

(A) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more than 24 months before the publication date.

(B) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(vi) The survey cannot as any part of its data wage information reflect the wages of H-2B workers or other nonimmigrant workers.

(vii) If the NPC does not approve the survey for use in the H-2B program, the NPC shall inform the employer in writing of the reasons the survey was not accepted. An employer may appeal the NPC's decision in accordance with § 655.11.

EFFECTIVE DATE NOTE 2: At 77 FR 10151, Feb. 21, 2012, § 655.10 was amended by revising paragraphs (a), (c) through (e), (h), and (i), and adding paragraphs (j) and (k), effective Apr. 23, 2012. For the convenience of the user, the added and revised text is set forth as follows:

§ 655.10 Prevailing wage.

(a) Offered wage. The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H-2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

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(c) Request for PWD. (1) An employer must request and receive a PWD from the NPWC before filing the job order with the SWA.

(2) The PWD must be valid on the date the job order is posted.

(d) Multiple worksites. If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the opportunity within the area of intended employment, the prevailing wage is the highest applicable wage among all the worksites.

(e) NPWC action. The NPWC will provide the PWD, indicate the source, and return the Application for Prevailing Wage Determination (ETA Form 9141) with its endorsement to the employer.

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(h) Validity period. The NPWC must specify the validity period of the prevailing wage, which in no event may be more than 365 days and no less than 90 days from the date that the determination is issued.

(i) Professional athletes. In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage. 8 U.S.C. 1182(p)(2).

(j) Retention of documentation. The employer must retain the PWD for 3 years from the date of issuance or the date of a final determination on the Application for Temporary Employment Certification, whichever is later, and submit it to a CO if requested by a Notice of Deficiency, described in § 655.31, or audit, as described in § 655.70, or to a WHD representative during a WHD investigation.

(k) Guam. The requirements of this paragraph apply to any request filed for an H-2B job opportunity on Guam.

§ 655.11 Certifying officer review of prevailing wage determinations.

(a) Request for review of prevailing wage determinations. Any employer desiring review of a PWD must make a written request for such review within 10 days of the date from when the final PWD was issued. The request for review must be sent to the NPC post-marked no later than 10 days after the determination; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all materials submitted to the NPC for purposes of securing the PWD.

(b) NPC review. Upon the receipt of a written request for review, the NPC shall review the employer's request and accompanying documentation, including any supplementary material submitted by the employer.

(c) Designations. The Director of the NPC will determine which CO will review the employer's request for review.

(d) Review on the record. The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:

(1) Affirm the PWD issued by the NPC; or

(2) Modify the PWD.

(e) Request for review by BALCA. Any employer desiring review of a CO's decision on a PWD must make a written request for review of the determination by BALCA within 30 calendar days of

the date of the decision of the CO. The CO must receive the written request for BALCA review no later than the 30th day after the date of its final determination including the date of the final determination.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the decision on the PWD by the NPC was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002.

(4) The BALCA shall handle appeals in accordance with § 655.33.

EFFECTIVE DATE NOTE: At 77 FR 10152, Feb. 21, 2012, § 655.11 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.11 Registration of H-2B employers.

All employers that desire to hire H-2B workers must establish their need for services or labor is temporary by filing an *H-2B Registration* with the Chicago NPC.

(a) *Registration filing.* An employer must file an *H-2B Registration*. The *H-2B Registration* must be accompanied by documentation evidencing:

(1) The number of positions that will be sought in the first year of registration;

(2) The time period of need for the workers requested;

(3) That the nature of the employer's need for the services or labor to be performed is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined at 8 CFR 214.2(h)(6)(ii)(B) and § 655.6 (or in the case of job contractors, a seasonal need or one-time occurrence); and

(4) For job contractors, the job contractor's own seasonal need or one-time occurrence, such as through the provision of payroll records.

(b) *Original signature.* The *H-2B Registration* must bear the original signature of the employer (and that of the employer's attorney or agent if applicable). If and when the *H-2B*

Registration is permitted to be filed electronically, the employer will satisfy this requirement by signing the *H-2B Registration* as directed by the CO.

(c) *Timeliness of registration filing.* A completed request for an *H-2B Registration* must be received by no less than 120 calendar days and no more than 150 calendar days before the employer's date of need, except where the employer submits the *H-2B Registration* in support of an emergency filing under § 655.17.

