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**Thursday,  
December 18, 2008**

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## **Part II**

### **Department of Labor**

**Employment and Training Administration**

**20 CFR Part 655**

**Wage and Hour Division**

**29 CFR Parts 501, 780, and 788**

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**Temporary Agricultural Employment of  
H-2A Aliens in the United States;  
Modernizing the Labor Certification  
Process and Enforcement; Final Rule**

**DEPARTMENT OF LABOR****Employment and Training  
Administration****20 CFR Part 655****Wage and Hour Division****29 CFR Parts 501, 780, and 788**

RIN 1205-AB55

**Temporary Agricultural Employment of  
H-2A Aliens in the United States;  
Modernizing the Labor Certification  
Process and Enforcement**

**AGENCY:** Employment and Training Administration, and Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Department of Labor (DOL or Department) is amending its regulations regarding the certification for the temporary employment of nonimmigrant workers in agricultural occupations on a temporary or seasonal basis, and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers.

This final rule re-engineers the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2A (agricultural temporary worker) status. The final rule utilizes an attestation-based application process based on pre-filing recruitment and eliminates duplicative H-2A activities currently performed by State Workforce Agencies (SWAs) and the Department. The rule also provides enhanced enforcement, including more rigorous penalties, to complement the modernized certification process and to appropriately protect workers.

**DATES:** This final rule is effective January 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** For further information about 20 CFR part 655, subpart B, contact William L. Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. Telephone: (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

For further information regarding 29 CFR part 501, contact James Kessler, Farm Labor Team Leader, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****Table of Contents**

- I. Background Leading to the NPRM
  - A. Statutory Standard and Current Department of Labor Regulations
  - B. Overview of the Proposed Redesign of the System
  - C. Severability
- II. Discussion of Comments on Proposed Rule
  - A. Revisions to 20 CFR Part 655
    - Subpart B
      - Section 655.93 Special Procedures
      - Section 655.100 Overview and Definitions
      - Section 655.101 Applications for Temporary Employment Certification
      - Section 655.102 Required pre-filing activity
      - Section 655.103 Advertising requirements
      - Section 655.104 Contents of job offers
      - Section 655.105 Assurances and obligations of H-2A employers
      - Section 655.106 Assurances and obligations of H-2A labor contractors
      - Section 655.107 Processing of applications
      - Section 655.108 Offered wage rate
      - Section 655.109 Labor certification determinations
      - Section 655.110 Validity and scope of temporary labor certifications
      - Section 655.111 Required departure
      - Section 655.112 Audits
      - Section 655.113 H-2A Applications Involving Fraud or Willful Misrepresentation
      - Section 655.114 Setting Meal Charges; Petition for Higher Meal Charges
      - Section 655.115 Administrative Review and *De Novo* Hearing before an Administrative Law Judge
      - Section 655.116 Job Service Complaint System; enforcement of work contracts
      - Section 655.117 Revocation of H-2A certification approval
      - Section 655.118 Debarment Timeline for Anticipated Training and Education Outreach Initiative Transition
    - B. Revisions to 29 CFR Part 501
      - Section 501.0 Introduction
      - Section 501.1 Purpose and scope
      - Section 501.2 Coordination of intake between DOL agencies
      - Section 501.3 Discrimination
      - Section 501.4 Waiver of rights prohibited
      - Section 501.5 Investigation authority of Secretary
      - Section 501.6 Cooperation with DOL officials

- Section 501.8 Surety bond
- Section 501.10 Definitions
- Section 501.15 Enforcement
- Section 501.16 Sanctions and remedies
- Section 501.19 Civil money penalty assessment
- Section 501.20 Debarment and revocation
- Section 501.21 Failure to cooperate with investigations
- Section 501.30 Applicability of procedures and rules
- Section 501.31 Written notice of determination required
- Section 501.32 Contents of notice
- Section 501.33 Requests for hearing
- Section 501.42 Exhaustion of administrative remedies
- C. Revisions to 29 CFR Parts 780 and 788
  - Section 780.115 Forest products
  - Section 780.201 Meaning of forestry or lumbering operations
  - Section 780.205 Nursery activities generally and Christmas tree production
  - Section 780.208 Forestry activities
  - Section 788.10 Preparing other forestry products
- III. Administrative Information
  - A. Executive Order 12866—Regulatory Planning and Review
  - B. Regulatory Flexibility Analysis
  - C. Unfunded Mandates Reform Act of 1995
  - D. Executive Order 13132—Federalism
  - E. Executive Order 13175—Indian Tribal Governments
  - F. Assessment of Federal Regulations and Policies on Families
  - G. Executive Order 12630—Protected Property Rights
  - H. Executive Order 12988—Civil Justice Reform
  - I. Plain Language
  - J. Executive Order 13211—Energy Supply
  - K. Paperwork Reduction Act

**I. Background Leading to the NPRM****A. Statutory Standard and Current Department of Labor Regulations**

The H-2A visa program provides a means for U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services when U.S. labor is in short supply. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act) (8 U.S.C. 1101(a)(15)(H)(ii)(a)) defines an H-2A worker as a nonimmigrant admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. Section 214(c)(1) of the INA (8 U.S.C. 1184(c)(1)) mandates that the Secretary of DHS consult with the Secretary of the Department of Labor (the Secretary) with respect to adjudication H-2A petitions, and, by cross-referencing Section 218 of the INA (8 U.S.C. 1188), with determining the availability of U.S. workers and the effect on wages and working conditions. Section 218 also sets forth further details of the H-2A application process and the requirements to be met by the agricultural employer.

Although foreign agricultural labor has contributed to the growth and success of America's agricultural sector since the 19th century, the modern-day agricultural worker visa program originated with the creation, in the INA (Pub. L. 82-144), of the "H-2 program"—a reference to the INA subparagraph that established the program. Today, the H-2A nonimmigrant visa program authorizes the Secretary of DHS to permit employers to hire foreign workers to come temporarily to the U.S. and perform agricultural services or labor of a seasonal or temporary nature, if the need for foreign labor is first certified by the Secretary.

Section 218(a)(1) of the INA (8 U.S.C. 1188(a)(1)) states that a petition to import H-2A workers may not be approved by the Secretary of Homeland Security unless the petitioner has applied to the Secretary for a certification that:

(a) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(b) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The INA specifies conditions under which the Secretary must deny certification, and establishes specific timeframes within which employers must file—and the Department must process and either reject or certify—applications for H-2A labor certification. In addition, the statute contains certain worker protections, including the provision of workers' compensation insurance and housing as well as minimum recruitment standards to which H-2A employers must adhere. See 8 U.S.C. 1188(b) and (c). The INA does not limit the number of foreign workers who may be accorded H-2A status each year or the number of labor certification applications the Department may process.

The Department has regulations at 20 CFR part 655, subpart B—"Labor Certification Process for Temporary Agricultural Employment Occupations in the United States (H-2A Workers)," governing the H-2A labor certification process, and at 29 CFR part 501 implementing its enforcement responsibilities under the H-2A program. Regulations relating to employer-provided housing for agricultural workers appear at 20 CFR part 654, subpart E (Housing for Agricultural Workers), and 29 CFR

1910.142 (standards set by the Occupational Safety and Health Administration); see also 20 CFR 651.10, and part 653, subparts B and F.

The Department was charged with reviewing the efficiency and effectiveness of its H-2A procedures in light of the increasing presence of undocumented workers in agricultural occupations and because of growing concern about the stability of the agricultural industry given its difficulty in gaining access to a legal workforce.<sup>1</sup> The Department reviewed its administration of the program and, in light of its extensive experience in both the processing of applications and the enforcement of worker protections, proposed measures to re-engineer the H-2A program in a Notice of Proposed Rulemaking on February 13, 2008 (73 FR 8538) (NPRM or Proposed Rule).

### *B. Overview of the Proposed Redesign of the System*

The NPRM described a pre-filing recruitment and attestation process as part of a re-engineered H-2A program. The Department proposed a process by which employers, as part of their application, would attest under threat of penalties, including debarment from the program, that they have complied with and will continue to comply with all applicable program requirements. In addition, employers would not be required to file extensive documentation with their applications but would be required to maintain all supporting documentation for their application for a period of 5 years in order to facilitate the Department's enforcement of program requirements. The Department's proposal also contained new and enhanced penalties and procedures for invoking those penalties against employers as well as their attorneys or agents who fail to perform obligations imposed under the H-2A program. The program also eliminates duplicative administration and processing by the State Workforce Agencies (SWAs) and the Department by requiring filing of the application only with the Department's National Processing Center (NPC) in Chicago, Illinois. This program would also enable the SWAs to better perform their mandated functions in processing H-2A agricultural clearance orders, by enhancing their ability to conduct housing inspections well in advance of the employer's application date. The

<sup>1</sup> Fact Sheet: Improving Border Security and Immigration Within Existing Law, Office of the Press Secretary, The White House (August 10, 2007); see also Statement on Improving Border Security and Immigration Within Existing Law, 43 Weekly Comp. Pres. Doc. (August 13, 2007).

