

Employment and Training Administration, Labor

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(h) *Disqualification from approval of petitions.* Where the WHD Administrator finds a substantial failure to meet any conditions of the application or in a DHS Form I-129, or a willful misrepresentation of a material fact in an application or in a DHS Form I-129, as those terms are defined in §655.31, the Administrator may recommend that ETA debar the employer for a period of no less than 1 year, and no more than 3 years.

(i) If the WHD Administrator finds a violation of the provisions specified in this subpart, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including reinstatement of displaced U.S. workers, or other appropriate legal or equitable remedies. If the WHD Administrator finds that an employer has not paid wages at the wage level specified under the application and required by §655.22(e), the Administrator may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of §655.22(e).

(j) The civil money penalties determined by the WHD Administrator to be appropriate are due for payment within 30 days of the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator.

(k) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every 4 years. The adjustments are to be based on changes in the Consumer Price

Index for all Urban Consumers (CPI-U) for the U.S. City Average for All Items. The adjusted amounts will be published in the FEDERAL REGISTER. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

EFFECTIVE DATE NOTE: At 77 FR 10166, Feb. 21, 2012, §655.65 was removed and reserved, effective Apr. 23, 2012.

§§ 655.66–655.69 [Reserved]

EFFECTIVE DATE NOTE: At 77 FR 10166, Feb. 21, 2012, §§655.66 through 655.69 were added and reserved, effective Apr. 23, 2012.

INTEGRITY MEASURES

EFFECTIVE DATE NOTE: At 77 FR 10166, Feb. 21, 2012, an undesignated center heading was added before §655.70, effective Apr. 23, 2012.

§ 655.70 WHD Administrator's determination.

(a) The WHD Administrator's determination shall be served on the employer by personal service or by certified mail at the employer's last known address. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The WHD Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the Administrator's determination.

(c) The WHD Administrator's written determination shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefore, and in the case of a finding of violation(s) by an employer, prescribe the amount of any back wages and civil money penalties assessed and the reason therefor.

(2) Inform the employer that a hearing may be requested pursuant to §655.71.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

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(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served).

(5) Where appropriate, inform the employer that the Administrator will notify ETA and DHS of the occurrence of a violation by the employer.

EFFECTIVE DATE NOTE: At 77 FR 10166, Feb. 21, 2012, § 655.70 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.70 Audits.

The CO may conduct audits of adjudicated temporary labor certification applications.

(a) *Discretion.* The CO has the sole discretion to choose the applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will send an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. The audit letter will:

(1) Specify the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and

(3) Advise that failure to fully comply with the audit process may result:

(i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.71 in future filings of H-2B temporary labor certification applications for a period of up to 2 years, or

(ii) In a revocation of the certification and/or debarment from the H-2B program and any other foreign labor certification program administered by the Department.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS, WHD, or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.71 Request for hearing.

(a) An employer desiring review of a determination issued under § 655.70, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. In such a proceeding, the Administrator shall be the prosecuting party, and the employer shall be the respondent. If such a request for an administrative hearing is timely filed, the WHD Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by an authorized representative of such employer; and

(6) Include the address at which such employer or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the WHD Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An employer which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting employer's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within 10 days.

(e) Copies of the request for a hearing shall be sent by the employer or authorized representative to the WHD official who issued the WHD Administrator's notice of determination, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

EFFECTIVE DATE NOTE: At 77 FR 10166, Feb. 21, 2012, §655.71 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.71 CO-ordered assisted recruitment.

(a) *Requirement of assisted recruitment.* If, as a result of audit or otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future *Application for Temporary Employment Certification*.

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a temporary labor certification, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in §655.61 apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§655.41 through 655.47 and may consist of, but is not limited to, one or more of the following:

(1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the *Application for Temporary Employment Certification*;

(2) Designating the sources where the employer must recruit for U.S. workers, including newspapers and other publications, and directing the employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisement and/or job order;

(4) Requiring the employer to notify the CO and the SWA in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO, in addition to providing a copy of the job order;

(7) Requiring the employer to provide proof of all SWA referrals made in response to the job order;

(8) Requiring the employer to submit any proof of contact with all referrals and past U.S. workers; and/or

(9) Requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) *Failure to comply.* If an employer materially fails to comply with requirements ordered by the CO under this section, the certification will be denied and the employer and/or its attorney or agent may be debarred under §655.73.

§ 655.72 Hearing rules of practice.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

EFFECTIVE DATE NOTE: At 77 FR 10166, Feb. 21, 2012, §655.72 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.72 Revocation.

(a) *Basis for DOL revocation.* The Administrator, OFLC may revoke a temporary labor certification approved under this subpart, if the Administrator, OFLC finds:

(1) The issuance of the temporary labor certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in §655.73(d);

(2) The employer substantially failed to comply with any of the terms or conditions

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of the approved temporary labor certification. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.73(d) and (e);

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (under § 655.73), or law enforcement function under 29 CFR part 503 or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary with the respect to the H-2B program.

