

Employment and Training Administration, Labor

§ 655.10

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(c) This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the U.S. in occupations other than agriculture and registered nursing.

(1) This subpart sets forth the procedures through which employers may apply for H-2B labor certifications, as well as the procedures by which such applications are considered and how they are granted or denied.

(2) This subpart sets forth the procedures governing the Department's investigatory, inspection, and law enforcement functions to assure compliance with the terms and conditions of employment under the H-2B program. The authority for such functions has been delegated by the Secretary of Homeland Security to the Secretary of Labor and re-delegated within the Department to the Employment Standards Administration (ESA) Wage and Hour Division (WHD). This subpart sets forth the WHD's investigation and enforcement actions.

[73 FR 78052, Dec. 19, 2008. Redesignated at 74 FR 25985, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 25985, May 29, 2009, § 655.1 was redesignated as § 655.5 and suspended, effective June 29, 2009.

§ 655.6 Temporary need.

(a) To use the H-2B program, the employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii).

(b) The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

(c) Except where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an *Application for Temporary Employment Certification* where the employer has a recurring, seasonal or peakload need lasting more than 10 months.

(d) The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

(e) The employer filing the application must maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the labor certification.

§§ 655.7-655.9 [Reserved]

§ 655.10 Determination of prevailing wage for temporary labor certification purposes.

(a) *Application process.* (1) The employer must request a prevailing wage determination from the NPC in accordance with the procedures established by this regulation.

(2) The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete *Application for Temporary Employment Certification* with the Department.

(3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.

(b) *Determinations.* Prevailing wages shall be determined as follows:

(1) Except as provided in paragraph (e) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for