SWAs would also continue to clear and post intrastate job orders, circulate them through the Employment Service interstate clearance system and refer potential U.S. workers to employers.

Finally, the Department proposed additional processes for penalizing employers or their attorneys or agents who fail to perform obligations required under the H-2A program, including provisions for debarring employers, agents, and attorneys and revoking approved labor certifications.

### *C. Severability*

The Department declares that, to the extent that any portion of this Final Rule is declared to be invalid by a court, it intends for all other parts of the Final Rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a court decision invalidating a portion of this Final Rule resulted in a partial reversion to the current regulations or to the statutory language itself, the Department intends that the rest of the Final Rule would continue to operate, if at all possible, in tandem with the reverted provisions.

## **II. Discussion of Comments on Proposed Rule**

The Department received over 11,000 comments in response to the proposed rule, the vast majority of them form letters or e-mails repeating the same contentions. Commenters included individual farmers and associations of farmers, agricultural associations, law firms, farmworker advocates, community-based organizations, and individual members of the public. The Department has reviewed these comments and taken them into consideration in drafting this Final Rule.

We do not discuss here those provisions of the NPRM on which we received no comments. Those provisions were adopted as proposed. We have also made some editorial changes to the text of the proposed regulations, for clarity and to improve readability. Those changes are not intended to alter the meaning or intent of the regulations.

### *A. Revisions to 20 CFR Part 655 Subpart B*

#### Section 655.93 Special Procedures

The Department proposed to revise the current regulation on special procedures to clarify its authority to establish procedures that vary from those procedures outlined in the regulations. We received numerous comments about this revised language on special procedures.

Several commenters questioned the effect the proposed language would have on special procedures currently in use. Section 655.93(b) of the current regulations provides for special procedures, stating that: "the Director has the authority to establish special procedures for processing H-2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary." The proposed rule provides that "the OFLC Administrator has the authority to establish or to revise special procedures in the form of variances for processing certain H-2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary."

Four associations of growers/producers specifically requested clarification of the phrase "in the form of variances." These associations asked the Department to confirm that the proposed language does not pose a threat to the continued use of the special procedures for sheepherders currently in place. One association expressed concern that this revised language would require hundreds of employers engaged in the range production of livestock to annually document their need for special procedures.

The addition of the phrase "in the form of variances" is intended to clarify that special procedures differ from those processes set out in the regulation, which otherwise apply to employers seeking to hire H-2A workers. The special procedures for sheepherders, for example, arise from decades of past practices and draw upon the unique nature of the activity that cannot be completely addressed in the generally applicable regulations. The establishment of special procedures recognizes the peculiarities of an industry or activity, and provides a means to comply with the underlying program requirements through an altered process that adequately addresses the unique nature of the industry or activity while meeting the statutory and regulatory requirements of the program. The special procedures do not enable industries and employers to evade their statutory or regulatory responsibilities but rather establish a feasible and tailored means of meeting them while recognizing the unique circumstances of that industry. The language in § 655.93(b) affirms the Department's authority to develop and/or revise special procedures. The Department does not intend to require any industry currently using special

procedures to seek ratification of their current practice, nor does the Department intend to require annual or periodic justifications of an industry's need for special procedures. The Department does reserve the right to make appropriate changes to those procedures after consultation with the industry involved.

Section 655.93(b) in the NPRM enables the Administrator/OFLC "to establish or revise special procedures in the form of variances for processing certain H-2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary." In contrast, the current rule states that the subpart permits the Administrator/OFLC to "continue and \* \* \* revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews."

The Department received several comments about the proposed language, universally expressing concern that the new language provides the Department with broader authority for changing or revoking existing special procedures without providing due process with respect to altering the procedures. An association of growers/producers stated that the proposed rule uses "more ominous terms" and gives the impression that the Administrator/OFLC has unilateral authority to make changes without safeguards, review, or democratic procedures. One association of growers and producers expressed the view that the revocation language gives the Department authority to revoke the procedures without advance notice and opportunity for comment and is, therefore, a violation of the Administrative Procedure Act.

A law firm that provides counsel to agricultural employers stated that the new language does not adequately solidify the Department's commitment to existing special procedures and recommended that the Department amend the regulation to affirm its commitment to continuing such long-standing special procedures by providing that any proposed changes to the existing special procedures and policies can be made only after publication in the **Federal Register** with at least a 120-day period for public comment. The firm also commented that the proposal to empower the Administrator/OFLC to revoke special procedures would violate Section 218(c)(4) of the INA, which requires the

Secretary of Labor to issue regulations addressing the specific requirements of housing for employees principally engaged in the range production of livestock.

The Department has decided, following consideration of these concerns, to retain the NPRM language in the final regulation, but has added language similar to that in the current regulation, to enumerate those special procedures currently in effect as examples of the use of special procedures. It is our belief that this provision, as it now reads, provides both the Department and employers using the H-2A program essential flexibility regarding special procedures, thus permitting the Department to be far more responsive to employers' changing needs, crop mechanization, and similar concerns. In addition, the language on special procedures in the Final Rule reaffirms the Department's continuing commitment to use special procedures where appropriate. The Department has no present intent to revoke any of the special procedures that are already in place, nor does the language of the final regulation give the Department any new power to do so. While it is possible that at some time in the future the Department may need to revoke or revise existing special procedures, that step would be taken with the same level of deliberation and consultation that was employed in the creation of those procedures. To strengthen our commitment to continue the current consultative process, we have changed the word "may" in the last sentence of paragraph (b) to "will." The provision also provides the Department with the authority to develop new procedures to meet employer needs and, additionally, provides employers with the opportunity to request that the Department consider additional procedures or revisions to existing special procedures. Proposed paragraph (c) has been deleted as unnecessarily duplicative of the language in paragraph (b).

Two associations of growers and producers requested that the Department formulate special procedures for dairy workers, stating that these requested special procedures should not be different from those already established for sheepherders. The associations stated the provisions for sheepherders have "special relevance to the current dairy situation" and also stated the "special procedures relieve the sheepherding industry from having to make a showing of temporary or seasonal employment." The longstanding special procedures that allow sheepherders to participate in the

H-2A program have their origins in prior statutory provisions dating back to the 1950s. The Department is unaware of any comparable statutory history pertaining to the dairy industry. The Department would, of course, consider a specific request from dairy producers or their representatives for the development of special procedures that would be applicable to eligible H-2A occupations (see further discussion on this point in the discussion of the definition of "agricultural labor or services" below). The Department does not believe, however, that it would be appropriate to speculatively address the merits of a specific special procedures request in this regulation, particularly before a request making a detailed case for the appropriateness of such special procedures has been received.

An individual employer commented that those involved in discussing and considering changes to the H-2A program should preserve the special procedures for shepherders and extend them to all occupations engaged in the range production of other livestock (cattle and horses). A private citizen provided suggestions for improving the handling of certification for sheep shearers.

The Department has previously established special procedures for open range production of livestock and sheep shearers and does not have any plans to change those procedures at this time and does not believe that it would be appropriate to address in this regulation the merits of the commenters' general suggestions for revising these special procedures. The Department would, of course, be willing to consider a specific request from livestock producers or their representatives for the revision or expansion of special procedures consistent with its authority and this regulation.

#### Section 655.100—Overview and definitions

##### (a) Overview

The Department included a provision in the NPRM, similar to a provision in the current regulation, which provides an overview of the H-2A program. This overview provides the reader, especially readers unfamiliar with the program, a general description of program obligations, requirements, and processes.

Only two commenters identified concerns with the overview as written. Both expressed concern with the proposed earlier time period for the recruitment of U.S. workers. They questioned whether U.S. workers who agreed to work on a date far in advance

would then be available to work for the entire contract period. The overview, however, simply describes in broad-brush fashion the regulatory provisions that are discussed in detail later in the NPRM, and in and of itself has no legal effect. The concerns and observations expressed by commenters will be addressed in the context of the relevant regulatory provision to which they apply rather than in the overview. The overview has also been edited for general clarity and to reflect changes made throughout the regulatory text.

##### (b) Transition

The Department, due to past program experience, has decided to add a transition period in order to provide an orderly and seamless transition to the new system created by these regulatory revisions. This will allow the Department to make necessary changes to program operations, provide training to the NPC, SWAs and stakeholder groups, and allow employers and their agents/representatives to become familiar with the new system. Employers with a date of need for workers on or after July 1, 2009 will be obligated to follow all of the new procedures established by these regulations. Prior to that time, the Department has created a hybrid system involving elements of the old and the new regulations as delineated in the new § 655.100(b).

Even though the NPRM put current and future users of H-2A workers on some notice regarding what this Final Rule will require, the rule as a whole implements several significant changes to the administration of the program. Several commenters requested that the Department allow employers some period of time to prepare and adjust their requests for temporary agricultural workers. These regulations implement new application forms, new processes, and new time periods for conducting recruitment for domestic workers to which current and new users of the program will need to become accustomed.

The Department is accordingly adopting a transition period after the effective date of this Final Rule. The transition period establishes procedures that will apply to any application for which the first date of need for H-2A workers is no earlier than the effective date of this rule and no later than June 30, 2009.

