§ 655.162 Approved certification.

If temporary labor certification is granted, the CO will send the certified Application for Temporary Employment Certification and a Final Determination letter to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer’s agent or attorney.

§ 655.163 Certification fee.

A determination by the CO to grant an Application for Temporary Employment Certification in whole or in part will include a bill for the required certification fees. Each employer of H–2A workers under the Application for Temporary Employment Certification (except joint employer associations, which may not be assessed a fee in addition to the fees assessed to the members of the association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the Application for Temporary Employment Certification (in whole or in part), as follows:

(a) Amount. The Application for Temporary Employment Certification fee for each employer receiving a temporary agricultural labor certification is $100 plus $10 for each H–2A worker certified under the Application for Temporary Employment Certification, provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than $1,000. There is no additional fee to the association filing the Application for Temporary Employment Certification. The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its H–2A employer members, the aggregate fees for all employers of H–2A workers under the Application for Temporary Employment Certification must be paid by one check or money order.

(b) Timeliness. Fees must be received by the CO no more than 30 days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in §655.182.

§ 655.164 Denied certification.

If temporary labor certification is denied, the Final Determination letter will be sent to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer’s agent or attorney. The Final Determination Letter will:

(a) State the reason(s) certification is denied;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the denial. The notice must state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, must file by facsimile (fax), or other means normally assuring next day delivery, a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO’s action; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within the 7 calendar days, the denial is final and the Department will not further consider that Application for Temporary Employment Certification.

§ 655.165 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of H–2A workers being requested or both for certification, based upon information the CO receives during the course of processing the Application for Temporary Employment Certification, an audit, or
Employment and Training Administration, Labor  

§ 655.167

otherwise. The number of workers certified will be reduced by one for each referred U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and has not been rejected for lawful job-related reasons, to perform the services or labor. If a partial labor certification is issued, the Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H–2A workers requested has been reduced;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the decision. The notice will state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, will file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO’s action; and

(c) State that if the employer does not request an expedited administrative review or a de novo hearing before an ALJ within the 7 calendar days, the partial certification is final and the Department will not further consider that Application for Temporary Employment Certification.

§ 655.166 Requests for determinations 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 able, willing, available, eligible, and qualified U.S. workers are available, and on or after 30 calendar days before the date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or 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 able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer’s establishment within 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 the procedures contained in §655.171.

(b) Unavailability of U.S. workers. The employer’s request for a new determination must be made directly to the CO by telephone or electronic mail, and must be confirmed by the employer in writing as required by this paragraph. If the employer telephonically or via electronic mail requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO’s receipt of the request for a new determination, the CO will deny the request.

(c) Notification of determination. If the CO determines that U.S. workers have become unavailable and cannot identify sufficient available U.S. workers who are able, willing, eligible, and 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 eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.167 Document retention requirements.

(a) Entities required to retain documents. All employers filing an Application for Temporary Employment Certification requesting H–2A agricultural workers under this subpart are required to retain the documents and