

## § 655.4

## 20 CFR Ch. V (4-1-12 Edition)

United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H-2B visas, or enforce compliance with the provisions of the H-2B visa program, in the Territory of Guam. Under DHS regulations, administration of the H-2B temporary labor certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

### § 655.4 Definitions of terms used in this subpart.

For the purposes of this subpart:

*Act* means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

*Administrative Law Judge* means a person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, which will hear and decide appeals as set forth in § 655.115.

*Administrator, Office of Foreign Labor Certification (OFLC)* means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

*Administrator, Wage and Hour Division (WHD)*, Employment Standards Administration means the primary official of the WHD, or the Administrator's designee.

*Agent* means a legal entity or person authorized to act on behalf of the employer for temporary non-agricultural labor certification purposes that is not itself an employer as defined in this subpart. The term "agent" specifically excludes associations or other organizations of employers.

*Applicant* means a lawful U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (Form ETA 9142).

*Application for Temporary Employment Certification* means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary nonagricultural labor certification determination from DOL. A complete submission of the *Application for Temporary Employment Certification* includes the form, all valid wage determinations as required by

§ 655.101(a)(1) and the U.S. worker recruitment report.

*Area of Intended Employment* means the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

*Attorney* means any person who is currently a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia, and who is not under suspension, debarment or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3, 1003.101. Such a person is permitted to act as an agent or attorney for an employer under this subpart.

*Board of Alien Labor Certification Appeals (BALCA or Board)* means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge, and consisting of Administrative Law Judges assigned to the Department and designated by the Chief Administrative Law Judge to be members of BALCA. The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

*Center Director* means the OFLC official to whom the OFLC Administrator

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has delegated his authority for purposes of National Processing Center (NPC) operations and functions.

*Certifying Officer (CO)* means the OFLC official designated by the Administrator, OFLC with making programmatic determinations on employer-filed applications under the H-2B program.

*Chief Administrative Law Judge* means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

*Date of need* means the first date the employer requires services of the H-2B workers as listed on the application.

*Department of Homeland Security (DHS)* means the Federal agency having jurisdiction over certain immigration-related functions, acting through its agencies, including the U.S. Citizenship and Immigration Services.

*Eligible worker* means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), or in this paragraph (c)) with respect to the employment in which the worker is engaging.

*Employee* means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

*Employer* means:

(1) A person, firm, corporation or other association or organization:

(i) Has a place of business (physical location) in the U.S. and a means by which it may be contacted;

(ii) Has an employer relationship with respect to H-2B employees or related U.S. workers under this part; and

(iii) Possesses, for purposes of the filing of an application, a valid Federal Employer Identification Number (FEIN).

(2) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers may be considered to jointly employ that employee.

*Employment and Training Administration or ETA* means the agency within the Department, which includes the OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the Act.

*ETA National Processing Center (NPC)* means a National Processing Center established by the OFLC for the processing of applications submitted in connection with the Department's mandate pursuant to the INA.

*Full-time*, for purposes of temporary labor certification employment, means 30 or more hours per week, except that where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition shall have precedence.

*H-2B Petition* means the form and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2B non-immigrant workers.

*INA* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Job contractor* means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

*Job opportunity* means one or more job openings with the petitioning employer for temporary employment at a place in the U.S. to which U.S. workers can be referred. Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories, possessions, or commonwealths cannot be the subject of an *Application for Temporary Employment Certification*.

*Joint employment* means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers may be considered to jointly employ that employee. An employer in a joint employment relationship to an employee may be considered a “joint employer” of that employee.

*Layoff* means any involuntary separation of one or more U.S. employees without cause or prejudice.

*Metropolitan Statistical Area (MSA)* means those geographic entities defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

*Offered wage* means the highest of the prevailing wage, Federal minimum wage, the State minimum wage, or local minimum wage.

*Office of Foreign Labor Certification (OFLC)* means the organizational component within ETA that provides national leadership and policy guidance and develops regulations and procedures by which it carries out the responsibilities of the Secretary under the INA, as amended, concerning foreign workers seeking admission to the U.S. in order to work under sec. 101(a)(15)(H)(ii)(b) of the INA, as amended.

*Occupational Employment Statistics Survey (OES)* means that program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual wage estimates for occupations at the State and MSA levels.

*Prevailing Wage Determination (PWD)* means the prevailing wage for the position, as described in § 655.10(b), that is the subject of the *Application for Temporary Employment Certification*.

*Professional athlete* shall have the meaning ascribed to it in INA sec. 212(a)(5)(A)(iii)(II), which defines “professional athlete” as an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

*Representative* means an individual employed by or authorized to act on behalf of the employer with respect to the recruitment activities entered into for and attestations made with respect to the *Application for Temporary Employment Certification*. A representative who interviews and/or considers U.S. workers for the job that is subject of the Application must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

*Secretary* means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary’s designee.

*Secretary of Homeland Security* means the chief official of the Department of Homeland Security or the Secretary of Homeland Security’s designee.

*Secretary of State* means the chief official of the U.S. Department of State or the Secretary of State’s designee.

*State Workforce Agency (SWA)*, formerly known as State Employment Security Agency, means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer public labor exchange delivered through the State’s one-stop delivery system in accordance with the Wagner-Peyser Act. (29 U.S.C. 49 *et seq.*)

*Strike* means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations. Whether a job opportunity is vacant by

reason of a strike or lock out will be determined by evaluating for each position identified as vacant in the *Application for Temporary Employment Certification* whether the specific vacancy has been caused by the strike or lock out.

*Successor in interest* means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in debarment. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same facilities;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Similarity in machinery, equipment, and production methods;
- (7) Similarity of products and services; and
- (8) The ability of the predecessor to provide relief.

*United States (U.S.)*, when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110-229, Title VII, the Commonwealth of the Northern Mariana Islands.

*United States Citizenship and Immigration Services (USCIS)* means the Federal agency within DHS making the determination under the INA whether to

grant petitions filed by employers seeking H-2B workers to perform temporary nonagricultural work in the U.S.

*United States worker (U.S. worker)* means a worker who is either

- (1) A citizen or national of the U.S.; or
- (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under sec. 207 of the INA, is granted asylum under sec. 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

*Within [number and type] days* will, for purposes of determining an employer's compliance with timing requirements with respect to appeals and requests for review, begin to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the employer sends whatever communication is required by these rules back to the Department, as evidenced by a postal mark or other similar receipt.

EFFECTIVE DATE NOTE: At 77 FR 10148, Feb. 21, 2012, §655.4 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

#### § 655.4 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities, the Administrator, OFLC has the authority to establish, continue, revise, or revoke special procedures in the form of variances for processing certain H-2B applications. Employers must request and demonstrate in writing to the Administrator, OFLC that special procedures are necessary. Before making determinations under this section, the Administrator, OFLC may consult with affected employers and worker representatives. Special procedures in place on the effective date of this regulation, including special procedures currently in effect for handling applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers, will remain in force until modified or withdrawn by the Administrator, OFLC.

#### § 655.5 Purpose and scope of subpart A.

- (a) Before granting the petition of an employer to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the