During this transition period, the Department will accept applications in the following manner: An employer will complete and submit Form ETA-9142, *Application for Temporary Employment Certification*, in accordance with

§ 655.107, no less than 45 days prior to their date of need. The employer will simultaneously submit Form ETA-790 *Agricultural and Food Processing Clearance Order* (job order), with the *Application for Temporary Employment Certification* (application) directly to the Chicago NPC. Activities that are required to be conducted prior to filing an application under the Final Rule will be conducted post-filing during this transition period, much as they are under the current rule. The employer will also be expected to make attestations in its application applicable to its future recruitment activities, payment of the offered wage rate, etc. Employers will not be required to complete an initial recruitment report for submission with the application, but will be required to complete a recruitment report for submission to the NPC prior to certification, and will also be required to complete a final recruitment report covering the entire recruitment period.

The employer will not separately request a wage determination from the Chicago NPC. Upon receipt of Forms ETA-9142 and ETA-790, the Chicago NPC will provide the employer with the minimum applicable wage rate to be offered by the employer, and will process the application and job order in a manner consistent with § 655.107, issuing a modification for any curable deficiencies within 7 calendar days. Once the application and job order have been accepted, the Chicago NPC will transmit a copy of the job order to the SWA(s) serving the area of intended employment to initiate intrastate and interstate clearance, request the SWA(s) schedule an inspection of the housing, and provide instructions to the employer to commence positive recruitment in a manner consistent with § 655.102. The NPC will designate labor supply States during this transition period on a case-by-case basis, applying the basic information standard for such designations that is set forth in § 655.102(i).

This transition period process will apply only to applications filed on or after the effective date of this regulation with dates of need no earlier than the effective date and no later than June 30, 2009. Employers with a date of need on or after July 1, 2009 will be expected to fully comply with all of the requirements of the Final Rule. Moreover, after the Final Rule's effective date, the requirements of the Final Rule will fully apply except for those modifications that are expressly mentioned as transition period procedures in § 655.100(b); all other

provisions of the Final Rule will apply on the effective date of the Final Rule.

These transition period procedures are designed to ensure that employers seeking to utilize the program immediately after its effective date, especially those with needs early in the planting season, will not be prejudiced by the new pre-filing requirements regarding wage determinations and recruitment, which might otherwise substantially impact employers' application timing. Because the Department's seasonal H-2A workload begins to peak in January of each year, however, the Department deems it essential to the smooth and continuous operation of the H-2A program throughout calendar year 2009 to make the rule effective as early in the year as possible.

(c) Definitions 655.100

Definition of "agent," "attorney," and "representative"

The Department did not propose any changes to the definition of "agent" from existing regulations but added definitions for "attorney" and "representative" in the proposed rule. A major trade association commented that the definitions of, and references to, the terms "agent," "attorney" and "representative" are confusing. The association found the definitions of agent and representative to be duplicative and the distinctions between these two terms, both of which encompass the authority to act on behalf of an employer, unclear. The association also commented that the definition of "attorney" is self-evident and appears to be a vehicle for permitting attorneys to act as "agents" or "representatives." Further, according to the commenter, the term "representative" is also problematic and the Department should consider revising it or eliminating it entirely. The association believes the main purpose of the definition is to deem the person who makes the attestations on behalf of the employer a "representative," but the association believes it is not clear whether the intent of the definition of "representative" is to also make the representative liable for any misrepresentations made in an attestation on behalf of an employer. The association recommended the proposed rule should clarify the intent of the definition of "representative" and also under what circumstances an agent will be liable for activities undertaken on behalf of an employer. The association recommended a clear set of standards for liability and suggested such standards should not deviate from

the current standards where agents, attorneys, and representatives (under the proposed rule) are not liable if they perform the administrative tasks necessary to file labor certification applications and petitions for visas and do not make attestations that are factually based. In addition, the association recommended that the agents, attorneys, or representatives should not be liable for program violations by the employer.

The Department understands the need for clarity in determining who qualifies as a representative before the Department and what responsibilities and liabilities attach to that role and has accordingly simplified the definition of a representative. Although the Department does distinguish between the different roles of attorneys and agents, both groups are held to the same standards of ethics and honesty under the Department's rules. Under the rules, attorneys can function as agents, and either attorneys or agents can function as a representative of the employer. The Department has, in addition, replaced the word "official" with "person or entity" to parallel the definition of agent.

However, the Department disagrees with the commenter's interpretation of the extent to which an agent or attorney can be held accountable by the Department for their own and their clients' conduct in filing an application for an employer. While agents and attorneys are of course not strictly liable for all misconduct engaged in by their clients, they do undertake a significant duty in attestations to the Department regarding their employer-clients' obligations. They are, therefore, responsible for exercising reasonable due diligence in ensuring that employers understand their responsibilities under the program and are prepared to execute those obligations. Agents and attorneys do not themselves make the factual attestations and are not required to have personal knowledge that the attestations they submit are accurate. They are, however, required to inform the employers they represent of the employers' obligations under the program, including the employers' liability for making false attestations, and the prohibition on submitting applications containing attestations they know or should know are false. The debarment provisions at § 655.118 of the final regulations have accordingly been clarified to state that agents and attorneys can be held liable for their employer-clients' misconduct when they "participated in, had knowledge of, or had reason to know of, the employer's substantial violation."

The same association also questioned why the Department is "singling out attorneys" in the definition of "representative" by requiring an attorney who acts as an employer's representative and interviews and/or considers U.S. workers for the job offered to the foreign worker(s) to also be the person who normally considers applicants for job opportunities not involving labor certifications. The association found no apparent rationale justifying why the Department should dictate who and under what circumstances an attorney or any other person should interview U.S. job applicants. It further recommended that the rule eliminate the reference to attorneys or, at a minimum, clarify that the rule does not reach attorneys who merely advise and guide employers through the H-2A program. The Department has accordingly clarified the definition of representative by deleting the sentence limiting the role attorneys can play in interviewing and considering workers, primarily because, unlike other labor certification programs administered by the Department, the relatively simple job qualifications that apply to most agricultural job opportunities render it unlikely that U.S. workers would be discouraged from applying for those jobs by the prospect of being interviewed by an attorney.

A specialty bar association urged that the definition of "agent" be changed in order to prevent abuses related to foreign nationals paying recruiters' fees. The association suggested that the Department limit representation of employers to that recognized by DHS: attorneys duly licensed and in good standing; law students and law graduates not yet licensed who are working under the direct supervision of an attorney licensed in the United States or a certified representative; a reputable individual of good moral character who is assisting without direct or indirect remuneration and who has a pre-existing relationship with the person or entity being represented; and accredited representatives, who are persons representing a nonprofit organization which has been accredited by the Board of Immigration Appeals.

The Department acknowledges that its allowance of agents who are not attorneys and who do not fit into the categories recognized by DHS creates a difference of practices between the two agencies. However, the Department has for decades permitted agents who do not meet DHS's criteria to appear before it. Agents who are not attorneys have adequately represented claimants before the Department in a wide variety of

activities since long before the development of the H-2A program. To change such a long-standing practice in the context of this rulemaking would represent a major change in policy that the Department is not prepared to make at this time. The Department has, however, added language to the definition of both "agent" and "attorney" to clarify that individuals who have been debarred by the Department under § 655.118 cannot function as attorneys or agents during the period of their debarment.

#### Definition of "adverse effect wage rate"

The Department proposed a revised definition of "adverse effect wage rate," limiting its application to only H-2A workers. A law firm commented that the proposed definition of "adverse effect wage rate" appears to apply only to H-2A workers and not to U.S. workers who are employed in "corresponding employment." The Department has clarified the definition to make clear that those hired into corresponding employment during the recruitment period will also receive the highest of the AEWR, prevailing wage, or minimum wage, as applicable. The firm also requested the same revision to 29 CFR Part 501 regulations. The Department believes that this requirement is adequately explained in the text of the regulations at § 655.104(l) and § 655.105(g).

#### Definition of "agricultural association"

The Department added a definition for "agricultural association" in the proposed regulation. A major trade association commented that the proposed definition does not acknowledge that associations may be joint employers and suggests that the definition could cause confusion because other sections of the proposed regulation acknowledge that associations may have joint employer status. The association recommended the definition clarify that agricultural associations may serve as agents or joint employers and define the circumstances under which joint employer arrangements may be utilized. A professional association further commented that associations should not be exempt from Farm Labor Contractor provisions if the associations are performing the same activities as Farm Labor Contractors.

The Department agrees that agricultural associations play a vital role in the H-2A program and seeks to minimize potential confusion about their role and responsibilities. The regulation has been revised to clarify that agricultural associations may

indeed serve as sole employers, joint employers, or as agents. The definition of "H-2A Labor Contractors" has also been revised to clearly differentiate labor contractors from agricultural associations and that an agricultural association that meets the definition in this part is not subject to the requirements attaching to H-2A Labor Contractors. Finally, the regulation has been clarified by specifying that "processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers" can all be encompassed by agricultural associations.