(b) *DOL procedures for revocation.* (1) Notice of Revocation. If the Administrator, OFLC makes a determination to revoke an employer's temporary labor certification, the Administrator, OFLC will send to the employer (and its attorney or agent, if applicable) a Notice of Revocation. The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 10 business days from the date the Notice of Revocation is issued, the notice is the final agency action and will take effect immediately at the end of the 10-day period.

(2) Rebuttal. If the employer timely submits rebuttal evidence, the Administrator, OFLC will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal according to the procedures of § 655.61. If the employer does not appeal the final determination, it will become the final agency action.

(3) Appeal. An employer may appeal a Notice of Revocation, or a final determination of the Administrator, OFLC after the review of rebuttal evidence, according to the appeal procedures of § 655.61. The ALJ's decision is the final agency action.

(4) Stay. The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) Decision. If the temporary labor certification is revoked, the Administrator, OFLC will send a copy of the final agency action to DHS and the Department of State.

(c) *Employer's obligations in the event of revocation.* If an employer's temporary labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other expenses;

(2) The workers' outbound transportation expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

§ 655.73 Service of pleadings.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the WHD Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following service and includes the last day of the period unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

EFFECTIVE DATE NOTE: At 77 FR 10166, Feb. 21, 2012, § 655.73 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.73 Debarment.

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under this subpart to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, OFLC finds that the employer committed the following violations:

(1) Willful misrepresentation of a material fact in its *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*;

(2) Substantial failure to meet any of the terms and conditions of its *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*. A substantial failure

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is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the DOS during the visa application process.

(b) *Debarment of an agent or attorney.* If the Administrator, OFLC finds, under this section, that an attorney or agent committed a violation as described in paragraphs (a)(1) through (3) of this section or participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(e) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*, the factors that the Administrator, OFLC may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the H-2B program;

(2) The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and

(5) Whether U.S. workers have been harmed by the violation.

(f) *Violations.* Where the standards set forth in paragraphs (d) and (e) in this section are met, debarable violations would include but would not be limited to one or more acts of commission or omission which involve:

(1) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2B workers and/or workers in corresponding employment;

(2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under this subpart or 29 CFR part 503;

(6) Failure to comply with the Notice of Deficiency process under this subpart;

(7) Failure to comply with the assisted recruitment process under this subpart;

(8) Impeding an investigation of an employer under 29 CFR part 503 or an audit under this subpart;

(9) Employing an H-2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(10) A violation of the requirements of § 655.20(o) or (p);

(11) A violation of any of the provisions listed in § 655.20(r);

(12) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(13) Fraud involving the *H-2B Registration, Application for Temporary Employment Certification* or the *H-2B Petition*; or

(14) A material misrepresentation of fact during the registration or application process.

(g) *Debarment procedure.* (1) Notice of Debarment. If the Administrator, OFLC makes a determination to debar an employer, attorney, or agent, the Administrator, OFLC will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an rebuttal evidence or a request for a hearing stays the debarment pending the outcome of the appeal as provided in paragraphs (g)(2)-(6) of this section.

(2) Rebuttal. The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the notice within 30 calendar days of the date the notice is issued. If rebuttal evidence is timely filed, the Administrator, OFLC will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the Administrator, OFLC

determines that the party should be debarred, the Administrator, OFLC will inform the party of its right to request a debarment hearing according to the procedures in this section. The party must request a hearing within 30 calendar days after the date of the Administrator, OFLC's final determination, or the Administrator OFLC's determination will be the final agency order and the debarment will take effect at the end of the 30-day period.

(3) *Hearing.* The recipient of a Notice of Debarment seeking to challenge the debarment must request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the Administrator, OFLC after review of rebuttal evidence submitted under paragraph (g)(2) of this section. To obtain a debarment hearing, the recipient must, within 30 days of the date of the Notice or the final determination, file a written request with the Chief ALJ, United States Department of Labor, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy on the Administrator, OFLC. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is timely filed. Within 10 business days of receipt of the request for a hearing, the Administrator, OFLC will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided to the parties to the debarment hearing by means normally assuring next day delivery. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is the final agency action. If a peti-

tion for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete hearing record to the ARB.

(iii) Where the ARB has determined to review the decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which the presentation must be submitted.

(6) *ARB Decision.* The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

(h) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to debar under this section or under 29 CFR 503.24. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(i) *Debarment from other foreign labor programs.* Upon debarment under this subpart or 29 CFR 503.24, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§ 655.74 Conduct of proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.71, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The administrative law judge shall notify all parties of the date, time and place of the hearing. All parties shall be given at least 14 calendar days notice of such hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the

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administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party.

