistrative law judge review is the same as the current regulations provide, and the *de novo* hearing procedures incorporate those in the DOL *Rules of Practice for Administrative Hearings Before the Office of Administrative Law Judges* at 29 CFR Part 18; however, precise, short time frames are established for setting the date for a hearing and for the administrative law judge to render a decision.

N. *Section 655.113: Job Service Complaint System; Enforcement of Work Contracts.*

This section describes how complaints regarding the work contracts will be handled by the State employment service agencies. Under section 216(g)(2) of the INA, the Secretary

> is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

8 U.S.C. 1186(g)(2).

If workers file complaints with the local employment service office under the Job Service Complaint System (see 20 CFR Part 658, Subpart E) regarding alleged employer noncompliance with contractual obligations, such complaints shall be referred by the local office to the DOL Employment Standards Administration for appropriate handling and resolution. The Employment Standards Administration is promulgating, contemporaneously with these regulations, a separate set of regulations for handling such matters.

Complaints and enforcement relating to the work contract will be handled by the Employment Standards Administration. Enforcement relating to the pre-employment activities, such as recruitment of U.S. workers, and issues which relate to the employer's future eligibility to apply for H–2A workers, will be handled by ETA.

O. *Changes to Other Regulations.*

Other minor, procedural changes are made to the regulations on housing for agricultural workers at 20 CFR Part 654, Subpart E; and to the regulations at 20 CFR Part 655, Subpart C, for the temporary alien agricultural labor certification process for H–2 logging employment (and for applications filed before June 1, 1987, for H–2 agricultural employment).

The interim final rule on housing standards differs from the proposed rule by giving the employer five days to bring the housing into compliance should defects be found during inspection. To accommodate the five days, the employer must assure initially that the housing is ready for occupancy 30 days before occupancy, rather than 25 days, as in the proposed rule.

Regulatory Impact

The interim final rule affects only those employers using nonimmigrant alien workers ("H–2A visaholders") in temporary agricultural jobs in the U.S. It does not have the financial or other impact to make it a major rule, and therefore, the preparation of a regulatory impact analysis is not necessary. See Executive Order No. 12291, 3 CFR 1981 Comp., p. 127, 5 U.S.C. 601 note.

At the time the proposed rule was published, the Department of Labor notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities. No significant economic impact is imposed by the proposed regulation above the costs contained in the current temporary alien agricultural labor certification program.

In preparing the interim final rule, the Department of Labor consulted with the Immigration and Naturalization Service of the Department of Justice, and with the Department of Agriculture. This rule was submitted to the Attorney General for approval, pursuant to section 301(e) of the Immigration Reform and Control Act of 1986. 8 U.S.C. 1186 note. This interim final rule received such approval.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the paperwork requirements that are included in this interim final rule have been submitted to the Office of Management and Budget for approval.

Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* as Number 17.202, "Certification of Foreign Workers for Agricultural and Logging Employment."

List of Subjects

20 CFR Part 654

Agriculture, Employment, Employment and Training Administration, Government procurement, Housing standards, Labor, Migrant labor, Unemployment.

20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Guam, Labor, Migrant labor, Wages.

Final Rule

Accordingly, Parts 654 and 655 of Chapter V of Title 20, Code of Federal Regulations, are amended as follows:

PART 654—SPECIAL RESPONSIBILITIES OF THE EMPLOYMENT SERVICE SYSTEM

Subpart E—Housing for Agricultural Workers

1. In 20 CFR Part 654, Subpart E, the separate authority citation for Subpart E is revised to read as follows:

Authority: 29 U.S.C. 49k; 8 U.S.C. 1186(c)(4); 41 Op.A.G. 406 (1959).

2. In 20 CFR Part 654, § 654.403 is revised to read as follows:

§ 654.403 Conditional access to the intrastate or interstate clearance system.

(a) *Filing requests for conditional access—(1) "Noncriteria" employers.* Except as provided in paragraph (a)(2) of this section, an employer whose housing does not meet applicable standards may file with the local Job Service office serving the area in which its housing is located, a written request that its job orders be conditionally allowed into the intrastate or interstate clearance system, provided that the employer's request assures that its housing will be in full compliance with the requirements of the applicable housing standards at least 30 calendar days (giving the specific date) before the housing is to be occupied.

(2) *"Criteria" employers.* If the request for conditional access described in paragraph (a)(1) of this section is from an employer filing a job order pursuant to an application for temporary alien agricultural labor certification for H–2A alien agricultural workers or H–2 alien workers under Subpart B or Subpart C, respectively, of Part 655 of this chapter, the request shall be filed with the RA as an attachment to the application for temporary alien agricultural labor certification.

(3) *Assurance.* The employer's request pursuant to paragraphs (a)(1) or (a)(2) of this section shall contain an assurance that the housing will be in full compliance with the applicable housing standards at least 30 calendar days (stating the specific date) before the housing is to be occupied.

(b) *Processing requests—(1) State agency processing.* Upon receipt of a

written request for conditional access to the intrastate or interstate clearance system under paragraph (a)(1) of this section, the local Job Service office shall send the request to the State office, which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration, (RA).

(2) *Regional office processing and determination.* Upon receipt of a request for conditional access pursuant to paragraph (a)(2) or paragraph (b)(1) of this section, the RA shall review the matter and, as appropriate, shall either grant or deny the request.

(c) *Authorization.* The authorization for conditional access to the intrastate or interstate clearance system shall be in writing, and shall state that although the housing does not comply with the applicable standards, the employer's job order may be placed into intrastate or interstate clearance until a specified date. The RA shall send the authorization to the employer and shall send copies to the appropriate State agency and local Job Service office. The employer shall submit and the local Job Service shall attach copies of the authorization to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) *Notice of denial.* If the RA denies the request for conditional access to the intrastate or interstate clearance system, the RA shall provide written notice to the employer, the appropriate State agency, and the local Job Service office, stating the reasons for the denial.

(e) *Inspection.* The local Job Service office serving the area containing the housing of any employer granted conditional access to the intrastate or interstate clearance system shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this subpart. An employer, however, may request an earlier preliminary inspection. If, on the date set forth in the authorization, the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office shall afford the employer five calendar days to bring the housing into full compliance. After the five-calendar-day period, if the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office immediately:

(i) Shall notify the RA;

(ii) Shall remove the employer's job orders from intrastate and interstate clearance; and

(iii) Shall, if workers have been recruited against these orders, in cooperation with the employment service agencies in other States, make every reasonable attempt to locate and notify the appropriate crew leaders or workers, and to find alternative and comparable employment for the workers.

PART 655—LABOR CERTIFICATION PROCESS FOR THE TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

3. In 20 CFR Part 655, the authority citation is revised to read as set forth below and the authority citations for all the subparts and following all the sections in Part 655 are removed:

Authority: 8 U.S.C. 1101(a)(15)(H) and 1184(c); 29 U.S.C. 49 *et seq.*; §§ 655.0, 655.00, and 655.000 also issued under 8 U.S.C. 1186 and 8 CFR 214.2(h)(3)(i); Subpart A and Subpart C also issued under 8 CFR 214.2(h)(3)(i); Subpart B also issued under 8 U.S.C. 1186.