#### Definition of Application for Temporary Employment Certification

The Department has added to the Final Rule a definition of *Application for Temporary Labor Certification*. An Application for Temporary Labor Certification is an Office of Management and Budget (OMB)-approved form that an employer submits to DOL to secure a temporary agricultural labor certification. A complete submission is required to include an initial recruitment report.

#### Definition of "date of need"

The Department slightly modified the definition of "date of need" to clarify that the applicable date is the one that is specified in the employer's Application for Temporary Employment Certification.

#### Definition of "employ" and "employer"

In the NPRM, the Department added a definition for "employ" and made revisions to the existing definition of "employer." A trade association suggested that the Department eliminate the definition of "employ" but retain the definition of "employer," stating that the definition of "employ" adds nothing to clarify status or legal obligations under the H-2A program. The association believes the status of an employer under the H-2A program is defined by the labor certification and visa petition processes and that the incorporation of the broad FLSA and MSPA definitions of "employ" insinuate broad legal concepts that add unnecessary confusion. The association further recommended that the Department eliminate the fourth criterion related to joint employment status in its proposed definition of "employer" and, instead, provide a separate definition of joint employer associations and the respective liabilities of the association and its joint employer members.

The Department agrees with these comments and has, accordingly,

removed the definition of "employ" as superfluous and created a separate definition of "joint employment" (using that portion of the definition of employer which discussed joint employers) to eliminate any confusion between the two terms. The definition of "employer" has also been revised. First, the Final Rule clarifies the proposal's statement that an employer must have a "location" within the U.S. to more specifically state that it must have a "place of business (physical location) within the U.S." Second, out of recognition that some H-2A program users, such as H-2ALCs, are itinerant by nature, and that SWA referrals may thus occasionally need to be made to non-fixed locations, the Final Rule states that an employer must have "a means by which it may be contacted for employment" rather than a specific location "to which U.S. workers may be referred." Finally, the Final Rule clarifies that an employer must have an employment relationship "with respect to H-2A employees or related U.S. workers under this subpart" rather than less specifically referring to "employees under this subpart," and deletes the references to specific indicia of an employment relationship because the applicable criteria are spelled out in greater detail in the definition of "employee." The definition of "joint employer" is modified slightly from the concept that appeared in the NPRM to clarify that the two or more employers must each have sufficient indicia of employment to be considered the employer of the employee in order to meet the test for joint employment.

#### Definition of "farm labor contracting activity" and "Farm Labor Contractor (FLC)"

The Department proposed adding definitions for "farm labor contracting activity" and "Farm Labor Contractor (FLC)" to this section. In the Final Rule, the Department has eliminated the definition for "farm labor contracting activity" and revised the definition for "Farm Labor Contractor." The revised definition is now contained under the heading "H-2A Labor Contractor."

A law firm commented that neither agents nor attorneys should be required to register as H-2A Labor Contractors. The commenter did not specifically address why it believed agents and attorneys would be required to register under the proposed definitions, so the Department is unable to respond to this point. As a general matter, however, an agent or attorney, if performing labor contracting activities as they appear in the revised definition of an H-2A Labor Contractor, would be required to register

as, and would be held to the standards of, an H-2A Labor Contractor.

A group of farmworker advocacy organizations commented that the definition proposed for Farm Labor Contractor (H-2A Labor Contractor) would exclude recruiters of foreign temporary workers from the scope of the rule, making enforcement impossible. This organization pointed out that under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), H-2A workers are not migrant or seasonal agricultural workers and, therefore, a contractor recruiting workers to become H-2A visa holders would not fit within the proposed regulatory definition. The organization also commented that the reference to "fixed-site" employers in the "farm labor contracting activity" definition could present problems in some employment situations, such as employment for a custom harvester, where the employer would not have a fixed site. An association of growers/producers suggested the MSPA definitions for "farm labor contracting activity" and "Farm Labor Contractor" should be used.

In response to the comments, the Department has deleted the definition of "agricultural employer" and included a separate definition for "fixed-site employer." The Department also deleted the definition of "Farm Labor Contractor" in the final regulation and replaced it with a new definition for "H-2A Labor Contractor." This will differentiate the two terms since the definition of an "H-2A Labor Contractor" does not match the definition of a "Farm Labor Contractor" as used in MSPA, and the operational differences between the H-2A program and MSPA do not allow perfect parallels to be drawn between the two statutory schemes. The definition of "farm labor contracting activity" has been deleted as redundant since the activities have been made part of the definitions of "fixed-site employer" and "H-2A Labor Contractor."

#### Definition of "joint employment"

The Department included in its definition of "employment" a reference to what would constitute "joint employment" for purposes of the H-2A program. The Department received one comment suggesting the inclusion of the definition of "joint employment" within the definition of "employment" was confusing. The Department has accordingly removed the last phrase from the proposed definition of "employer" and provided a separate definition for "joint employment."

#### Definition of "prevailing"

The Department proposed a revision to the definition of "prevailing" to include, "with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H-2A and non-H-2A employers) for the occupation in the area of intended employment." This represented a change from the current rule, which does not refer to "commonly provided" practices or benefits but instead uses a percentage test (50 percent or more of employers in an area and for an occupation must engage in the practice or offer the benefit for it to be considered "prevailing," and the 50 percent or more of employers must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area"). The Department received comments on the change, specifically inquiring whether the SWAs would continue to conduct prevailing wage and practice surveys, and requesting that if the Department intends to no longer require SWAs to conduct prevailing wage and practice surveys, the change should be discussed in the preamble.

The Department has determined that, to provide greater clarity and for ease of administration, the definition of "prevailing" will revert to the definition in the current regulation that requires that 50 percent or more of employers in an area and for an occupation engage in the practice or offer the benefit and that the 50 percent or more of the employers in an area must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area.

The Department notes it does not intend to change the provision on prevailing wage surveys currently undertaken by SWAs. The Department has included specific definitions for the terms "prevailing piece rate" and "prevailing hourly rate," the two kinds of wage surveys that have traditionally been undertaken by SWAs, and has included express references to both types of surveys throughout the rule.

#### Definition of "strike"

The Department has been added to the Final Rule a definition for the term *strike*. The definition conforms to the changes explained in the discussion of § 655.105(c), and clarifies that the Department will evaluate whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individualized, position-by-position basis.

#### Definition of "successor in interest"

The Department's proposal included a debarment provision allowing for debarment of a successor in interest to ensure that violators are not able to re-incorporate to circumvent the effect of the debarment provisions. A national agricultural association commented that this provision as drafted could result in an innocent third party buying the farm of a debarred farmer and being subject to debarment, even though the successor is free of any wrongdoing, and thus the rule would place roadblocks on the sale of assets to innocent parties.

The Department agrees with this commenter. We have addressed this issue by including a definition of "successor in interest" to make clear that the Department will consider the facts of each case to determine whether the successor and its agents were personally involved in the violations that led to debarment in determining whether the successor constitutes a "successor in interest" for purposes of the rule.

#### Definition of "United States"

The Consolidated Natural Resources Act of 2008, Public Law 110-229, Title VII (CNRA), applies the INA to the Commonwealth of the Northern Mariana Islands (CNMI) at the completion of the transition period as provided in the CNRA, which at the earliest, would be December 31, 2014. Accordingly, the H-2A program will not apply to the CNMI until such time. However, the CNRA amends the definition of "United States" in the INA to include the CNMI. It should be noted that the amendment to the INA of the definition of "United States" does not take effect until the beginning of the transition period which could be as early as June 1, 2009, but may be delayed up to 180 days. Accordingly, the Department has included CNMI in the definition of "United States" with the following qualification: "as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110-229, Title VII." The Department will publish a notice in the **Federal Register** at such time that its regulations regarding the foreign labor programs described in the INA, including the H-2A program, will apply to the Commonwealth.

#### Definition of "Within [number and type] days"

The Department has added to the Final Rule a definition of the term *within [number and type] days*. The definition clarifies how the Department will calculate timing for meeting filing

deadlines under the rule where that term, in some formulation, appears. The definition specifies that a period of time described by the term “within [number and type] days” will 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 the rules back to the Department, as evidenced by a postal mark or other similar receipt.

#### Definition of “Work contract”

The Department has added to the Final Rule a definition of the term *work contract*. The definition was borrowed from the definition section of 29 CFR part 501 of the NPRM, with minor modifications made for purposes of clarification.

#### d. Definition of “agricultural labor or services”

The Department proposed changes to the definition of “agricultural labor or services” to clarify, as in the current regulation, that an activity that meets either the Internal Revenue Code (IRC) or the Fair Labor Standards Act (FLSA) definition of agriculture is considered agricultural labor or services for H-2A program purposes and, more significantly, to remove limitations on the performance of certain traditional agricultural activities which, when performed for more than one farmer, are not considered agricultural labor or services under the IRC or the FLSA, including packing and processing.