(d) *Temporary need.* (1) The employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). A job contractor must also demonstrate through documentation its own seasonal need or one-time occurrence.

(2) The employer's need will be assessed in accordance with the definitions provided by the Secretary of DHS and as further defined in § 655.6.

(e) *NPC review.* The CO will review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors:

(1) The job classification and duties qualify as non-agricultural;

(2) The employer's need for the services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;

(3) The number of worker positions and period of need are justified; and

(4) The request represents a bona fide job opportunity.

(f) *Mailing and postmark requirements.* Any notice or request pertaining to an *H-2B Registration* sent by the CO to an employer requiring a response will be mailed to the address provided on the *H-2B Registration* using methods to assure next day delivery, including electronic mail. The employer's response to the notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date specified by the CO or by the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(g) *Request for information (RFI).* If the CO determines the *H-2B Registration* cannot be approved, the CO will issue an RFI. The RFI will be issued within 7 business days of the CO's receipt of the *H-2B Registration*. The RFI will:

(1) State the reason(s) why the *H-2B Registration* cannot be approved and what supplemental information or documentation is needed to correct the deficiencies;

(2) Specify a date, no later than 7 business days from the date the RFI is issued, by which the supplemental information or documentation must be sent by the employer;

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(3) State that, upon receipt of a response to the RFI, the CO will review the *H-2B Registration* as well as any supplemental information and documentation and issue a Notice of Decision on the *H-2B Registration*. The CO may, at his or her discretion, issue one or more additional RFIs before issuing a Notice of Decision on the *H-2B Registration*; and

(4) State that failure to comply with an RFI, including not responding in a timely manner or not providing all required documentation within the specified timeframe, will result in a denial of the *H-2B Registration*.

(h) *Notice of Decision*. The CO will notify the employer in writing of the final decision on the *H-2B Registration*.

(1) *Approved H-2B Registration*. If the *H-2B Registration* is approved, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will notify the employer that it is eligible to seek H-2B workers in the occupational classification for the anticipated number of positions and period of need stated on the approved *H-2B Registration*. The CO may approve the *H-2B Registration* for a period of up to 3 consecutive years.

(2) *Denied H-2B Registration*. If the *H-2B Registration* is denied, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will:

(i) State the reason(s) why the *H-2B Registration* is denied;

(ii) Offer the employer an opportunity to request administrative review under § 655.61 within 10 business days from the date the Notice of Decision is issued and state that if the employer does not request administrative review within that period the denial is final.

(i) *Retention of documents*. All employers filing an *H-2B Registration* are required to retain any documents and records not otherwise submitted proving compliance with this subpart. Such records and documents must be retained for a period of 3 years from the date of certification of the last *Application for Temporary Employment Certification* supported by the *H-2B Registration*, if approved, or 3 years from the date the decision is issued if the *H-2B Registration* is denied or 3 years from the day the Department receives written notification from the employer withdrawing its pending *H-2B Registration*.

(j) *Transition period*. In order to allow OFLC to make the necessary changes to its program operations to accommodate the new registration process, OFLC will announce in the FEDERAL REGISTER a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications.

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§ 655.12 Use of registration of H-2B employers.

(a) Upon approval of the *H-2B Registration*, the employer is authorized for the specified period of up to 3 consecutive years from the date the *H-2B Registration* is approved to file an *Application for Temporary Employment Certification*, unless:

(1) The number of workers to be employed has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers) from the initial year;

(2) The dates of need for the job opportunity have changed by more than a total of 30 calendar days from the initial year for the entire period of need;

(3) The nature of the job classification and/or duties has materially changed; or

(4) The temporary nature of the employer's need for services or labor to be performed has materially changed.

(b) If any of the changes in paragraphs (a)(1) through (4) of this section apply, the employer must file a new *H-2B Registration* in accordance with § 655.11.

[77 FR 10153, Feb. 21, 2012]

EFFECTIVE DATE NOTE: At 77 FR 10153, Feb. 21, 2012, § 655.12 was added, effective Apr. 23, 2012.

§ 655.13 Review of PWDs.

(a) *Request for review of PWDs*. Any employer desiring review of a PWD must make a written request for such review to the NPWC Director within 7 business days from the date the PWD is issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) *NPWC review*. Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review shall issue a Final Determination letter; that letter may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.