§ 655.0 [Amended]

4. In 20 CFR Part 655, § 655.0 is amended:

a. By removing paragraphs (b) and (c);

b. By redesignating paragraphs (d) and (e) as paragraphs (b) and (c) respectively; and

c. By removing from paragraph (a) the words "are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the Immigration and Nationality Act, as implemented by the INS regulation at 8 CFR 214.2(h)(3)(i)," and adding, in their place, the words "are required to carry out the policies of the Immigration and Nationality Act (INA),".

§ 655.00 [Amended]

5. In 20 CFR Part 655, § 655.00 is amended by removing the words "The Administrator" and adding, in their place, the words "The Director".

§ 655.000 [Amended]

6. In 20 CFR Part 655, §§ 655.000 is amended by removing the period at the end of the first sentence in paragraph (a) and adding in its place the words ", except with respect to agricultural employment covered by 8 U.S.C. 1101 (a)(15)(H)(ii)(a) and Subpart B of this Part."

§ 655.1 [Amended]

7. In 20 CFR Part 655, § 655.1 is amended by removing paragraph (b) and by redesignating § 655.1(a) as § 655.1.

8. In 20 CFR Part 655, Subpart B is revised to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

Sec.

655.90 Scope and purpose of Subpart B.
655.92 Authority of the Regional Administrator.
655.93 Special circumstances.
655.100 Overview of subpart and definition of terms.
655.101 Temporary alien agricultural labor certification applications.
655.102 Contents of job offers.
655.103 Assurances.
655.104 Determinations based on acceptability of H–2A applications.
655.105 Recruitment period.
655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.
655.107 Adverse effect wage rates (AEWRs).
655.108 H–2A applications involving fraud or willful misrepresentation.
655.110 Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications.
655.111 Petitions for higher meal charges.
655.112 Administrative review and *de novo* hearing before an administrative law judge.
655.113 Job Service Complaint System; enforcement of work contracts.

§ 655.90 Scope and purpose of Subpart B.

(a) *General.* This subpart sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of: (1) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and (2) whether the employment of H–2A workers will adversely effect the wages and working conditions of workers in the U.S. similarly employed. Under the authority of the INA, the Secretary of Labor has promulgated the regulations in this subpart. This subpart sets forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers in agriculture. This subpart provides the Secretary's methodology for the two-fold determination of availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers, for particular temporary and seasonal agricultural jobs in the United States.

(b) *The statutory standard.* (1) A petitioner for H–2A workers must apply

to the Secretary of Labor for a certification that, as stated in the INA:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) Section 216(b) of the INA further requires that the Secretary may not issue a certification if the conditions regarding U.S. worker availability and adverse effect are not met, and may not issue a certification if, as stated in the INA:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H–2A workers and the Secretary has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment . . . shall terminate on the date the H–2A workers depart for the employer's place of employment.

(3) Regarding the labor certification determination itself, section 216(c)(3) of the INA, as quoted in the following, specifically directs the Secretary to make the certification if:

(i) the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) the employer does not actually have, or has not been provided with referrals of, qualified individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.

(c) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected must be established. (The regulations in this subpart establish such minimum levels for wages, terms, benefits, and conditions of employment). Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F. 2d 299 (5th Cir. 1976). Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this subpart set forth requirements for recruiting U.S. workers in accordance with this principle.

(d) *Construction.* This subpart shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc.* v. *Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974); *Flecha* v. *Quiros,* 567 F.2d 1154, 1156 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed. *Williams* v. *Usery,* 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied,* 429 U.S. 1000, and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

§ 655.92 Authority of the Regional Administrator.

Under this subpart, the accepting for consideration and the making of temporary alien agricultural labor certification determinations are ordinarily performed by the Regional Administrator (RA) of an Employment and Training Administration region, who, in turn, may delegate this responsibility to a designated staff member. The Director of the United States Employment Service, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by USES in Washington, DC. In those cases, the RA will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

§ 655.93 Special circumstances.

(a) *Systematic process.* The regulations under this subpart are designed to provide a systematic process for handling applications from the kinds of employers who have historically utilized nonimmigrant alien workers in agriculture, usually in relation to the production or harvesting of a particular agricultural crop for market, and which normally share such characteristics as:

(1) A fixed-site farm, ranch, or similar establishment;

(2) A need for workers to come to their establishment from other areas to perform services or labor in and around their establishment;

(3) Labor needs which will normally be controlled by environmental conditions, particularly weather and sunshine; and

(4) A reasonably regular workday or workweek.

(b) *Establishment of special procedures.* In order to provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Director has the authority to establish special procedures for processing H–2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Director has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates for those occupations, for a Statewide or other geographical area, other than the rates established pursuant to § 655.107 of this part, provided that the Director uses a methodology to establish such adverse effect wage rates which is consistent

with the methodology in § 655.107(a). Prior to making determinations under this paragraph (b), the Director may consult with employer representatives, appropriate RAs, and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the Director to continue and, where the Director deems appropriate, to revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.

§ 655.100 Overview of this subpart and definition of terms.

(a) *Overview*—(1) *Filing applications.* This subpart provides guidance to an employer who desires to apply for temporary alien agricultural labor certification for the employment of H–2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employer shall file an H–2A application, including a job offer, on forms prescribed by the Employment and Training Administration (ETA), which describes the material terms and conditions of employment to be offered and afforded to U.S. workers and H–2A workers, with the Regional Administrator (RA) having jurisdiction over the geographical area in which the work will be performed. The entire application shall be filed with the RA no less than 60 calendar days before the first date of need for workers, and a copy of the job offer shall be submitted at the same time to the local office of the State employment service agency which serves the area of intended employment. Under the regulations, the RA will promptly review the application and notify the applicant in writing if there are deficiencies which render the application not acceptable for consideration, and afford the applicant a five-calendar-day period for resubmittal of an amended application or an appeal of the RA's refusal to approve the application as acceptable for consideration. Employers are encouraged to file their applications in advance of the 60-calendar-day period mentioned above in this paragraph (a)(1). Sufficient time should be allowed for delays that might arise due to the need for amendments in order to make the application acceptable for consideration.

(2) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the RA's certification determination, to increase the number of workers requested in the initial application; without requiring, under certain circumstances, an additional recruitment period for U.S. workers.

(3) *Untimely applications.* If an H–2A application does not satisfy the specified time requirements, this subpart provides for the RA's advice to the employer in writing that the certification cannot be granted because there is not sufficient time to test the availability of U.S. workers; and provides for the employer's right to an administrative review or a *de novo* hearing before an administrative law judge. Emergency situations are provided for, wherein the RA may waive the specified time periods.

(4) *Recruitment of U.S. workers; determinations*—(i) *Recruitment.* This subpart provides that, where the application is accepted for consideration and meets the regulatory standards, the State agency and the employer begin to recruit U.S. workers. If the employer has complied with the criteria for certification, including recruitment of U.S. workers, by 20 calendar days before the date of need specified in the application (except as provided in certain cases), the RA makes a determination to grant or deny, in whole or in part, the application for certification.

(ii) *Granted applications.* This subpart provides that the application for temporary alien agricultural labor certification is granted if the RA finds that the employer has not offered foreign workers higher wages or better working conditions (or has imposed less restrictions on foreign workers) than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, and qualified will not be available at the time and place needed to perform the work for which H–2A workers are being requested; and that the employment of such aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees*—(A) *Amount.* This subpart provides that each employer (except joint employer associations) of H–2A workers shall pay to the RA fees for each temporary alien agricultural labor certification received. The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee.

(B) *Timeliness of payment.* The fee must be received by the RA no later than 30 calendar days after the granting a each temporary alien agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial violation which may result in the denial of future temporary alien agricultural labor certifications.