The Department received several comments supporting these changes, with some specific suggestions for additional changes. A major trade association complimented the Department on providing “bright line” definitional guidance regarding the activities that constitute agricultural work to be covered by the H-2A program as distinct from the H-2B program. A number of these commenters mentioned that the Department’s inclusion of packing and processing activities in work considered as agricultural provides an option for obtaining legal workers, especially in light of the numerical limitations on H-2B visas. One association of growers/producers supported the expansion of the current definition to include packing and processing but suggested that agricultural employers who have previously used the H-2B program for packing or processing operations be allowed to continue using the H-2B program. Another association of growers/producers suggested that the definition be changed to allow product

that is moving from on-farm production directly to the end consumer be included as permissible work for H-2A workers, and suggested that the definition provide that it is a permissible activity for H-2A workers to work on production of a purchased crop when the crop is purchased by a farm because of weather damage to that farm’s crops in a particular year.

The Department appreciates the general support for the proposed changes and has retained them in the final regulation. Regarding packing and processing activities, the proposed definition includes as agricultural activities “handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm.” In response to the request to allow employers who have used the H-2B program for packing or processing operations to continue using the H-2B program, the Department has revised the definition to clarify that while the Department cannot permit H-2A workers and H-2B workers to simultaneously perform the same work at the same establishment, the distinctions between establishments at which operations of this nature should be performed by H-2A workers and those at which the operations should be performed by H-2B workers are too fine for the Department to reasonably distinguish between them with sufficient precision to establish a bright line test. The Department will therefore defer to operators as to whether the “handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering” operations at their particular establishment are more properly governed by the H-2A or the H-2B program, but will not accept applications for both kinds of workers to simultaneously perform the same work at the same establishment.

The Department agrees with the comment that H-2A workers should be permitted to work in the production of a purchased crop, as well as work in processing or packing a farm product that is moving from on-farm production directly to the end consumer. Moreover, the Department believes such activities are permitted by the definition in the proposed rule and therefore the provision requires no additional language in the Final Rule.

The Department has clarified the Final Rule to reflect existing law, which provides that work performed by H-2A workers, or workers in corresponding

employment, which is not defined as agriculture under Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. 203(f), is subject to the provisions of the FLSA as provided therein, including the overtime provisions in Section 7(a)(29 U.S.C. 207(a)).

#### Incidental Activities

The Department also proposed clarifications to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H-2A labor certification was approved may be performed by an H-2A worker. A number of commenters, including a professional association, a major trade association, and several associations of growers/producers supported this change, stating that it was positive and would provide more flexibility for employers. A major trade association commented this change would allow employers to include duties in H-2A certified job opportunities that reflect the actual duties performed by farm workers and further commented that, “[p]resumably the provision will cover a farm worker who engages in incidental employment in the farm’s roadside retail stand, a farm worker who assists in managing ‘pick your own’ activities, and a farm worker who occasionally drives a tractor pulling a hay wagon for a hay ride, to cite a few examples of incidental activities customarily performed by farm workers that have been disallowed in the past.” This commenter’s understanding of the Department’s interpretation is correct.

One association of growers/producers commented that allowing H-2A workers to perform duties typically performed on a farm benefits the employee as well as the employer. A trade association commented that being able to use workers in other jobs not listed on the contract is needed, particularly when weather prevents field work.

The Department has revised the wording in the definition of “agricultural labor or services” provided in § 655.100(d)(1)(vi) to provide additional clarity for employers. The definition now reads: “Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (i.e., less than 20 percent of the total time worked on the job duties that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H-2A worker was sought.” The Department recognizes that, due to the unpredictable nature of weather

conditions and agricultural work itself, employers need some flexibility in assigning tasks, and that it would be difficult if not impossible to list all potential minor and incidental job responsibilities of H-2A workers on the *Application for Temporary Employment Certification*. The proposed amendment of the definition is intended to recognize the reality of working conditions at agricultural establishments and ensure that an H-2A worker's performance of minor and incidental activity does not violate the terms and conditions of the worker's H-2A visa status. The further revision to the definition will assist employers in determining whether activities or work not included on the *Application for Temporary Employment Certification* can reasonably be considered as minor and incidental.

#### Inclusion of Other Occupations

The Department proposed to include logging employment in its definition of "agricultural labor or services" for purposes of the H-2A program. Two commenters voiced their support for this inclusion; we received no comments in opposition. The Department also sought comments as to whether there are other occupations that should be included within the definition of agriculture used in the H-2A program. The Department received several suggestions of other industries that should be considered, including livestock and dairy producers, fisheries, nurseries, greenhouses, landscapers, poultry producers, wine businesses, equine businesses, turf grass growers, mushroom producers, maple syrup producers, and employers engaging in seasonal food processing as well as growers who operate processing and packing plants.

Of those requesting expansion of the definition to include other occupations, representatives of the dairy industry submitted the most comments. A major trade association and a number of associations of growers/producers commented that the dairy industry is unable to use the H-2A agricultural worker visa program and that this exclusion is unfair. They stated dairy farmers need and deserve the same access to legal foreign workers as other sectors of the agricultural industry. The association suggested that H-2A visas for dairy workers should last at least three years rather than one. Two trade association commenters stated they understood the importance under the statutory definition of H-2A workers needing to be temporary or seasonal, but not why the jobs themselves needed to be temporary or seasonal. A farm bureau

provided comments suggesting dairy and livestock operations should be allowed to designate seasonal jobs within their operations for which H-2A workers could be employed. This association commented that current worker patterns suggest typical milkers stay in their positions for 9 to 10 months and then voluntarily leave, but return to seek a job after 2 to 3 months.

The Department also received comments from an association of growers/producers and from two individual employers requesting that reforestation work be considered as agricultural labor. These commenters assert that there are reforestation activities including planting, weed control, herbicide application and other unskilled tasks related to preparing the site and cultivating the soil and that workers who perform these tasks deserve consideration for eligibility for H-2A visas, as do workers who perform the same or similar tasks in cultivating other agricultural and horticultural commodities on many of the same farms. These commenters also pointed out that workers performing reforestation tasks for farmers or on farms are clearly agricultural employees under the FLSA and, additionally, believed the Internal Revenue Code supports their position for considering reforestation work performed on a farm or for a farmer as agricultural labor or services.

Following review of the comments discussed above, the Department has decided the definition of agriculture should not be further expanded at this time and no additional activities have been selected for inclusion as agricultural activities beyond those included in the NPRM. In most cases where there was the suggestion for the inclusion of a particular industry or activity in the definition of agriculture there was not strong support for the inclusion by representatives of that industry, as indicated by the number and source of the comments received. For example, one commenter supported adding maple syrup harvesting and ancillary activities to the definition of agricultural labor. The suggestion did not come from someone actually involved in the maple syrup industry, however, but rather from a State Workforce Agency. While the Department appreciates the input of such commenters, it would be inappropriate to impose on those industries (most of which currently qualify for the H-2B program rather than the H-2A program) changes that the industry itself did not seek.

The two exceptions to this pattern in the comments were the dairy industry

and the reforestation industry, both of which, as discussed above, submitted comments evidencing industry-based support. The Department's analysis of the comments from the dairy industry, however, indicates it is not the program's definition of agriculture, which already includes dairy activities, that presents a potential barrier to the industry's use of the H-2A program, but rather the statutory requirement for the work to be temporary or seasonal in nature.

The H-2A program, by statute, provides a means for agricultural employers to employ foreign workers on a temporary basis. Many dairy-related job needs, however, appear to be year-round and permanent in nature.

While the H-2A program is specially designed for agricultural employers, they are not limited to using only the H-2A program. The employment-based permanent visa program is also open to agricultural employers with a permanent need for which they are unable to secure U.S. workers. At the same time, year-round operations are permitted to seek certification to utilize H-2A workers for seasonal or temporary jobs within their industries when they can substantiate the temporary or seasonal nature of the jobs. The Department recognizes that an employer may have both permanent and temporary jobs in the same occupation. However, employers should be aware that the Department does not typically approve subsequent applications requesting foreign workers for the same position when, taken together, those applications would cover a continuous period of time in excess of 10 months, unless exceptional circumstances are present.

The comments from the reforestation industry, while thoughtful, represented the input of only two individual employers and a single employer association who do not necessarily provide a representative sample of the entire reforestation industry. The Department is reluctant to overturn the regulatory practices of several decades and impose the significant obligations of an H-2A employer on an entire industry without significant input from that industry. While the Department is willing to further explore whether to include the reforestation industry in the definition of agriculture, it does not believe a decision to do so is warranted at this time.

"On a seasonal or other temporary basis"

The Department proposed a definition of the key terms "on a seasonal or other temporary basis" in the definition of

agricultural labor or services in the NPRM that continued the interpretation of the current regulation. We received several comments related to the phrase “on a seasonal or other temporary basis.” A trade association suggested the rule borrow the temporary and seasonal concepts from the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) definitions that are appropriate in an H-2A context without incorporating the MSPA regulations and related judicial precedent. It was the association’s belief that this approach would allow an H-2A worker to be admitted for longer than a 10-month period. An association of growers/producers suggested the definition of temporary or seasonal should apply to the worker rather than the job and also that year-round farming operations/nurseries should be allowed to access a workforce to provide year-round services by rotating “shifts” of workers with different contract/visa periods. Another trade association also suggested the definition and interpretation of temporary and seasonal could be expanded.

