

§ 655.174

must be available for inspection by the CO for a period of 1 year.

(2) The employer may begin charging the higher rate upon receipt of a favorable decision from the CO unless the CO sets a later effective date in the decision.

(c) *Appeal rights.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief ALJ, pursuant to § 655.171.

§ 655.174 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary agricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

INTEGRITY MEASURES

§ 655.180 Audit.

The CO may conduct audits of applications for which certifications have been granted.

(a) *Discretion.* The applications selected for audit will be chosen within the sole discretion of the CO.

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

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

(2) Specify a date no more than 30 days from the date of the audit letter by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process may result in the revocation of the certification or program debarment.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit.

(d) *Potential referrals.* In addition to steps in this subpart, the CO may determine to provide the audit findings

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and underlying documentation to DHS or another appropriate enforcement agency. The CO will refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.181 Revocation.

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

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process;

(2) The employer substantially violated a material term or condition of the approved temporary agricultural labor certification, as defined in § 655.182;

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (as discussed in § 655.180), or law enforcement function under 8 U.S.C. 1188, 29 CFR part 501, or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by the WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(b) *DOL procedures for revocation.* (1) Notice of Revocation. If the OFLC Administrator makes a determination to revoke an employer's temporary labor certification, the OFLC Administrator will send to the employer (and its attorney or agent) a Notice of Revocation. The Notice will contain a detailed statement of the grounds for the revocation, and it will inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 14 days of the date of the Notice of Revocation, the Notice is the final agency action and will take effect immediately at the end of the 14-day period.

(2) *Rebuttal.* The employer may submit evidence to rebut the grounds stated in the Notice of Revocation within 14 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed by the employer, the OFLC Administrator will inform the employer of the OFLC Administrator's final determination on the revocation within 14 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification should be revoked, the OFLC Administrator will inform the employer of its right to appeal according to the procedures of §655.171. The employer must file the appeal within 10 calendar days after the OFLC Administrator's final determination, or the OFLC Administrator's determination is the final agency action and will take effect immediately at the end of the 10-day period.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the OFLC Administrator after the review of rebuttal evidence, according to the appeal procedures of §655.171. The ALJ's decision is the final agency action.

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

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

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

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under §655.122(h)(1);

(2) The worker's outbound transportation expenses, as if the worker meets the requirements for payment under §655.122(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by §655.122(i); and

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

§ 655.182 Debarment.

(a) *Debarment of an employer.* The OFLC Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Debarment of an agent or attorney.* The OFLC Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501, if the OFLC Administrator finds that the agent or attorney participated in an employer's substantial violation. The OFLC Administrator may not issue future labor certifications under this subpart to any employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of limitations and period of debarment.* (1) The OFLC Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

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

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

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

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

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180 of this subpart;

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

(viii) A violation of the requirements of § 655.135(j) or (k);

(ix) A violation of any of the provisions listed in 29 CFR 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) The employer's failure to pay a necessary certification fee in a timely manner;

(3) Fraud involving the *Application for Temporary Employment Certification*; or

(4) A material misrepresentation of fact during the application process.

(e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial so as to merit debarment, the factors the OFLC Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

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

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

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188;

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

(f) *Debarment procedure*—(1) *Notice of Debarment.* If the OFLC Administrator makes a determination to debar an employer, attorney, or agent, the OFLC Administrator will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and it will inform the party subject to the Notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice will be the final agency action and the debarment will take effect at the end of the 30-day period.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 30 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a final determination on the debarment within 30 days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party should be debarred, the OFLC Administrator will inform the party of its right to request a debarment hearing according to the procedures of § 655.182(f)(3). The party must request a hearing within 30 calendar days after the date of the OFLC Administrator's final determination, or the OFLC Administrator's determination will be the final agency order and the debarment will take effect at the end of the 30-day period.

(3) *Hearing.* The recipient of a Notice of Debarment may request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the OFLC Administrator after review of rebuttal evidence submitted pursuant to § 655.182(f)(2). To obtain a debarment

hearing, the debarred party must, within 30 days of the date of the Notice or the final determination, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the OFLC Administrator. The debarment will take effect 30 days from the date the Notice of Debarment or final determination is issued, unless a request for review is properly filed within 30 days from the issuance of the Notice of Debarment or final determination. The timely filing of a request for a hearing stays the debarment pending the outcome of the hearing. Within 10 days of receipt of the request for a hearing, the OFLC Administrator will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next-day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

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

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

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

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

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

(6) *ARB decision.* The ARB's final decision must be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ. If the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final agency decision.

(g) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and the WHD may inform one another and may coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS promptly.

(h) *Debarment involving members of associations.* If the OFLC Administrator determines that an individual employer-member of a joint employer association has committed a substantial violation, the debarment determination will apply only to that member unless the OFLC Administrator determines that the association or another association member participated in the violation, in which case the debarment will be invoked against the association or other complicit association member(s) as well.

(i) *Debarment involving associations acting as joint employers.* If the OFLC Administrator determines that an association acting as a joint employer

with its members has committed a substantial violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association. However, if the OFLC Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit association member as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(j) *Debarment involving associations acting as sole employers.* If the OFLC Administrator determines that an association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

§ 655.183 Less than substantial violations.

(a) *Requirement of special procedures.* If the OFLC Administrator determines that a less than substantial violation has occurred, but the OFLC Administrator has reason to believe that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before and after the temporary labor certification determination. These special procedures may include special on-site positive recruitment and streamlined interviewing and referral techniques. The special procedures are designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary agricultural labor certification. Such requirements will be reasonable; will not require the employer to offer better wages, working conditions, and benefits than those specified in § 655.122; and will be no more than deemed necessary to assure employer compliance with the test of

U.S. worker availability and adverse effect criteria of this subpart.

(b) *Notification of required special procedures.* The OFLC Administrator will notify the employer (or agent or attorney) in writing of the special procedures that will be required in the coming year. The notification will state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary agricultural labor certification, and will offer the employer an opportunity to request an administrative review or a de novo hearing before an ALJ. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.171 will apply.

(c) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (a) of this section, the OFLC Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H-2A certification determination will be reduced by 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC Administrator in the OFLC Administrator's written certification determination. The notice will offer the employer an opportunity to request administrative review or a de novo hearing before an ALJ. If administrative review or a de novo hearing is requested, the procedures prescribed in § 655.171 will apply, provided that if the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (a) of this section, the reduction in the number of workers requested will be 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year.

Employment and Training Administration, Labor

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§ 655.184 Applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification*, the CO may refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If the WHD, a court or the DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* and certification has been granted, a finding under this paragraph will be cause to revoke the certification. The finding of fraud or willful misrepresentation may also constitute a debarable violation under § 655.182.

§ 655.185 Job service complaint system; enforcement of work contracts.

(a) *Filing with DOL.* Complaints arising under this subpart must be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints involving allegations of fraud or misrepresentation must be referred by the SWA to the CO for appropriate handling and resolution. Complaints that involve worker contracts must be referred by the SWA to the WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, the WHD may report the results of its investigation to the OFLC Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) *Filing with the Department of Justice.* Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if OSC becomes aware of a violation of the regulations in this subpart, it may

provide such information to the appropriate SWA and the CO.

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

SOURCE: 74 FR 26002, May 29, 2009, unless otherwise noted.

§ 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.

(b) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with an appropriate State Workforce Agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a determination by the OFLC Administrator as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the OFLC Administrator makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working condition standards, the OFLC Administrator shall deny the temporary labor certification application and offer the employer an administrative-judicial review of the denial by an Administrative Law Judge. If the application is not timely, the OFLC Administrator has discretion, as set forth in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as