(iv) *Denied applications.* This subpart provides that if the application for temporary alien agricultural labor certification is denied, in whole or in part, the employer may seek review of the denial, or a *de novo* hearing, by an administrative law judge as provided in this subpart.

(b) *Definitions of terms used in this subpart.* For the purposes of this subpart:

"Accept for consideration" means, with respect to an application for temporary alien agricultural labor certification, the action by the RA to notify the employer that a filed temporary alien agricultural labor certification application meets the adverse effect criteria necessary for processing. An application accepted for consideration ultimately will be approved or denied in a temporary alien agricultural labor certification determination.

"Administrative law judge" means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105; or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by Part 656 of this chapter, but which shall hear and decide appeals as set forth in § 655.112 of this part. "Chief Administrative Law Judge" means the chief official of the Department of Labor Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

"Adverse effect wage rate (AEWR)" means the wage rate which the Director has determined must be offered and paid, as a minimum, to every H–2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H–2A worker so that the

wages of similarly employed U.S. workers will not be adversely affected.

"Agent" means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, which (1) is authorized to act on behalf of the employer for temporary alien agricultural labor certification purposes, and (2) is not itself an employer, or a joint employer, as defined in this paragraph (b).

"Director" means the chief official of the United States Employment Service (USES) or the Director's designee.

"DOL" means the United States Department of Labor.

"Eligible worker" means a "U.S. worker", as defined in this section.

"Employer" means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. An association of employers shall be considered the sole employer if it has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

"Employment Service (ES)" and "Employment Service (ES) System" mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

"Employment Standards Administration" means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with the carrying out of certain functions of the Secretary under the INA.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Federal holiday" means a legal public holiday as defined at 5 U.S.C. 6103.

"H–2A worker" means any nonimmigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

"Immigration and Naturalization Service (INS)" means the component of the U.S. Department of Justice which makes the determination under the INA on whether or not to grant visa petitions to employers seeking H–2A workers to perform temporary agricultural work in the United States.

"INA" means the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*).

"Job offer" means the offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

"Job opportunity" means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

"Local office" means the State agency's office which serves a particular geographic area within a State.

"Positive recruitment" means the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

"Regional Administrator, Employment and Training Administration (RA)" means the chief ETA official of a DOL regional offfice or the RA's designee.

"Secretary" means the Secretary of Labor or the Secretary's designee.

"Solicitor of Labor" means the Solicitor, United States Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

"State agency" means the State employment service agency designated under § 4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the ES System.

"Temporary alien agricultural labor certification" means the certification made by the Secretary of Labor with respect to an employer seeking to file with INS a visa petition to import an alien as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 216 of the INA that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and (2) the employment of the alien in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1186).

"Temporary alien agricultural labor certification determination" means the written determination made by the RA to approve or deny, in whole or in part, an application for temporary alien agricultural labor certification.

"United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

"United States (U.S.) worker" means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at § 101(a)(38) of the INA (8 U.S.C. 1101(a)(38)).

"Wages" means all forms of cash remuneration to a worker by an employer in payment for personal services.

(c) *Definition of "agricultural labor or services of a temporary or seasonal nature".* For the purposes of this subpart, "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) *"Agricultural labor or services".* Pursuant to section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), "agricultural labor or services" is defined for the purposes of this subpart as either "agricultural labor" as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be "agricultural labor or services", notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below:

(i) *"Agricultural labor".* Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), quoted as follows, defines the term "agricultural labor" to include all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4) (A) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(ii) *"Agriculture"* Section 203(f) of Title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938, as codified), quoted as follows, defines "agriculture" to include:

(f) * * * farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(iii) *"Agricultural commodity".* Section 1141j(g) of Title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended), quoted as follows, defines "agricultural commodity" to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) *"Gum rosin".* Section 92 of Title 7, United States Code, quoted as follows, defines "gum spirits of turpentine" and "gum rosin" as—

(c) "Gum spirits of turpentine" means spirits of turpentine made from gum (oleoresin) from a living tree.

* * * * *

(h) "Gum rosin" means rosin remaining after the distillation of gum spirits of turpentine.

(2) *"Of a temporary or seasonal nature"*—(i) *"On a seasonal or other temporary basis".* For the purposes of this subpart, "of a temporary or seasonal nature" means "on a seasonal or other temporary basis", as defined in the Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* For informational purposes, the definition of "on a seasonal or other temporary basis", as set forth at 29 CFR 500.20, is provided below:

"On a seasonal or other temporary basis" means:

* * * * *

Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

* * * * *

A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

* * * * *

"On a seasonal or other temporary basis" does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

* * * * *

"On a seasonal or other temporary basis" does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) *"Temporary".* For the purposes of this subpart, the definition of "temporary" in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part.

§ 655.101 Temporary alien agricultural labor certification applications.

(a) *General*—(1) *Filing of application.* An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the RA in whose region the area of intended employment is located, for a temporary alien agricultural labor certification for temporary foreign workers (H–2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the RA. At the same time, a duplicate application shall be submitted to the local office serving the area of intended employment.

(2) *Applications filed by agents.* If the temporary alien agricultural labor certification application is filed by an agent on behalf of an employer, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer's behalf. The employer may authorize the agent to accept for interview workers being referred to the job and to make hiring commitments on behalf of the employer. The statement shall specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf,

and for compliance with all regulatory and other legal requirements.

(3) *Applications filed by associations.* If an association of agricultural producers which uses agricultural labor or services files the application, the association shall identify whether it is: (i) The sole employer; (ii) a joint employer with its employer-member employers; or (iii) the agent of its employer-members. The association shall submit documentation sufficient to enable the RA to verify the employer or agency status of the association; and shall identify by name and address each member which will be an employer of H–2A workers.

(b) *Application form.* Each H–2A application shall be on a form or forms prescribed by ETA. The application shall state the total number of workers the employer anticipates employing in the agricultural labor or service activity during the covered period of employment. The application shall include:

(1) A copy of the job offer which will be used by each employer for the recruitment of U.S. and H–2A workers. The job offer shall state the number of workers needed by the employer, based upon the employer's anticipation of a shortage of U.S. workers needed to perform the agricultural labor or services, and the specific estimated date on which the workers are needed. The job offer shall comply with the requirements of §§ 655.102 and 653.501 of this chapter, and shall be signed by the employer or the employer's agent on behalf of the employer; and

(2) An agreement to abide by the assurances required by § 655.103 of this part.

(c) *Timeliness.* Applications for temporary alien agricultural labor certification are not required to be filed more than 60 calendar days before the first day of need. The employer shall be notified by the RA in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The RA's temporary alien agricultural labor certification determination on the approved application shall be made no later than 20 calendar days before the date of need if the employer has complied with the criteria for certification. To allow for the availability of U.S. workers to be tested, the following process applies:

(1) *Application filing date.* The entire H–2A application, including the job offer, shall be filed with the RA, in duplicate, no less than 60 calendar days before the first date on which the employer estimates that the workers are needed. Applications may be filed in person; may be mailed to the RA (Attention: H–2A Certifying Officer) by certified mail, return receipt requested; or delivered by guaranteed commercial delivery which will ensure delivery to the RA and provide the employer with a documented acknowledgment of receipt of the application by the RA. Any application received 60 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the RA as being acceptable for processing.