EFFECTIVE DATE NOTE: At 77 FR 10169, Feb. 21, 2012, § 655.74 was removed and reserved, effective Apr. 23, 2012.

§ 655.75 Decision and order of administrative law judge.

(a) The administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Administrative Review Board (Board) review thereof shall be filed as provided in § 655.76. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order affirming the decision, or unless and until 30 calendar days have passed after the Board's receipt of the petition for review and the Board has not issued notice to the parties that the Board will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the WHD Administrator assesses back wages for wage violation(s) of § 655.22(e), (g), or (j) based upon a PWD obtained by the Administrator from OFLC during the investigation and the administrative law judge determines that the Administrator's request was not warranted, the administrative law judge shall remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from OFLC or, in the event the employer filed a timely appeal under § 655.11, the final wage determination resulting from that process. Under no

circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

EFFECTIVE DATE NOTE: At 77 FR 10169, Feb. 21, 2012, § 655.75 was removed and reserved, effective Apr. 23, 2012.

§ 655.76 Appeal of administrative law judge decision.

(a) The WHD Administrator or an employer desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which

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would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (e.g., briefs); and

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-5220, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding.

(h) The Board's final decision shall be served upon all parties and the administrative law judge.

EFFECTIVE DATE NOTE: At 77 FR 10169, Feb. 21, 2012, § 655.76 was removed and reserved, effective Apr. 23, 2012.

§ 655.80 Notice to OFLC and DHS.

(a) The WHD Administrator shall, as appropriate, notify DHS and OFLC of the final determination of a violation and recommend that DHS not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the

employer and the appropriate statutory period for disqualification of the employer from approval of petitions.

(b) The Administrator shall notify DHS and OFLC upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, or reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision holding that a violation was committed by an employer.

EFFECTIVE DATE NOTE: At 77 FR 10169, Feb. 21, 2012, § 655.80 was removed and reserved, effective Apr. 23, 2012.

§ 655.81 Application filing transition.

(a) *Compliance with these regulations.* Except as provided in paragraphs (b) and (c) of this section, employers filing applications for H-2B workers on or after the effective date of these regulations where the date of need for the services or labor to be performed is on or after October 1, 2009, must comply with all of the obligations and assurances in this subpart. SWAs will no longer accept for processing applications filed by employers for H-2B workers for temporary or seasonal non-agricultural services on or after January 18, 2009.

(b) *Applications filed under former regulations.* (1) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations, the SWAs shall continue to process all active applications under the former regulations and transmit all completed applications to the appropriate NPC for review and

issuance of a labor certification determination.

(2) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations that were completed and transmitted to the NPC, the NPC shall continue to process all active applications under the former regulations and issue a labor certification determination.

(c) *Applications filed with the NPC under these regulations.* Employers filing applications on or after the effective date of these regulations where their date of need for H-2B workers is prior to October 1, 2009, must receive a prevailing wage determination from the SWA serving the area of intended employment. The SWA shall process such requests in accordance with the provisions of §655.10. Once the employer receives its prevailing wage determination from the SWA, it must conduct all of the pre-filing recruitment steps set forth under this subpart prior to filing an *Application for Temporary Employment Certification* with the NPC.

[73 FR 78052, Dec. 19, 2008. Redesignated at 74 FR 25985, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 25985, May 29, 2009, §655.5 was redesignated as §655.81 and suspended, effective June 29, 2009.

EFFECTIVE DATE NOTE: At 77 FR 10169, Feb. 21, 2012, §655.81 was removed and reserved, effective Apr. 23, 2012.

§§ 655.82–655.99 [Reserved]

EFFECTIVE DATE NOTE: At 77 FR 10169, Feb. 21, 2012, §§655.82 through 655.99 are added and reserved, effective Apr. 23, 2012.

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

SOURCE: 75 FR 6959, Feb. 12, 2010, unless otherwise noted.

§ 655.100 Scope and purpose of subpart B.

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) under the authority given in 8 U.S.C. 1188 to acquire infor-

mation sufficient to make factual determinations of:

(a) Whether there are sufficient able, willing, and qualified United States (U.S.) workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and

(b) Whether the employment of H-2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.

§ 655.101 Authority of the Office of Foreign Labor Certification (OFLC) Administrator.

The Secretary has delegated her authority to make determinations under 8 U.S.C. 1188 to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). The determinations are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members; e.g., a Certifying Officer (CO).

§ 655.102 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements, the OFLC Administrator has the authority to establish, continue, revise, or revoke special procedures for processing certain H-2A applications. Employers must demonstrate upon written application to the OFLC Administrator that special procedures are necessary. These include special procedures currently in effect for the handling of applications for shepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine harvesting crews. Similarly, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the OFLC Administrator has the authority to establish monthly, weekly, or semi-monthly adverse effect wage rates (AEWR) for those occupations for