The Department does not agree that the definition of temporary or seasonal should focus on the worker rather than the job. The INA is clear that the employer must have a need for foreign labor to undertake work of a temporary or seasonal nature for which it cannot locate U.S. workers. The Department’s position has traditionally been that job opportunities that are permanent in nature do not qualify for the H-2A program. The controlling factor is the employer’s temporary need, generally less than 1 year, and not the nature of the job duties. *See Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982); *see also Global Horizons, Inc. v. DOL*, 2007–TLC–1 (November 30, 2006) (upholding the Department’s position that a failure to prove a specific temporary need precludes acceptance of temporary H-2A application); *see also* 11 U.S. Op. Off. Legal Counsel 39 (1987). An H-2A worker could, however, be employed continuously by successive H-2A employers having a temporary need for the worker’s services and thus be employed and remain in the U.S. for a period beyond one year.

In addition, the Department has made several edits to the Definitions section of the NPRM to provide consistency with other changes to the regulatory text and to clarify the Final Rule. For example, the definition of “*Application for Temporary Employment Certification*” has been amended to help ensure the public has a clear understanding of what this regulation requires. Other definitions, such as

“temporary agricultural labor certification determination” and “unauthorized alien,” have been eliminated because they are not used in this regulation. We have also made non-substantive changes to provide clarity and to comport with plain English language requirements.

#### Section 655.101 Applications for Temporary Employment Certification in Agriculture

##### (a) Instituting an Attestation-based Process

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H-2A program. The Department received several comments in favor of the new process, several opposed, and others generally in favor but suggesting changes to the process as outlined in the Department’s proposal.

Some commenters believed that attestations to future events should not be required, and that attestations should be made under the “applicant’s best knowledge and belief” standard and not the “under penalty of perjury” standard because applicants cannot know what will happen in the future.

The Department believes that the attestations the Final Rule requires employers to make do not require employers to predict future events, but rather represent straightforward commitments to comply with program requirements. Such compliance is fully in the control of the employer. It is, therefore, not necessary to delete or modify the manner in which attestations are made.

##### (1) Support for an Attestation-based Process

Those commenters who favored the shift to an attestation-based process generally believed the new process would make the H-2A application more efficient and less burdensome for employers. One State government agency commented that the process would enable the SWAs to focus on job orders, referrals, and housing inspections while relieving them of the burden to review the applications themselves. Another commenter supported the shift but encouraged the Department to ensure the “Administrator \* \* \* acquires the agricultural expertise necessary to provide training and guidance to those who are reviewing and overseeing the operating of a program that is critical to future U.S. agricultural production.”

The Department appreciates support for its proposed process. As of June 1, 2008, the Department has centralized

the Federal processing of all applications for H-2A temporary foreign workers in the Chicago National Processing Center. This centralization will enhance the Department’s ability to handle the expected increases in the usage of the H-2A program and ensure consistency in application of program requirements. The Department recognizes the unique needs and timeframes associated with this program and anticipates that centralization will lead to the development of greater expertise to meet those needs and timeframes. It also believes that centralized processing of applications will facilitate the identification of areas where program training should be enhanced and that the centralized environment will maximize the effectiveness of such training.

An association of growers/producers supported the attestation-based process but found the process, as described in the proposed regulation, confusing and duplicative. This commenter requested that all of the attestation requirements be consolidated into one rule clearly stating which facts are to be verified.

The Department appreciates the commenter’s suggestion about consolidation of the attestation requirements and, as provided in the proposal, has retained the comprehensive listing of the requirements in § 655.105, “Assurances and Obligations of H-2A Employers” and § 655.106, “Assurances and Obligations of H-2A Labor Contractors.” It was not clear if this commenter was requesting a consolidated listing of the attestations required by both the Departments of Labor and Homeland Security. The Department of Labor is including in the comprehensive lists only those attestations that DOL requires. The commenter did not include specific examples of duplication or confusing information and the Department, therefore, is unable to provide any further response.

##### (2) Legality of the Attestation-based Process

Several of the commenters who opposed the change asserted an attestation-based process conflicts with the statutory mandate in Section 218 of the INA (8 U.S.C. 1188). These commenters interpreted the INA to require the Department to make a determination based upon an active verification of the H-2A application. One group commented that the attestation process violates the statute’s Congressional mandate. Two organizations expressed the belief that the certification process has always been understood to require active

oversight by the Department of the employer's recruitment and hiring of U.S. workers as well as the details of the job offer. One commenter, an advocacy organization, voiced the opinion that the statutory standard is not whether the employer has made adequate assurances that it has or will meet the obligations of the H-2A program but is whether the employer has actually met them. Another commenter opined that labor certifications were not meant to be attestation-based and that this approach will dramatically reduce government oversight of this program. These commenters believe that the Secretary will not be able to certify that wages and working conditions have not been adversely affected and that this regulation is contrary to the statute.

The attestation-based process implemented by the Final Rule is not inconsistent with any statutory requirements, but rather is a reasonable means selected by the Department to fulfill its statutory responsibilities. The Department does not interpret Section 218 of the INA to specify a particular methodology that the Department must employ to determine that all of the statutory criteria have been met, and indeed, various aspects of the Department's methodology have changed through the years. The attestation-based system, backed by audits, that is implemented by the Final Rule is an acceptable means, within the reasonable discretion of the Secretary, for the Department to ensure that the statutory criteria for certification are met and that program requirements are satisfied. Similar approaches have been used by the Department in other contexts (such as approval of permanent labor certifications) to fulfill its statutory responsibilities. Indeed, as discussed in greater detail in various sections below, under the statutory time limits for filing applications and issuing certifications the Department typically makes certification determinations on applications prior to the completion of many of the recruitment requirements and without any direct observation or inspection by the Department or its SWA agents that rental housing secured by employers complies with all of the applicable legal standards.

No system for review and approval of applications, of course, is foolproof, and the statute prescribes appropriate penalties for situations in which the terms of approved labor certifications are later violated. See 8 U.S.C. 1188(b)(2)(A). There will always be bad actors who attempt to circumvent program requirements. Employers sometimes violate program requirements under the current H-2A

application process, and the Department has also detected violations in other foreign worker programs it administers. Under the final rule, the Department will have more enforcement tools at its disposal than ever before to deal with such violations. The Department believes that the attestation-based process fully complies with all statutory requirements and, when utilized in concert with a strong audit and review process, represents the best means for the Department to deploy its limited resources in a manner that ensures that statutory timelines are met and that the program's integrity is maintained.

#### (3) Protections for U.S. Workers in an Attestation-based Process

Several commenters believed the proposed attestation-based process would not provide adequate protections for U.S. and H-2A workers because it would reduce the oversight responsibilities of the Department. Some of these commenters also said the current system should be maintained to ensure that the Department oversees worker protection, especially in the areas of housing and wages. An organization commented that while this change may ease the application process for employers it ignores the damage that could be caused by false attestations and a lack of active oversight of the job terms, recruitment, and hiring of U.S. workers. A farmworker advocacy organization questioned the change to an attestation-based process claiming there is a long history of labor abuse in agriculture and saying they believed that when "self-inspection procedures" are implemented they are generally based upon a prior record of compliance and an accompanying determination that resources would be better utilized in another pursuit. Another farmworker advocacy organization commented that the attestation-based process, as proposed, would further remove and diminish the Department's role in assuring all reasonable efforts to locate U.S. workers had been exhausted before foreign guest workers could be certified. Another commenter voiced concern that the proposed process would eliminate the current process of follow-up correspondence that has been instrumental in ensuring that employers have actually undertaken the required recruitment steps. A worker advocacy organization commented the proposed process, with its emphasis on meeting paper requirements, would be "ill suited to deal with the inherent disparities in bargaining power between U.S. agricultural employers and impoverished workers from the developing world."

The Department believes these commenters' concerns, while not invalid, are substantially resolved by the safeguards that have been built into the new process. The new program model emphasizes compliance through enforcement mechanisms such as audits, revocation of approved certifications, and debarment from the program. In light of these enforcement tools, employers will have a substantial incentive to be truthful in their representations that they cannot find U.S. workers willing to engage in agricultural work at the appropriate wage, because good-faith compliance with program obligations is necessary to maintain continued access to a legal nonimmigrant workforce. Because the rule requires pre-filing recruitment, the Department will also have an opportunity to review recruitment reports and (through its SWA partners) to conduct housing inspections before applications are approved. Job orders must also be reviewed, approved, and circulated by the SWAs before labor certifications can be granted, making it impossible for even bad actor employers to entirely circumvent the program's core recruitment requirements. Finally, it is worth noting that the bulk of the program's requirements, including requirements to pay workers at prescribed rates, maintain housing conditions, and provide transportation that complies with applicable safety requirements, have always been, and must necessarily be, enforced by the Department after the labor certification has been granted.

