

decision with the Administrative Review Board (ARB).

(iii) Review by the ARB.

(A) 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 must 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 shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall 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 in person or by certified mail.

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

(C) Where the ARB has determined to review such decision and order, the ARB shall notify each party of:

(1) The issue or issues raised;

(2) The form in which submissions shall be made (*i.e.*, briefs, oral argument, etc.); and

(3) The time within which such presentation shall be submitted.

(D) 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, in person or by certified mail. 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 decision of the Secretary.

(f) *Inter-agency reporting.* After completion of the appeal process, DOL will inform DHS and other appropriate enforcement agencies of the findings and provide a copy of the *Notice of Debarment*.

EFFECTIVE DATE NOTE: At 77 FR 10160, Feb. 21, 2012, § 655.31 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.31 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification*. If applicable, the Notice of Deficiency will include job order deficiencies identified by the SWA under § 655.16. The CO will send a copy of the Notice of Deficiency to the SWA serving the area of intended employment identified by the employer on its job order, and if applicable, to the employer's attorney or agent.

(b) *Notice content.* The Notice of Deficiency will:

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance and state the modification needed for the CO to issue a Notice of Acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 10 business days from the date of the Notice of Deficiency. The Notice will state the modification needed for the CO to issue a Notice of Acceptance;

(3) Offer the employer an opportunity to request administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61. The notice will inform the employer that it must submit a written request for review to the Chief ALJ of DOL within 10 business days from the date the Notice of Deficiency is issued by facsimile or other means normally assuring next day delivery, and that the employer must 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

(4) State that if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the *Application for Temporary Employment Certification*. The notice will inform the employer that the denial of the *Application for Temporary Employment Certification* is final, and cannot be appealed. The Department will not further consider that *Application for Temporary Employment Certification*.

§ 655.32 Labor certification determinations.

(a) *COs.* The Administrator, OFLC, is the Department's National CO. The Administrator, and the CO(s) in the NPC

(by virtue of delegation from the Administrator), have the authority to certify or deny applications for temporary employment certification under the H-2B nonimmigrant classification. If the Administrator directs that certain types of temporary labor certification applications or specific applications under the H-2B nonimmigrant classification be handled by the National OFLC, the Director of the Chicago NPC will refer such applications to the Administrator.

(b) *Determination.* The CO will make a determination either to grant or deny the *Application for Temporary Employment Certification*. The CO will grant the application if and only if the employer has met all the requirements of this subpart, including the criteria for certification defined in § 655.23(b), thus demonstrating that an insufficient number of qualified U.S. workers are available for the job opportunity for which certification is sought and the employment of the H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

(c) *Notice.* The CO will notify the employer in writing (either electronically or by U.S. Mail) of the labor certification determination.

(d) *Approved certification.* If temporary labor certification is granted, the CO must send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney with a copy to the employer. The Final Determination letter will notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office.

(e) *Denied certification.* If temporary labor certification is denied, the Final Determination letter will:

(1) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing benefits, wages, and working conditions of similarly employed U.S. workers in the occupation and/or any applicable special procedures;

(3) Offer the employer an opportunity to request administrative review of the denial available under § 655.33, or to file a new application in accordance with specific instructions provided by the CO; and

(4) State that if the employer does not request administrative review in accordance with § 655.33, the denial is final and the Department will not further consider that application for temporary alien nonagricultural labor certification.

(f) *Partial certification.* The CO may, in his/her discretion, and to ensure compliance with all statutory and regulatory requirements, issue a partial certification, reducing either the period of need, the number of H-2B positions being requested, or both, based upon information the CO receives in the course of processing the temporary labor certification application, an RFI, or otherwise. If a partial labor certification is issued, the Final Determination letter will:

(1) State the reason(s) for which either the period of need and/or the number of H-2B positions requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation;

(3) Offer the employer an opportunity to request administrative review of the partial labor certification available under § 655.33; and

(4) State that if the employer does not request administrative review in accordance with § 655.33, the partial labor certification is final and the Department will not further consider that application for temporary non-agricultural labor certification.

EFFECTIVE DATE NOTE: At 77 FR 10160, Feb. 21, 2012, § 655.32 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.32 Submission of a modified application or job order.

(a) *Review of a modified Application for Temporary Employment Certification or job order.* Upon receipt of a response to a Notice of Deficiency, including any modifications, the CO will review the response. The CO may issue one or more additional Notices of Deficiency before issuing a Notice of Decision. The employer's failure to comply with a Notice of

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Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the *Application for Temporary Employment Certification*.

(b) *Acceptance of a modified Application for Temporary Employment Certification or job order.* If the CO accepts the modification(s) to the *Application for Temporary Employment Certification* and/or job order, the CO will issue a Notice of Acceptance to the employer. The CO will send a copy of the Notice of Acceptance to the SWA instructing it to make any necessary modifications to the not yet posted job order and, if applicable, to the employer's attorney or agent, and follow the procedure set forth in § 655.33.

(c) *Denial of a modified Application for Temporary Employment Certification or job order.* If the CO finds the response to Notice of Deficiency unacceptable, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.51.

(d) *Appeal from denial of a modified Application for Temporary Employment Certification or job order.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* and/or job order are the same as for appealing the denial of a non-modified *Application for Temporary Employment Certification* outlined in § 655.61.

(e) *Post acceptance modifications.* Irrespective of the decision to accept the *Application for Temporary Employment Certification*, the CO may require modifications to the job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions as set forth in § 655.18. The employer must make such modification, or certification will be denied under § 655.53. The employer must provide all workers recruited in connection with the job opportunity in the *Application for Temporary Employment Certification* with a copy of the modified job order no later than the date work commences, as approved by the CO.

§ 655.33 Administrative review.

(a) *Request for review.* If a temporary labor certification is denied, in whole or in part, under § 655.32, the employer may request review of the denial by the BALCA. The request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 calendar days of the date of determination;

(2) Must clearly identify the particular temporary labor certification

determination for which review is sought;

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the Final Determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO in support of the application.

(b) Upon the receipt of a request for review, the CO shall, within 5 business days assemble and submit the Appeal File using means to ensure same day or overnight delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) Within 5 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or overnight delivery, a brief in support of the CO's decision.

(d) The Chief Administrative Law Judge may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) The BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the denial of the temporary labor certification; or

(2) Direct the CO to grant the certification; or

(3) Remand to the CO for further action.

(f) The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 5 business days of the submission of the CO's brief or 10 days after receipt of the Appeal File, whichever is earlier, using means to ensure same day or overnight delivery.

EFFECTIVE DATE NOTE: At 77 FR 10160, Feb. 21, 2012, § 655.33 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

§ 655.33 Notice of acceptance.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and job order are complete and meet the requirements of this subpart, the CO will notify the employer in writing within 7 business days from the date the CO