(2) *Review of application; recruitment; certification determination period.* Section 655.104 of this part requires the RA to promptly review the application, and to notify the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration and to afford an opportunity for resubmittal of an amended application. The employer shall have five calendar days in which to file an amended application. Section 655.106 of this part requires the RA to grant or deny the temporary alien agricultural labor certification application no later than 20 calendar days before the date on which the workers are needed, provided that the employer has complied with the criteria for certification, including recruitment of eligible individuals. Such recruitment, for the employer, the State agencies, and DOL to attempt to locate U.S. workers locally and through the circulation of intrastate and interstate agricultural clearance job orders acceptable under § 653.501 of this chapter and under this subpart, shall begin on the date that an acceptable application is filed, except that the local office shall begin to recruit workers locally beginning on the date it first receives the application. The time needed to obtain an application acceptable for consideration (including the job offer) after the five-calendar-day period allowed for an amended application will postpone day-for-day the certification determination beyond the 20 calendar days before the date of need, provided that the RA notifies the applicant of any deficiencies within seven calendar days after receipt of the application. Delays in obtaining an application acceptable for consideration which are directly attributable to the RA will not postpone the certification determination beyond the 20 calendar days before the date of need. When an employer resubmits to the RA (with a copy to the local office) an application with modifications required by the RA, and the RA approves the modified application as meeting necessary adverse effect standards, the modified application will not be rejected solely because it now does not meet the 60-calendar-day filing requirement. If an application is approved as being acceptable for processing without need for any amendment within the seven-calendar-day review period after initial filing, recruitment of U.S. workers will be considered to have begun on the date the application was received by the RA; and the RA shall make the temporary alien agricultural labor certification determination required by § 655.106 of this part no later than 20 calendar days before the date of need provided that other regulatory conditions are met.

(3) *Early filing.* Employers are encouraged, but not required, to file their applications in advance of the 60-calendar-day minimum period specified in paragraph (c)(1) of this section, to afford more time for review and discussion of the applications and to consider amendments, should they be necessary. This is particularly true for employers submitting H–2A applications for the first time who may not be familiar with the Secretary's requirements for an acceptable application or U.S. worker recruitment. Such employers particularly are encouraged to consult with DOL and local office staff for guidance and assistance well in advance of the minimum 60-calendar-day filing period.

(4) *Local recruitment; preparation of clearance orders.* At the same time the employer files the H–2A application with the RA, a copy of the application shall be submitted to the local office which will use the job offer portion—of the application to prepare a local job order and begin to recruit U.S. workers in the area of intended employment. The local office also shall begin preparing an agricultural clearance order, but such order will not be used to recruit workers in other geographical areas until the employer's H–2A application is accepted for consideration and the clearance order is approved by the RA and the local office is so notified by the RA.

(5) *First-time employers of H–2A workers.* With respect only to those applications filed on or before May 31, 1989, and notwithstanding the time requirements in paragraphs (c)(1) through (c)(4) of this section, under the following circumstances the RA shall make the certification determination required by § 655.106 of this part no later than 10 calendar days before the date of need:

(i) The employer would be a first-time employer of H–2A workers (and, prior to June 1, 1987, did not use or apply for certification to use H–2 agricultural

workers under the INA as then in effect) and has not previously applied for a temporary alien agricultural labor certification to use H–2A workers;

(ii) The RA, the employer, and the ES System have had a reasonable opportunity to test the availability of U.S. workers under the conditions of a job offer which has been determined to be acceptable by the RA in accordance with the provisions of §§ 655.102 and 655.103 of this part at least 30 calendar days before the date of need; and

(iii) The RA has determined that the employer has otherwise made good faith efforts to comply with the requirements of this subpart.

(d) *Amendments to application to increase number of workers.* Applications may be amended at any time, prior to an RA certification determination, to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than ten workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved only when the need for additional workers could not have been foreseen, and that crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(e) *Minor amendments to applications.* Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the RA determines they are justified and will have no significant effect upon the RA's ability to make the labor certification determination required by § 655.106 of this part. Amendments described at paragraph (d) of this section are not "minor technical amendments".

(f) *Untimely applications*—(1) *Notices of denial.* If an H–2A application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the RA may then advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial shall inform the employer of its right to an administrative review or *de novo* hearing before an administrative law judge.

(2) *Emergency situations.* Notwithstanding paragraph (f)(1) of this section, in emergency situations the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien agricultural workers (H–2 or H–2A) for the prior year's agricultural season or for any employer which has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the RA has an opportunity to obtain sufficient labor market information on an expedited basis to make the labor certification determination required by § 216 of the INA (8 U.S.C. 1186). In making this determination, the RA will accept information offered by and may consult with representatives of the U.S. Department of Agriculture.

(g) *Length of job opportunity.* The employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is "of a temporary or seasonal nature", as defined at § 655.100(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the RA shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H–2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, except in extraordinary circumstances.

§ 655.102 Contents of job offers.

(a) *Preferential treatment of aliens prohibited.* The employer's job offer to U.S. workers shall offer the U.S. workers no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H–2A workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H–2A workers. This does not relieve the employer from providing to H–2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Minimum benefits, wages, and working conditions.* Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H–2A application always shall include each of the following minimum benefit, wage, and working condition provisions:

(1) *Housing.* The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

(i) *Standards for employer-provided housing.* Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404–654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii) of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at § 654.403 of this chapter.

(ii) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL Occupational Safety and Health Administration for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.

(iii) *Standards for other habitation.* Rental, public accomodation, or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, Occupational Safety and Health Administration standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the RA that the housing complies with the local, State, or federal housing standards applicable under this paragraph (b)(1)(iii).

(iv) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by an employer, and use of the public housing unit normally requires charges from migrant workers, such charges shall be paid by the employer directly to the appropriate individual or entity affiliated with the housing's management.

(v) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers by

employers who provide housing for their workers. However, employers may require workers to reimburse them for damage caused to housing by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(vi) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing shall be provided to workers with families who request it.

(2) *Workers' compensation.* The employer shall provide, at no cost to the worker, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the RA prior to the issuance of a labor certification.

(3) *Employer-provided items.* Except as provided below, the employer shall provide, without charge including deposit charge, to the worker all tools, supplies, and equipment required to perform the duties assigned; the employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement is permissible if approved in advance by the RA.

(4) *Meals.* Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall provide each worker with three meals a day. When such facilities are not available, the employer either shall provide each worker with three meals a day or shall furnish free and convenient cooking and kitchen facilities to the workers which will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. Until a new amount is set pursuant to this paragraph (b)(4), the charge shall not be more than $5.26 per day unless the RA has approved a higher charge pursuant to § 655.111 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the **Federal Register.**

(5) *Transportation; daily subsistence—(i) Transportation to place of employment.* The employer shall advance transportation and subsistence costs (or otherwise provide them) to workers when it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H–2A workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment. The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment. If no charges will be made for meals and free and convenient cooking and kitchen facilities will be provided, the amount of the subsistence payment shall be no less than the amount permitted under paragraph (b)(4) of this section.

(ii) *Transportation from place of employment.* If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses; except that, if the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer is not required to provide or pay for such expenses.

(iii) *Transportation between living quarters and worksite.* The employer shall provide transportation between the worker's living quarters (*i.e.*, housing provided by the employer pursuant to paragraph (b)(1) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations. This paragraph (b)(5)(iii) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (b)(1) of this section.

