

it has listed a fixed-site agricultural business; and

(6) Attest that it will be providing housing and transportation that complies with the applicable housing standards in § 655.104(d) or that it has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a written statement stating that:

(i) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable housing standards in § 655.104(d); and

(ii) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and will provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, subpart D, except where workers' compensation is used to cover such transportation as described in § 655.104(h)(3).

§ 655.1307 Processing of applications.

(a) *Processing.* (1) Upon receipt of the application, the CO will promptly review the application for completeness and an absence of errors that would prevent certification, and for compliance with the criteria for certification. The CO will make a determination to certify, deny, or issue a Notice of Deficiency prior to making a Final Determination on the application. Applications requesting that zero job opportunities be certified for H-2A employment because the employer has been able to recruit a sufficient number of U.S. workers must comply with other requirements for H-2A applications and must be supported by a recruitment report, in which case the application will be accepted but will then be denied. Criteria for certification, as used in this subpart, include, but are not limited to, whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; made all the assurances and met all the obligations required by § 655.105, and/or, if an H-2ALC, by § 655.106; complied with the timeliness requirements in § 655.102;

and complied with the recruitment obligations required by §§ 655.102 and 655.103.

(2) Unless otherwise noted, any notice or request sent by the CO or OFLC to an applicant requiring a response shall be sent by means normally assuring next-day delivery, to afford the applicant sufficient time to respond. The employer's response shall be considered filed with the Department when sent (by mail, certified mail, or any other means indicated to be acceptable by the CO) to the Department, which may be demonstrated, for example, by a postmark.

(b) *Notice of deficiencies.* (1) If the CO determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification in paragraph (a) of this section, the CO will promptly notify the employer within 7 calendar days of the CO's receipt of the application.

(2) The notice will:

(i) State the reason(s) why the application fails to meet the criteria for temporary labor certification, citing the relevant regulatory standard(s);

(ii) Offer the employer an opportunity to submit a modified application within 5 business days from date of receipt, stating the modification that is needed for the CO to accept the application for consideration;

(iii) Except as provided for under paragraph (b)(2)(iv) of this section, state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the application within 5 business days and in a manner specified by the CO;

(iv) Where the CO determines the employer failed to comply with the recruitment obligations required by §§ 655.102 and 655.103, offer the employer an opportunity to correct its recruitment and conduct it on an expedited schedule. The CO shall specify the positive recruitment requirements, request the employer submit proof of corrected advertisement and an initial recruitment report meeting the requirements

of § 655.102(k) no earlier than 48 hours after the last corrected advertisement is printed, and state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made within 5 business days of receiving the required documentation, which may be a date later than 30 days before the date of need:

(v) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ, of the *Notice of Deficiency*. The notice will state that in order to obtain such a review or hearing, the employer, within 5 business days of the receipt of the notice, must file by facsimile or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(vi) State that if the employer does not comply with the requirements under paragraphs (b)(2)(ii) and (iv) of this section or request an expedited administrative judicial review or a de novo hearing before an ALJ within the 5 business days the CO will deny the application in accordance with the labor certification determination provisions in § 655.109.

(c) *Submission of modified applications.* (1) If the CO notifies the employer of any deficiencies within the 7 calendar day timeframe set forth in paragraph (b)(1) of this section, the date by which the CO's Final Determination is required by statute to be made will be postponed by 1 day for each day that passes beyond the 5 business-day period allowed under paragraph (b)(2)(ii) of this section to submit a modified application.

(2) Where the employer submits a modified application as required by the CO, and the CO approves the modified application, the CO will not deny the application based solely on the fact that it now does not meet the timeliness requirements for filing applications.

(3) If the modified application is not approved, the CO will deny the applica-

tion in accordance with the labor certification determination provisions in § 655.109.

(d) *Amendments to applications.* (1) Applications may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(2) Applications may be amended to make minor changes in the total period of employment, but only if a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity. If a request for a change in the start date of the total period of employment is made after workers have departed for the employer's place of work, the CO may only approve the change if the request is accompanied by a written assurance signed and dated by the employer that all such workers will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

(3) Other amendments to the application, including elements of the job offer and the place of work, may be approved by the CO if the CO determines the proposed amendment(s) are justified by a business reason and will not prevent the CO from making the labor certification determination required under § 655.109. Requested amendments will be reviewed as quickly as possible, taking into account revised dates of

need for work locations associated with the amendment.

(e) *Appeal procedures.* With respect to either a Notice of Deficiency issued under paragraph (b) of this section, the denial of a requested amendment under paragraph (d) of this section, or a notice of denial issued under § 655.109(e), if the employer timely requests an expedited administrative review or *de novo* hearing before an ALJ, the procedures set forth in § 655.115 will be followed.

§ 655.1308 Offered wage rate.

(a) *Highest wage.* To comply with its obligation under § 655.105(g), an employer must offer a wage rate that is the highest of the AEWR in effect at the time recruitment for a position is begun, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.

(b) *Wage rate request.* The employer must request and obtain a wage rate determination from the NPC, on a form prescribed by ETA, before commencing any recruitment under this subpart, except where specifically exempted from this requirement by these regulations.

(c) *Validity of wage rate.* The recruitment must begin within the validity period of the wage determination obtained from the NPC. Recruitment for this purpose begins when the job order is accepted by the SWA for posting.

(d) *Wage offer.* The employer must offer and advertise in its recruitment a wage at least equal to the wage rate required by paragraph (a) of this section.

(e) *Adverse effect wage rate.* The AEWR will be based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey. The NPC will obtain wage information on the AEWR using the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center Web site (<http://www.flcdatcenter.com/>). This wage shall not be less than the July 24, 2009 Federal minimum wage of \$7.25.

(f) *Wage determination.* The NPC must enter the wage rate determination on a form it uses, indicate the source, and return the form with its endorsement to the employer.

(g) *Skill level.* (1) Level I wage rates are assigned to job offers for beginning level employees who have a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy.

(2) Level II wage rates are assigned to job offers for employees who have attained, through education or experience, a good understanding of the occupation. These employees perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

(3) Level III wage rates are assigned to job offers for employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. These employees perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be an indicator that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as lead, senior, crew chief, or journeyman would be indicators that a Level III wage should be considered.

(4) Level IV wage rates are assigned to job offers for employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees receive only