Although not a factor in our evaluation of the comments here, the Department also notes that many commenters who opposed the attestation-based system in this rulemaking, claiming that it will adversely affect U.S. workers, have enthusiastically endorsed proposed legislation before the U.S. Congress that would in fact mandate that the Department adopt an attestation-based application system in the H-2A program. Those organizations in their comments on this rulemaking made no attempt to explain their contradictory public positions regarding the merits of an attestation-based application system.

#### (4) Improvements for Employers in an Attestation-based Process

Several commenters questioned whether the proposed process would yield a simplified process for employer applicants. These commenters believed the new process requires the same amount of paperwork and only relieves employers of submitting documentation while at the same time imposes

additional requirements including post-filing audits, increased penalties, and a five-year records retention requirement. Several commenters were concerned that the attestation-based process would lead to increased liabilities for employers.

The Department does not believe that employers, attorneys, and agents wishing to comply with program obligations will be adversely affected by the institution of an attestation-based process. The process is designed to give employers specific notice of the assurances they are making to the Department and what their obligations are. Once the employer is on notice of those assurances, it is better able to understand what it must do to comply with H-2A requirements and to conform its conduct to those requirements.

A trade association of agricultural employers agreed with the shift to an attestation-based process but believed the process as outlined in the proposed regulations was not a true attestation-based process and recommended the process used in the H-1B program serve as a model. Other commenters also recommended use of a process similar to the one used in the H-1B program. Several commenters also suggested that the Department combine the *Application for Temporary Employment Certification* with the I-129 petition for simultaneous submission to the Departments of Labor and Homeland Security.

In response to the proposals to convert the proposed attestation-based process into a process modeled after the H-1B labor condition application, the statutory differences between the two programs are sufficiently substantial to make such an idea impractical. In the H-1B program, the Department is statutorily limited to reviewing the attestations made by an employer for "completeness and obvious inaccuracies." 8 U.S.C. 1182(n)(1)(G)(ii). The Department believes the different H-2A statutory language suggests that a different application and review process is appropriate for the H-2A program. The Department appreciates the suggestion that simultaneous submissions to the Department and DHS could lead to further application efficiencies for employers. However, the Department believes that the complexity of the current statutory requirements for the H-2A program would make it unworkable to combine the Department's application with the petition submitted to DHS. A proposal presented by the Department several years ago to employ such a process in the H-2B program for temporary nonagricultural workers was met with

significant opposition. To attempt to undertake a similar process with the significantly more complex H-2A program does not appear feasible at this time.

Some commenters appeared not to understand the proposed attestation process. The Department received comments stating that it is not clear what should be included with the attestation. The Department has accordingly clarified in the Final Rule that the application must be accompanied by the prevailing wage determinations obtained in anticipation of the recruitment for the application as well as the initial recruitment report. The employer will be required to keep all other supporting documentation in case of an audit, which means the employer should keep all records relating to compliance with the H-2A program, including advertising, job orders, recruitment logs/reports, and housing inspection requests. To eliminate any lingering confusion over document retention requirements, the Department has spelled these out in a new regulatory section (§ 655.119) in this Final Rule.

#### (b) SWA Involvement/Application Submission

The NPRM revised the application submission requirements by proposing to have employers submit applications only to the NPC rather than to both the NPC and SWA as currently required. Most of the comments received about this proposal were in favor of it, but a few commenters expressed concerns about the reduced role for SWAs. One person commented that eliminating the SWA involvement would leave employers who seek assistance and guidance from the government in completing applications more disposed to making errors and would increase their potential liability. A farmworker advocacy organization commented that SWA knowledge has proven useful to workers in the past and that the advantage of SWA involvement is the detailed knowledge their experienced staff can bring to bear about local agricultural practices and the use of agricultural labor in their area. The commenter also believed that the proposed process, which requires the employer to place a job order with the SWA, means that the SWA must take on faith that the employer's job offer is consistent with the terms of the H-2A application because the SWA will no longer receive a copy of the application. This organization recommended that applications should be filed with the SWA as well as the NPC so the SWA could advise the NPC if the application

did not appear legitimate. A growers and producers association believed retaining responsibility for the substantive review by the NPC staff could remain a problem because of their lack of expertise related to agriculture.

A State governor suggested the process could be improved by eliminating the Department from the process. The governor believes the States know their agricultural industry better, can resolve issues more quickly, and are in the best position to identify and enforce sanctions against fraud. Conversely, a professional association of immigration attorneys recommended the SWA be eliminated from the recruitment process and, alternatively, the employer handle all recruitment for the positions, including accepting applications received as a result of a job order placed by the SWA in the interstate and intrastate system.

The Department remains committed to modernizing the application process and continues to believe the submission of applications directly to the NPC is the most effective way of accomplishing this goal. Eliminating the SWAs' participation in the application review process will provide more efficient review of applications, as well as greater consistency of review. The Department disagrees that NPC staff have insufficient knowledge of the agricultural industry; to the contrary, NPC reviewers who have handled H-2A applications have, in some cases, more experience with such applications than many SWA staff.

The SWAs will, moreover, continue to play an important role in the H-2A application process. SWAs will be responsible for posting job orders, both intrastate and interstate, under § 655.102(e) and (f) and 20 CFR Part 653, thus reducing the risk for employers to make mistakes with respect to job descriptions, minimum requirements, and other application particulars. SWAs will review the job offer, its terms and conditions, any special requirements, and the justifications therefor. As part of their duties to post job orders pursuant to 20 CFR Part 653, SWAs will also refer eligible workers to employers as well as conduct housing inspections and follow up on deficiencies in the job order. Finally, SWAs will continue an active role in conducting prevailing hourly wage, prevailing piece rate, and prevailing practice surveys.

Two commenters noted potential coordination or communication issues could result when the SWA did not also receive the application. One commenter was concerned there would be no assurance that the job order posted by

the SWA would be the same as that on the application. The other commenter pointed out the proposed regulations provided that the SWA receive a copy of the notice of deficiency when one was issued, but the SWA would not have a copy of the submitted application and thus could have inadequate information to be of assistance to the involved employer. An association of growers/producers recommended the Department provide training to H-2A employers about the need to send a formal request to the SWA to request a housing inspection and also recommended the Department notify the SWA when an application was received for processing so the SWA could, in turn, contact the employer.

The Department appreciates the concerns about the need for communication between the NPC and the SWA and reiterates that there was never any intent to eliminate the SWA from all H-2A activity. As discussed above, SWAs remain an integral partner in key respects: The placing of the intrastate/interstate job orders, conducting prevailing hourly wage, prevailing piece rate, and prevailing practice surveys, referring eligible workers, and conducting housing inspections, all activities for which SWAs will continue to receive grants from the Department. Moreover, nothing in the regulations precludes the Department from contacting SWAs, where there is reason to believe that it is necessary, to verify that the terms in the employer's Application for Temporary Employment Certification are consistent with the terms of the job offer.<sup>2</sup> However, SWAs will no longer process H-2A applications. Accordingly, to minimize confusion about roles and responsibilities, the Department has removed from § 655.107(a)(3) (§ 655.107(b) of the Final Rule) the provision requiring that SWAs be sent deficiency notices.

#### (c) Electronic Filing

The Department invited comments on the concept of a future electronic filing process for the H-2A program and received comments supporting the

<sup>2</sup> There is also no prohibition preventing a SWA from contacting the Department to ensure that the employer's job order and Application for Temporary Employment Certification are consistent. As a practical matter, a SWA will rarely be able to do so before posting a job order, because Applications for Temporary Employment Certification generally are not filed with the Department under the Final Rule until at least 15 days after the job order has been submitted to the SWA. Communication between SWAs and the Department has always been essential to identifying and putting a stop to deceitful employer behavior, however, and the Department expects that such communication will continue under the Final Rule.

concept, although some also included suggestions for on-line training, the establishment of a toll-free help line, and an outreach and education component. A trade association recommended that a paper-based option should also remain available. One commenter noted that the Department did not provide an effective date for the electronic filing process.

The Department appreciates the support for electronic filing and is in the process of developing a system that will include the ability to complete and submit an application form online with sufficient security (PIN numbers, features to deter fraud and maintain system integrity, electronic notifications, etc.). The Department is aware of the need to provide outreach and training prior to the implementation of electronic filing and will involve user groups in these efforts. Additionally, the Department will ensure an adequate notice process and timeframe for transitioning to a new or revised electronic application system.

#### (d) H-2A Labor Contractor Applications

The Final Rule has been clarified slightly to more clearly state the obligations of H-2A Labor Contractors in filing applications. The proposed rule stated that H-2ALCs must have a place of business in the United States "to which U.S. workers may be referred." Because H-2ALCs may be mobile, however, and because referrals during the season may need to be made to whatever location an H-2ALC is working at rather than to the physical location of the H-2ALC's place of business, the final rule has been modified to state that H-2ALCs must have a place of business in the United States "and a means by which it may be contacted for employment." This slightly modified requirement will ensure that referrals can be made to H-2ALCs during the course of a season (where such referrals are provided for by the Final Rule), and that U.S. workers will have a means of contacting the H-2ALC to secure employment. All other changes made to the paragraph on filing requirements for H-2ALCs were purely stylistic and made for purposes of clarity.