(6) *Three-fourths guarantee*—(i) *Offer to worker.* The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the expiration date specified in the work contract or in its extensions, if any. If the employer affords the U.S. or H–2A worker during the total work contract period less employment than that required under this paragraph (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the guaranteed number of days. For purposes of this paragraph (b)(6), a workday shall mean the number of hours in a workday as stated in the job order and shall exclude the worker's Sabbath and federal holidays. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time specified in the job order. The work shall be offered for at least three-fourths of the workdays (that is, 3/4 x (number of days) x (specified hours)). Therefore, if, for example, the contract contains 20 eight-hour workdays, the worker shall be offered employment for 120 hours during the 20 workdays. 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 shall not be required to work for more than the number hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays.

(ii) *Guarantee for piece-rate-paid worker.* If the worker will be paid on a piece rate basis, the employer shall use

the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

(iii) *Failure to work.* Any hours which 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 do so pursuant to paragraph (b)(6)(i) of this section and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(iv) *Displaced H–2A worker.* The employer shall not be liable for payment under this paragraph (b)(6) with respect to an H–2A worker whom the RA certifies is displaced because of the employer's compliance with § 655.103(e) of this part.

(7) *Records.* (i) The employer shall keep accurate and adequate records with respect to the workers' earnings including field tally records, supporting summary payroll records and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (b)(6) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the three-fourths guarantee at paragraph (b)(6) of this section, the records shall state the reason or reasons therefore.

(iii) Upon reasonable notice, the employer shall make available the records, including field tally records and supporting summary payroll records for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker; and

(iv) The employer shall retain the records for not less than three years after the completion of the work contract.

(8) *Hours and earnings statements.* The employer shall 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 the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily.

(9) *Rates of pay.* (i) If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(ii)(A) If the worker will be paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay shall be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate for each hour worked; and the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment; and

(B) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention,

(*1*) Such standards shall be specified in the job offer and be no more than those required by the employer in 1977, unless the RA approves a higher minimum; or

(*2*) If the employer first applied for H–2 agricultural or H–2A temporary alien agricultural labor certification after 1977, such standards shall be no more than those normally required (at the time of the first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

(10) *Frequency of pay.* The employer shall state the frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least twice monthly whichever is more frequent).

(11) *Abandonment of employment; or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the local office of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section, and that worker is not entitled to the "three-fourths guarantee" (see paragraph (b)(6) of this section).

(12) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, hurricane, or other Act of God which makes the fulfillment of the contract impossible the employer may terminate the work contract. In the event of such termination of a contract, the employer shall fulfill the three-fourths guarantee at paragraph (b)(6) of this section for the time that has elapsed from the start of the work contract to its termination. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the employer shall:

(i) Offer to return the worker, at the employer's expense, to the place from which the worker disregarding intervening employment came to work for the employer,

(ii) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment, and

(iii) Notwithstanding whether the employment has been terminated prior to completion of 50 percent of the work contract period originally offered by the employer, pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker, without intervening employment, has come to work for the employer to the place of employment. Daily subsistence shall be computed as set forth in paragraph (b)(5)(i) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved.

(13) *Deductions.* The employer shall make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions not required by law which the employer will make from the

worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA as determined by the Secretary at 29 CFR Part 531.

(14) *Copy of work contract.* The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract.

(c) *Appropriateness of required qualifications.* Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA for their appropriateness. The RA may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer; and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

(d) *Positive recruitment plan.* The employer shall submit in writing, as a part of the application, the employer's plan for conducting independent, positive recruitment of U.S. workers as required by §§ 655.103 and 655.105(a) of this part. Such a plan shall include a description of recruitment efforts (if any) made prior to the actual submittal of the application. The plan shall describe how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H–2A agricultural employers and provide an override which is no less than that being provided by non-H–2A agricultural employers.

§ 655.103 Assurances.

As part of the temporary alien agricultural labor certification application, the employer shall include in the job offer a statement agreeing to abide by the conditions of this subpart. By so doing, the employer makes each of the following assurances:

(a) *Labor disputes.* The specific job opportunity for which the employer is requesting H–2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(b) *Employment-related laws.* During the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.

(c) *Rejections and terminations of U.S. workers.* No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office.

(d) *Recruitment of U.S. workers.* The employer shall independently engage in positive recruitment until the foreign workers have departed for the employer's place of employment and shall cooperate with the ES System in the active recruitment of U.S. workers by:

(1) Assisting the ES System to prepare local, intrastate, and interstate job orders using the information supplied on the employer's job offer;

(2) Placing advertisements (in a language other than English, where the RA determines appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the RA:

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier, if appropriate; and

(ii) Each such advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the ES System and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone; and

(4) Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers.

(e) *Fifty-percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by § 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other benefits, wages, and working conditions required by § 655.102 of this part to any such U.S. worker and shall not treat less favorably than H–2A workers any U.S. worker referred or transferred pursuant to this assurance.

(f) *Other recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by § 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H–2A agricultural employers and shall provide an override which is no less than that being provided by non-H–2A agricultural employers. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an

override. The employer shall not be required to provide for housing through an override.

(g) *Retaliation prohibited.* The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to § 216 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA (8 U.S.C. 1186);

(3) Testified or is about to testify in any proceeding under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA.

(h) *Fees.* The application shall include the assurance that fees will be paid in a timely manner, as follows:

(1) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, the fee for each employer-member receiving a temporary alien agricultural labor certification shall be $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. Fees shall be paid by a check or money order made payable to "Department of Labor", and are nonrefundable. In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the RA within 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

§ 655.104 Determinations based on acceptability of H–2A applications.

(a) *Local office activities.* The local office, using the job offer portion of the H–2A application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment. The RA should notify the State or local office by telephone no later than seven calendar days after the application was received by the RA if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the local office, whichever is earlier, the local office shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *Regional office activities.* The RA, upon receipt of the H–2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§ 655.101–655.103 of this part. If the RA determines that the application does not meet the requirements of §§ 655.101–655.103, the RA shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the RA determines that the application is not timely in accordance with § 655.101 of this part and that neither the first-year employer provisions of § 655.101(c)(5) nor the emergency provisions of § 655.101(f) apply, the RA may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.

(c) *Rejected applications.* If the application is not accepted for consideration, the RA shall notify the applicant in writing (by means normally assuring next-day delivery) within seven calendar days of the date the application was received by the RA with a copy to the local office. The notice shall:

(1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;

(2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in order for the RA to accept the application for consideration;

(3) Offer the applicant an opportunity to request an expedited administrative review or a *de novo* administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall telegraph a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and to telegraph a copy to the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and

(4) State that if the employer does not request an expedited administrative-judicial review or a *de novo* hearing before an administrative law judge within the seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

(d) *Appeal procedures.* If the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge pursuant to paragraph (c)(3) of this section, the procedures at § 655.112 of this part shall be followed.

(e) *Required modifications.* If the application is not accepted for consideration by the RA, but the RA's written notification to the applicant is not timely as required by § 655.101 of this part, the certification determination will not be extended beyond 20 calendar days before the date of need. The notice will specify that the RA's temporary alien agricultural labor certification determination will be made no later than 20 calendar days before the date of need, provided that the applicant submits the modifications to the application which are required by the RA within five calendar days and in a manner specified by the RA which will enable the test of U.S. worker availability to be made as required by § 655.101 of this part within the time available for such purposes.

§ 655.105 Recruitment period.

