

## § 655.1250

## 20 CFR Ch. V (4–1–12 Edition)

### § 655.1250 Who is the official record keeper for these administrative appeals?

The official record of every completed administrative hearing procedure provided by subparts L and M of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

### § 655.1255 What are the procedures for debarment of a facility based on a finding of violation?

(a) The Administrator shall notify the Department of Homeland Security and ETA of the final determination of a violation by a facility upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by a facility, and no timely request for hearing is made under § 655.1220; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by a facility, and no timely petition for review to the Board is made under § 655.1245; or

(3) Where a petition for review is taken from an administrative law judge's decision and the Board either declines within 30 days to entertain the appeal, under § 655.1245(c), or the Board affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by a facility, and the Board, upon review, issues a decision under § 655.1245(h), holding that a violation was committed by a facility.

(b) U.S. Citizenship and Immigration Services, upon receipt of the Administrator's notice under paragraph (a) of this section, shall not approve petitions filed with respect to that employer under section 212(m) of the INA (8 U.S.C. 1182(m)) during a period of at least 12 months from the date of receipt of the Administrator's notification. The Administrator must provide USCIS with a recommendation as to the length of the debarment.

(c) ETA, upon receipt of the Administrator's notice under paragraph (a) of this section, shall suspend the employer's attestation(s) under subparts L and M of this part, and shall not accept for filing any attestation submitted by the employer under subparts L and M of this part, for a period of 12 months from the date of receipt of the Administrator's notification or for a longer period if one is specified by the Department of Homeland Security for visa petitions filed by that employer under section 212(m) of the INA.

[75 FR 10406, Mar. 5, 2010]

### § 655.1260 Can Equal Access to Justice Act attorney fees be awarded?

A proceeding under subpart L or M of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses under the provisions of the Equal Access to Justice Act.

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

SOURCE: 73 FR 77207, Dec. 18, 2008, unless otherwise noted. Redesignated at 74 FR 25985, May 29, 2009.

EFFECTIVE DATE NOTE: At 74 FR 25985, May 29, 2009, subpart B, consisting of §§ 655.90, 655.92, 655.93, and 655.100 through 655.119, was redesignated as subpart N, consisting of §§ 655.1290, 655.1292, 655.1293, and 655.1300 through 655.1319, and newly designated subpart N was suspended, effective June 29, 2009.

### § 655.1290 Purpose and scope of subpart B.

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) to acquire information sufficient to make factual determinations of:

(a) 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

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

**§ 655.1292 Authority of ETA-OFLC.**

Temporary agricultural labor certification determinations are made by the Administrator, Office of Foreign Labor Certification (OFLC) in the Department of Labor's (the Department or DOL) Employment & Training Administration (ETA), who, in turn, may delegate this responsibility to a designated staff member; e.g., a Certifying Officer (CO).

**§ 655.1293 Special procedures.**

(a) *Systematic process.* This subpart provides procedures for the processing of applications from agricultural employers and associations of employers for the certification of employment of nonimmigrant workers in agricultural employment.

(b) *Establishment of 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 Administrator, OFLC has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for processing certain H-2A applications when employers can demonstrate upon written application to the Administrator, OFLC that special procedures are necessary. These include special procedures in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine crews. 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 Administrator, OFLC has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates (AEWR) for those occupations for a statewide or other geographical area. Prior to making determinations under this section, the Administrator, OFLC will consult with employer and worker representatives.

**§ 655.1300 Overview of subpart B and definition of terms.**

(a) *Overview—(1) Application filing process.* (i) This subpart provides guidance to employers desiring to apply for a 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 employers must file with the Administrator, OFLC an H-2A application on forms prescribed by the ETA that describe the material terms and conditions of employment to be offered and afforded to U.S. and H-2A workers. The application must be filed with the Administrator, OFLC at least 45 calendar days before the first date the employer requires the services of the H-2A workers. The application must contain attestations of the employer's compliance or promise to comply with program requirements regarding recruitment of eligible U.S. workers, the payment of an appropriate wage, and terms and conditions of employment.

(ii) No more than 75 and no fewer than 60 calendar days before the first date the employer requires the services of the H-2A workers, and as a precursor to the filing of an *Application for Temporary Employment Certification*, the employer must initiate positive recruitment of eligible U.S. workers and cooperate with the local office of the State Workforce Agency (SWA) which serves the area of intended employment to place a job order into intrastate and interstate recruitment. Prior to commencing recruitment an employer must obtain the appropriate wage for the position directly from the ETA National Processing Center (NPC). The employer must then place a job order with the SWA; place print advertisements meeting the requirements of this regulation; contact former U.S. employees; and, when so designated by the Secretary, recruit in other States of traditional or expected labor supply with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. The SWA will post the job order locally, as well as in all States listed in the application as anticipated work sites, and in any additional States designated by