

## § 655.57

and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

[77 FR 10164, Feb. 21, 2012]

EFFECTIVE DATE NOTE: At 77 FR 10164, Feb. 21, 2012, §655.56 was added, effective Apr. 23, 2012.

### **§ 655.57 Request for determination based on nonavailability of U.S. workers.**

(a) *Standards for requests.* If a temporary labor certification has been partially granted or denied, based on the CO's determination that qualified U.S. workers are available, and, on or after 21 calendar days before the date of need, some or all of those qualified U.S. workers are, in fact no longer available, the employer may request a new temporary labor certification determination from the CO. Prior to making a new determination the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment with 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request. An employer may appeal a denial of such a determination in accordance with procedures contained in § 655.61.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO by electronic mail or other appropriate means and must be accompanied by a signed statement confirming the employer's assertion. In addition, unless the employer has provided to the CO notification of abandonment or termination of employment as required by § 655.20(y), the employer's signed statement must include the name and contact information of each U.S. worker who became unavailable and must supply the reason why the worker has become unavailable.

(c) *Notification of determination.* If the CO determines that U.S. workers have

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become unavailable and cannot identify sufficient available U.S. workers who are qualified or who are likely to become available, the CO will grant the employer's request for a new determination. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being qualified because of lawful job-related reasons.

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### **§§ 655.58–655.59 [Reserved]**

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### **POST CERTIFICATION ACTIVITIES**

EFFECTIVE DATE NOTE: At 77 FR 10165, Feb. 21, 2012, an undesignated center heading was added before §655.60, effective Apr. 23, 2012.

### **§ 655.60 Violations.**

The WHD Administrator, through investigation, shall determine whether an employer has—

(a) Filed a petition with ETA that willfully misrepresents a material fact.

(b) Substantially failed to meet any of the conditions of the labor certification application attested to, as listed in §655.22, or any of the conditions of the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker in 8 CFR 214.2(h).

(c) Misrepresented a material fact to the State Department during the visa application process.

EFFECTIVE DATE NOTE: At 77 FR 10165, Feb. 21, 2012, §655.60 was revised, effective Apr. 23, 2012. For the convenience of the user, the revised text is set forth as follows:

### **§ 655.60 Extensions.**

An employer may apply for extensions of the period of employment in the following circumstances. A request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need

could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing. The CO will not grant an extension where the total work period under that *Application for Temporary Employment Certification* and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peak-load, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in §655.61. The H-2B employer's assurances and obligations under the temporary labor certification will continue to apply during the extended period of employment. The employer must immediately provide to its workers a copy of any approved extension.

**§ 655.61 Administrative review.**

(a) *Request for review.* Where authorized in this subpart, employers may request an administrative review before the BALCA of a determination by the CO. In such cases, 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 business days from the date of determination;
- (2) Must clearly identify the particular determination for which review is sought;
- (3) Must set forth the particular grounds for the request;
- (4) Must include a copy of the CO's determination; and
- (5) May contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued.

(b) *Appeal file.* Upon the receipt of a request for review, the CO will, within 7 business days, assemble and submit the Appeal File using means to ensure same day or next day 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) *Briefing schedule.* Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or next day delivery, a brief in support of the CO's decision.

(d) *Assignment.* The Chief ALJ may designate a single member or a three

member panel of the BALCA to consider a particular case.

(e) *Review.* The BALCA must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

(f) *Decision.* The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

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**§ 655.62 Withdrawal of an Application for Temporary Employment Certification.**

Employers may withdraw an *Application for Temporary Employment Certification* after it has been accepted and before it is adjudicated. The employer must request such withdrawal in writing.

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**§ 655.63 Public disclosure.**

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary nonagricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

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