(a) *Notice of acceptance of application for consideration; required recruitment.* If the RA determines that the H–2A application meets the

requirements of §§ 655.101–655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be laced into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the RA finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the RA shall take into account other recent recruiting efforts in those areas and will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H–2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H–2A agricultural employers in the area and the kind and degree of recruitment efforts which the potential H–2A employer made to obtain H–2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H–2A employer, during the period after filing the application and before the date the H–2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H–2A employer made to obtain H–2A workers.

(b) *Recruitment of U.S. workers.* After an application for temporary alien agricultural labor certification is accepted for processing pursuant to paragraph (a) of this section, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the RA, with the Director's concurrence, may require modifications to a job offer when the RA determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by § 655.102(b) of this part. If any such modifications are required after an application has been accepted for consideration by the RA, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

(d) *Final determination.* By 20 calendar days before the date of need specified in the application, except as provided for under §§ 655.101(c)(2) and 655.104(e) of this part for untimely modified applications, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.103 of this part. If the RA concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the RA shall deny the temporary alien agricultural labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.104(d) of this part.

(e) *Appeal procedure.* With respect to determinations by the RA pursuant to this section, if the employer timely requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

§ 655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.

(a) *Referral of able, willing, and qualified eligible U.S. workers.* With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b) (1) *Determinations.* If the RA, in accordance with § 655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of § 655.102 of this part, by the date specified pursuant to § 655.101(c)(2) of this part for untimely modified applications or 20 calendar days before the date of need specified in the application, whichever is applicable, the RA shall grant the temporary alien agricultural labor certification request for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the RA shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are likely to sign a work contract. The RA shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the RA. The RA shall not grant a temporary alien agricultural labor certification request for any H–2A workers if the RA determines that:

(i) Enough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer's job opportunities;

(ii) The employer, since the time the application was accepted for consideration under § 655.104 of this part, has adversely affected U.S. workers by offering to, or agreeing to provide to, H–2A workers better wages, working conditions or benefits (or by offering to, or agreeing to impose on alien workers less obligations and restrictions) than those offered to U.S. workers;

(iii) The employer during the previous two-year period employed H–2A

workers and the RA has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H–2A workers;

(iv) The employer has not complied with the workers' compensation requirements at § 655.102(b)(2) of this part; or

(v) The employer has not satisfactorily complied with the positive recruitment requirements specified by this subpart.

Further, the RA, in making the temporary alien agricultural labor certification determination, will subtract from any temporary alien agricultural labor certification the specific verified number of job opportunities involved which are vacant because of a strike or other labor dispute involving a work stoppage, or a lockout, in the occupation at the place of employment (and for which H–2A workers have been requested). Upon receipt by the RA of such labor dispute information from any source, the RA shall verify the existence of the strike, labor dispute, or lockout and the vacancies directly attributable through the receipt by the RA of a written report from the State agency written following an investigation by the State agency (made under the oversight of the RA) of the situation and after the RA has consulted with the Director prior to making such a determination.

(2) *Fees.* A temporary alien agricultural labor certification determination granting an application shall include a bill for the required fees. Each employer (except joint employer associations) of H–2A workers under the application for temporary alien agricultural labor certification shall pay in a timely manner a nonrefundable fee upon issuance of the temporary alien agricultural labor certification granting the application (in whole or in part), as follows:

(i) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. The fees shall be paid by check or money order made payable to "Department of Labor". In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(ii) *Timeliness.* Fees received by the RA no more than 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

(c) *Changes to temporary alien agricultural labor certifications; temporary alien agricultural labor certifications involving employer associations*—(1) *Changes.* Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the RA after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from one employer to another, except as provided for by paragraph (c)(2) of this section.

(2) *Associations*—(i) *Applications.* If an association is requesting a temporary alien agricultural labor certification as a joint employer, the temporary alien agricultural labor certification granted under this section shall be made jointly to the association and to its employer members. Except as provided in paragraph (c)(2)(iii) of this section, such workers may be transferred among its producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members. If an association is requesting a temporary alien agricultural labor certification as a sole employer, the temporary alien agricultural labor certification granted pursuant to this section shall be made to the association only.

(ii) *Referrals and transfers.* For the purposes of complying with the "fifty-percent rule" at § 655.103(e) of this part, any association shall be allowed to refer or transfer workers among its members (except as provided in paragraph (c)(2)(iii) of this section), and an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(iii) *Ineligible employer-members.* Workers shall not be transferred or referred to an association's member, if that member is ineligible to obtain any or any additional workers, pursuant to § 655.110 of this part.

(3) *Extension of temporary alien agricultural labor certification*–(i) *Short-term extension.* An employer who seeks an extension of two weeks or less of the temporary alien agricultural labor certification shall apply for such extension to INS. If INS grants such an extension, the temporary alien agricultural labor certification shall be deemed extended for such period as is approved by INS. No extension granted under this paragraph (c)(3)(i) shall be for a period longer than the original work contract period of the temporary alien agricultural labor certification.

(ii) *Long-term extension.* For extensions beyond the period which may be granted by INS pursuant to paragraph (c)(3)(i) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the RA for an extension of the period of the temporary alien agricultural labor certification, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The RA shall grant or deny the request for extension of the temporary alien agricultural labor certification based on available information, and shall notify the employer of the decision on the request in writing. The RA shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The RA shall not grant an extension where the temporary alien agricultural labor certification has already been extended by INS pursuant to paragraph (c)(3)(i) of this section.

(d) *Denials of applications.* If the RA does not grant the temporary alien agricultural labor certification (in whole or in part) the RA shall notify the employer by means reasonably calculated to assure next-day delivery. The notification shall contain all the statements required in § 655.104(c) of this part. If a timely request is made for an administrative-judicial review or a *de novo* hearing by an administrative law judge, the procedures of § 655.112 of this part shall be followed.

(e) *Approvals of applications*—(1) *Continued recruitment of U.S. workers.* After a temporary alien agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers, until the H–2A workers have departed for the employer's place of employment, and shall notify the local office, in writing, of the exact date on which the H–2A workers depart for the employer's place of employment. The employer, however, shall keep an active job order on file until the "50-percent rule" assurance at § 655.103(e) of this part is met, except as provided for by paragraph (f) of this section.

(2) *Referrals by ES System.* The ES System shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

(f) *Exceptions*—(1) *"Fifty-percent rule" inapplicable to small employers.* The assurance requirement at § 655.103(e) of this part does not apply to any employer who:

(i) Did not, during any calendar quarter during the preceeding calendar year, use more than 500 "man-days" of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the RA in the H–2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and

(iii) Has not otherwise "associated" with other employers who are applying for H–2A workers under this subpart, and so certifies to the RA.

(2) *Displaced H–2A workers.* An employer shall not be liable for payment under § 655.102(b)(6) of this part with respect to an H–2A worker whom the RA certifies is displaced due to compliance with § 655.103(e) of this part.

(g) *Withholding of U.S. workers prohibited*—(1) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers under § 655.103(e) of this part may submit a written complaint to the local office. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (*e.g.*, dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the local office.

(2) *Investigations.* The local office shall inform the RA by telephone that a complaint under the provisions of paragraph (g) has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the local office fails to conduct such interviews, the RA shall do so.

(3) *Reports of findings.* Within five working days after receipt of the complaint, the local office shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the RA.

(4) *Written findings.* The RA shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the RA deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the RA shall issue written findings to the local office and the employer. Where the RA determines that the employer's complaint is valid and justified, the RA shall immediately suspend the application of § 655.103(e) of this part to the employer. Such suspension of § 655.103(e) of this part under these circumstances shall not take place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The RA's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

(h) *Requests for new temporary alien agricultural labor certification determinations based on nonavailability of able, willing, and qualified U.S. workers*— (1) *Standards for requests.* If a temporary alien agricultural labor certification application has been denied (in whole or in part) based on the RA's determination of the availability of able, willing, and qualified U.S. workers, and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able, willing, qualified, or available at the time and place needed, the employer may request a new temporary alien agricultural labor certification determination from the RA. The RA shall expeditiously, but in no case later than 72 hours after the time a request is received, make a determination on the request.

(2) *Filing requests.* The employer's request for a new determination shall be made directly to the RA. The request may be made to the RA by telephone, but shall be confirmed by the employer in writing as required by paragraphs (h)(2)(i) or (ii) of this section.

(i) *Workers not able, willing, qualified, or eligible.* If the employer asserts that any worker who has been referred by the ES System or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H–2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified, or eligible because of lawful job-related reasons. The employer's burden of proof shall be met by the employer's submission to the RA, within 72 hours of the RA's receipt of the request for a new determination, of a signed statement of the employer's assertions, which shall identify each rejected worker by name and shall state each lawful job-related reason for rejecting that worker.

(ii) *U.S. workers not available.* If the employer telephonically requests the new determination, asserting solely that U.S. workers are not available, the employer shall submit to the RA a signed statement confirming such assertion. If such signed statement is not received by the RA within 72 hours of the RA's receipt of the telephonic request for a new determination, the RA may make the determination based solely on the information provided telephonically and the information (if any) from the local office.

(3) *Regional office review— (i) Expeditious review.* The RA expeditiously shall review the request for a new determination. The RA may request a signed statement from the local office in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) *New determination.* If the RA determines that the employer's assertion

of nonavailability is accurate and that no able, willing, or qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons, the RA shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the RA promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) *Notification of new determination.* If the RA cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the RA shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The RA's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the RA's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H–2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93 of this part) for which temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The Director shall publish, at least once in each calendar year, on a date or dates to be determined by the Director, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the **Federal Register.**

(b) *Higher prevailing wage rates.* If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the Director) is found to be higher that the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) *Federal minimum wage rate.* In no event shall an AEWR computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

§ 655.108 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS and DOL Office of the Inspector General for investigation. The RA shall continue to process the application and may issue a temporary alien agricultural labor certification.

(b) *Continued processing.* If a court finds an employer or agent not guilty of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary alien agricultural labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) *Terminated processing.* If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary alien agricultural labor certification application, the application is thereafter invalid, consideration of the application shall be terminated and the RA shall return the application to the employer or agent with the reasons therefor stated in writing.

§ 655.110 Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications.

(a) *Investigation of violations.* If, during the period of two years after a temporary alien agricultural labor certification has been granted (in whole or in part), the RA has reason to believe that an employer violated a material term or condition of the temporary alien agricultural labor certification, the RA shall, except as provided in paragraph (b) of this section, investigate the matter. If, after the investigation, the RA determines that a substantial violation has occurred, the RA, after consultation with the Director, shall notify the employer that a temporary alien agricultural certification request will not be granted for the next period of time in a calendar year during which the employer would normally be expected to request a temporary alien agricultural labor certification, and any application subsequently submitted by the employer for that time period will not be accepted by the RA. If multiple or repeated substantial violations are involved, the RA's notice to the employer shall specify that the prospective denial of the temporary alien agricultural labor certification will apply not only to the next anticipated period for which a temporary alien agricultural labor certification would normally be requested, but also to any periods within the coming two or three years; two years for two violations, or repetitions of the same violations, and three years for three or more violations, or repetitions thereof. The RA's notice shall be in writing, shall state the reasons for the determinations, and shall offer the employer an opportunity to request an expedited administrative review or a *de novo* hearing before an administrative law judge of the determination within seven calendar days of the date of the notice. If the employer requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

(b) *Employment Standards Administration investigations.* The RA may make the determination described in paragraph (a) of this section based on information and recommendations provided by the Employment Standards Administration, after an Employment Standards Administration investigation has been conducted in accordance with the Employment Standards Administration procedures, that an employer has not complied with the terms and conditions of employment prescribed as a condition for a temporary alien agricultural labor certification. In such instances, the RA need not conduct any investigation of his/her own, and the subsequent notification to the employer and other

procedures contained in paragraph (a) of this section will apply. Penalties invoked by the Employment Standards Administration for violations of temporary alien agricultural labor certification terms and conditions shall be treated and handled separately from sanctions available to the RA, and an employer's obligations for compliance with the Employment Standards Administration's enforcement penalties shall not absolve an employer from sanctions applied by ETA under this section (except as noted in paragraph (a) of this section).

(c) *Less than substantial violations—(1) Requirement of special procedures.* If, after investigation as provided for under paragraph (a) of this section, or an Employment Standards Administration notification as provided under paragraph (b) of this section, the RA determines that a less than substantial violation has occurred, but the RA has reason to believe that past actions on the part of the employer may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the RA may require the employer to conform to special procedures before and after the temporary alien labor certification determination (including special on-site positive recruitment and streamlined interviewing and referral techniques) designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary alien agricultural labor certification. Such requirements shall be reasonable, and shall not require the employer to offer better wages, working conditions and benefits than those specified in § 655.102 of this part, and shall be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart. The RA shall notify the employer in writing of the special procedures which will be required in the coming year. The notification shall state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary alien agricultural labor certification, and shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in § 655.112 of this part shall apply.

(2) *Failure to comply with special procedures.* If the RA determines that the employer has failed to comply with special procedures required pursuant to paragraph (c)(1) of this section, the RA shall send a written notice to the employer, stating that the employer's otherwise affirmative temporary alien agricultural labor certification determination will be reduced by twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year. Notice of such a reduction in the number of workers requested shall be conveyed to the employer by the RA in the RA's written temporary alien agricultural labor certification determination required by § 655.101 of this part (with the concurrence of the Director). The notice shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in § 655.112 of this part shall apply, provided that if the administrative law judge affirms the RA's determination that the employer has failed to comply with special procedures required by paragraph (c)(1) of this section, the reduction in the number of workers requested shall be twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year.

(d) *Penalties involving members of associations.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) shall apply only to that member of the association unless the RA determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the penalty shall be invoked against the association or other association member as well.

(e) *Penalties involving associations acting as joint employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) of this section shall apply only to the association, and shall not be applied to any individual producer member of the association unless the RA determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the penalty shall be invoked against the association member as well.

(f) *Penalties involving associations acting as sole employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, no individual producer member of the association shall be permitted to employ certified H–2A workers in the crop and occupation for which the H–2A workers had been previously certified for the sole employer association unless the producer member applies for temporary alien agricultural labor certification under the provisions of this subpart in the capacity of an individual employer/applicant or as a member of a joint employer association, and is granted temporary alien agricultural labor certification by the RA.

(g) *Types of violations*—(1) *Substantial violation.* For the purposes of this subpart, a substantial violation is one or more actions of commission or omission on the part of the employer or the employer's agent, with respect to which the RA determines:

(i)(A) That the action(s) is/are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H–2A workforce; and that:

(*1*) With respect to the action(s), the employer has failed to comply with one or more penalties imposed by the Employment Standards Administration for violation(s) of contractual obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to § 216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR Part 501 (Employment Standards Administration enforcement of contractual obligations); or

(*2*) The employer has engaged in a pattern or practice of actions which are significantly injurious to the wages, benefits, or working conditions of 10

percent o more of an employer's U.S. and/or H–2A workforce;

(B) That the action(s) involve(s) impeding an investigation of an employer pursuant to § 216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR Part 501 (Employment Standards Administration enforcement of contractual obligations);

(C) That the employer has not paid the necessary fee in a timely manner;

(D) That the employer is not currently eligible to apply for a temporary alien agricultural labor certification pursuant to § 655.210 of this part (failure of an employer to comply with the terms of a temporary alien agricultural labor certification in which the application was filed under Subpart C of this part prior to June 1, 1987); or

(E) That there was fraud involving the application for temporary alien agricultural labor certification of that the employer made a material misrepresentation of fact during the application process; and

(ii) That there are no extenuating circumstances involved with the action(s) described in paragraph (g)(1)(i) of this section (as determined by the RA).

(2) *Less than substantial violation.* For the purposes of this subpart, a less than substantial violation is an action of commission or omission on the part of the employer or the employer's agent which violates a requirement of this subpart, but is not a substantial violation.

§ 655.111 Petition for higher meal charges.

(a) *Filing petitions.* Until a new amount is set pursuant to this paragraph (a), the RA may permit an employer to charge workers up to $6.58 for providing them with three meals per day, if the employer justifies the charge and submits to the RA the documentation required by paragraph (b) of this section. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal such denial. Such appeals shall be filed with the Chief Administrative Law Judge. Administrative law judges shall hear such appeals according to the procedures in 29 CFR Part 18, except that the appeal shall not be considered as a complaint to which an answer is required. The decision of the administrative law judge shall be the final decision of the Secretary. Each year the maximum charge allowed by this paragraph (a) will be changed by the same percentage as the twelve-month percent change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the **Federal Register.** However, an employer may not impose such a charge on a worker prior to the effective date contained in the RA's written confirmation of the amount to be charged.

(b) *Required documentation.* Documentation submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the RA for a period of one year.

§ 655.112 Administrative review and de novo hearing before an administrative law judge.

(a) *Administrative review*—(1) *Consideration.* Whenever an employer has requested an administrative review before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by Part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge shall not remand the case and shall not receive additional evidence.

(2) *Decision.* Within five working days after receipt of the case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions submitted from the parties involved or *amici curiae,* either affirm, reverse, or modify the RA's denial by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, the Director, and INS by telegram or hand delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

(b) *De novo hearing*—(1) *Request for hearing; conduct of hearing.* Whenever an employer has requested a *de novo* hearing before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by Part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to conduct the *de novo* hearing. The procedures contained in 29 CFR Part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required,

(ii) The administrative law judge shall ensure that, at the request of the employer, the hearing is scheduled to take place within five working days after the administrative law judge's receipt of the case file, and

(iii) The administrative law judge's decision shall be rendered within ten working days after the hearing.

(2) *Decision.* After a *de novo* hearing, the administrative law judge shall either affirm, reverse, or modify the RA's determination, and the administrative law judge's decision shall be provided immediately to the employer, RA, Director, and INS by telegram or hand delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien

agricultural labor certification determination by any DOL official.

§ 655.113 Job Service Complaint System; enforcement of work contracts.

Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR Part 658, Subpart E. Complaints which involve worker contracts shall be referred by the local office to the Employment Standards Administration for appropriate handling and resolution. See 29 CFR Part 501. As part of this process, the Employment Standards Administration may report the results of its investigation to ETA for consideration of employer penalties under § 655.110 of this part or such other action as may be appropriate.

9. In 20 CFR Part 655, Subpart C is amended by revising the subpart heading to read as follows:

Subpart C—Labor Certification Process for Logging Employment and Non-H-2A Agricultural Employment

§ 655.200 [Amended]

10. In 20 CFR Part 655, § 655.200 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c) respectively, and by adding a new paragraph (a), to read as follows:

§ 655.200 General description of this subpart and definition of terms.

(a) This subpart applies to applications for temporary alien agricultural labor certification filed before June 1, 1987, and to applications for temporary alien labor certification for logging employment.

* * * * *

Signed at Washington, DC., this 26th day of May 1987.

William E. Brock,

Secretary of Labor.

[FR Doc. 87-12322 Filed 5-29-87; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 501

Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act

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

ACTION: Interim final rule; request for comments.

SUMMARY: The Employment Standards Administration (ESA) of the U.S. Department of Labor (DOL) is promulgating interim final regulations applicable to employers of nonimmigrant aliens for temporary employment in agriculture in the United States. This program is commonly known as the "H-2A" program. These interim final regulations conform to the requirements of section 216 of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations incorporate some provisions promulgated by the Employment and Training Administration (ETA) of DOL in carrying out responsibilities of that agency under the "H-2A" program. These regulations relate specifically to enforcement of the contractual obligations of an employer of H-2A workers to the workers, including U.S. and H-2A workers and other workers engaged in corresponding employment employed by the employer.

Dates:

Effective date: The interim final rule is effective on June 1, 1987. Applications for temporary alien labor certification filed on and after that date will be subject to the interim final rule.

Comments: The comment period in this rulemaking is being reopened through July 31, 1987. Comments on the May 5, 1987 proposed rule (52 FR 16795) will continue to be considered as part of this rulemaking. Comments on the interim final rule must be submitted by mail and received on or before July 31, 1987.

ADDRESS: Send written comments to: Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Telephone (202) 523-8305.

SUPPLEMENTARY INFORMATION:

I. History of this Rulemaking.

On May 5, 1987, there were published in the **Federal Register** proposed rules to implement the Department of Labor's responsibilities under the temporary alien agricultural labor certification program, as set out at sections 101(a)(15)(H)(ii)(a), 214(c), and 216 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (IRCA), 100 Stat. 3359. The Employment Standards Administration responsibilities relative to an employer's contractual obligations to workers were published at 52 FR 16795. Written comments on the proposed rule were invited through May 19, 1987.

Section 301(e) of IRCA requires that "(n)otwithstanding any other provision of law, final regulations to implement . . . (sections 101(a)(15)(H)(ii)(a) and 216 of the Immigration and Nationality Act) shall first be issued, on an interim or other basis, not later than the effective date." 8 U.S.C. 1186 note.

Given the constraints of time and the statutory mandate to issue final regulations by June 1, 1987, the comments received on the proposed rule have been considered and some changes have been made in this interim final rule. When changes have been made, other than minor technical or typographical changes, they are discussed in this preamble.

While the comments received during the comment period on the proposed rule continue to be considered, the Department of Labor is publishing this final rule on an interim basis. The comment period is being reopened through July 31, 1987, with comments invited on the interim final rule. A final rule will be published at a later date.

II. Background

Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), provides that the Attorney General may not approve such a petition from an employer for employment of a nonimmigrant H-2A alien worker, in agriculture unless the petitioner has applied to the Secretary of Labor (the Secretary) for a labor certification showing that: (1) there are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or service involved in the petition; and (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The amendments to the INA made by IRCA codify DOL's role in the temporary agricultural labor certification process. Prior to 1987, many of the responsibilities of the Department of Labor (DOL) specified in IRCA were carried out under the requirement in the INA at 8 U.S.C. 1184(c) that the Attorney