#### (e) Master Applications

Both the current and proposed regulations require an association of agricultural producers filing an application to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members. Although the current regulations do not specifically describe a "master

application" that can be filed by associations, they are clearly contemplated by 8 U.S.C. 1188(d), and the Department has permitted them to be filed as a matter of practice. See 52 FR 20496, 20498 (Jun. 1, 1987) (cited in ETA Handbook No. 398).

The Department received several comments objecting to the omission of a provision in the NPRM for the filing of master applications. An association of growers/producers commented that the Department should encourage agricultural employers in small commodity groups or large associations of employers to jointly participate in the H-2A program, as this will make processing more efficient for both the Department and farmers. Another association of growers/producers stated that using an association application is the only possible solution for the H-2A program to accommodate growers who need harvest workers for a short period of time (one month or less). A major trade association also commented that the master application significantly reduces the paperwork and bureaucratic burden for the associations and its members, as well as for the Department.

A major trade association and other associations of growers/producers recommended that the Department retain and improve the master application process and fully incorporate it into the H-2A regulatory structure. The association recommended the master application also be simplified as part of the new H-2A application process. It recommended the regulations include the essential components of the master application process that has been followed in practice, including the filing of one application on behalf of multiple employers seeking workers in virtually the same occupation, permitting the association to place the required advertisements and conduct the required positive recruitment on behalf of all participants but without the listing of every individual employer in the advertisement as currently required, permitting referral of workers to the association, and allowing the association to place workers in the job opportunities. The association further recommended the master application process also apply to applications filed by associations acting as agents.

The statute governing the H-2A program requires that agricultural associations be permitted to file H-2A applications, see 8 U.S.C. 1188(d), and that they be permitted to do so either as agents or as employers, see 8 U.S.C. 1188(c)(3)(B)(iv) and (d)(2). Consequently, the Department has, as a matter of longstanding practice,

accepted master applications from agricultural associations. In response to the comments received on this subject, the Department has decided to include specific language concerning such applications in the regulation text at § 655.101(a)(3).

The basic theory behind master applications is that agricultural associations should be able to file a single H-2A application on behalf of all their employer members in essentially the same manner that a single employer controlling all the work sites and all the job opportunities included in the application would. Two important limitations apply to such applications. First, all the workers requested by the application must be requested for the same date of need. If an agricultural association needs workers at different times, it must file a separate Application for Temporary Employment Certification for each date of need, just as a single employer would. Second, the combination of job duties and opportunities that are listed in the application must be supported by a legitimate business reason, which must be provided as part of the application. The purpose of this limitation is to prevent agricultural associations from creating undesirable combinations of job duties and opportunities for the sole purpose of discouraging U.S. workers from applying for the jobs. So long as a legitimate business reason exists supporting the combination presented, however, the Department will deem it acceptable. An acceptable business reason for a combination of job duties and opportunities could include, for example, the efficiencies that closely proximate employers expect to gain from having access to a flexible, readily available pool of workers, even though the employers in question do not grow the same crops, which may be necessary for agricultural employers to deal with uncertain and weather-dependent planting and harvesting times.

The Department is aware that this may mean that at times a U.S. worker wishing to perform only one type of job duty, such as picking asparagus, may be required to perform an additional job duty, such as harvesting tobacco, in order to secure an agricultural job with that association. It is not at all uncommon, however, for jobs in the United States to include multiple job duties, some of which workers may view as more desirable than others. Indeed, many job opportunities offered under the current H-2A regulations include multiple job duties, some of which may be more desirable than others. There is nothing in the statute governing the H-2A program indicating

that Congress intended to require agricultural employers to allow prospective workers to selectively choose which job duties they want to perform and which job duties they do not, with regard to a particular job opportunity. The Department is requiring that combinations of job duties be supported by a legitimate business reason to prevent the deliberate and unnecessary discouragement of U.S. workers from applying for job opportunities, but the Department does not believe that further restrictions on job duty combinations are warranted or necessary to fulfill the statutory criteria for certification.

#### (f) Timeliness of Filing Application

As required by statute, the provision stating a completed application is not required to be filed more than 45 calendar days before the date of need was retained in the proposed rule. The Department has continued that requirement in § 655.101(c). The Department received some suggestions for changes to the proposed timeframes for submitting applications. Two commenters suggested the Department should at least provide the employer with the option of applying not more than 45 days before the date of need, undertaking the recruitment after the application has been accepted, and continuing to accept referrals under the 50 percent rule.

The Department may not require an application to be filed more than 45 calendar days before the date of need under 8 U.S.C. 1188(c). The Department does not agree with the suggestion for offering employers the option of applying not more than 45 days prior to the date of need, doing post-acceptance recruitment, and continuing to accept referrals under the 50 percent rule. Given the need to maintain consistency in the program's requirements, the Department cannot offer varying options for recruitment timeframes.

#### (g) Emergency Situations

The NPRM did not contain the current regulatory provision (currently found at § 655.101(f)(2)) allowing the Administrator/OFLC to waive the required timeframe for application submission for employers who did not use the H-2A program during the prior agricultural season or for any employer for good and substantial cause. The Department received a number of comments objecting to its elimination. A major trade association stated the elimination would preclude many employers from legalizing their workforce simply because their decision to join the program was made too late

to meet the required timeframes. Another major trade association commented that a provision allowing filing after the deadline is even more essential because the *de facto* deadline for meeting requirements under the final regulation is further in advance of the date of need than the current requirement. One association of growers/producers cited the situation following Hurricane Katrina when many employers needed to secure additional H-2A workers as an example of the need for an emergency application process.

Most of those requesting that the provision for an emergency application be reinstated also commented that if an emergency application is filed in an area of intended employment and for a job opportunity for which other employers have previously been certified for the same time frame, the emergency application should be certified immediately. These commenters also suggested that post-application recruitment could be extended for emergency applications to ensure that their availability would not create an incentive to avoid the pre-filing recruitment efforts.

The Department agrees that a provision allowing the Certifying Officer (CO) to waive the required timeframe for submission of applications in emergency situations is necessary and has included such a provision in the Final Rule at § 655.101(d). The provision, which substantially replicates the current regulatory provision governing emergency situations, requires submission of a completed application, except for the initial recruitment report that would otherwise be required, and a statement of the emergency situation giving rise to the waiver request. The emergency situation giving rise to a request for a waiver may include a lack of experience with the H-2A program obligations (including housing and transportation requirements) or for other good and substantial cause. The Department anticipates that employers who were non-users of the program during the previous year may fail to meet the filing deadline due to miscalculation of the time needed to complete the application. The Department will entertain waiver requests from employers in this situation but will consider them only after first verifying that the employer did not use the program during the prior year.

The Department is not providing an explicit definition of good and substantial cause in order to preserve flexibility when faced with unanticipated situations or conditions.

We have provided some examples in the regulatory text to assist employers in determining what might constitute sufficient cause warranting a waiver. One example provided is a dramatic change in the weather conditions resulting in a substantial change to the anticipated date of need for H-2A workers with significant attendant crop loss unless the waiver is granted. However, the employer must be able to demonstrate that the situation or condition leading to the request for a waiver was genuinely outside of the control of the employer.

The Department is requiring, in the Final Rule, that the employer who requests a waiver must conduct some recruitment as a condition for obtaining that waiver. The employer will be required to submit a job order to the relevant SWA(s) and conduct positive recruitment from the time of filing the application until the date that is 30 days after the employer's date of need. The SWA must transmit the job offer for interstate clearance as in a normal application process. We have also added a provision that requires the CO to specify a date upon which the employer must submit a recruitment report consistent with the requirements of this part.

The Department recognizes that the suggestions that waivers be approved if other applications for similar occupations and dates of need in the same geographic locations have been previously certified are intended to expedite the process. However, each application is unique and the Department must consider each request on its own merits, and therefore does not believe it should commit to approving requests solely because there have been prior approvals for employers with similar job opportunities and dates of need in the same area.

Finally, the Department made changes in § 655.101 to conform to other changes made to the rule. Such changes include, but are not limited to, changes to clarify a potential electronic filing of future applications. In addition, the Department has made non-substantive changes to enhance readability.

#### Section 655.102 Required Pre-Filing Activity

The Department has changed the title of this section from "Required Pre-filing Recruitment" to "Required Pre-filing Activity" to include the activities other than recruitment that are discussed in this section.

#### (a) Section 655.102(a) Time of Filing of Application

The NPRM proposed requiring that applications be filed at least 45 days before the employer's date of need (as required by statute) with a pre-filing recruitment period commencing no more than 120 days prior to the date of need and not less than 60 days prior to the date of need. The Department received a number of comments on the change to a pre-filing recruitment framework and the related timing for that recruitment.

The Department received multiple comments opposing this proposed timeframe; several commenters were generally opposed to the expanded timeframe and others raised more specific concerns. Several commenters questioned the Department's legal authority for a shift to pre-filing recruitment. The Department also received comments arguing that the proposed pre-filing recruitment requirement has the effect of moving the deadline for filing an application. Several commenters argued that the proposed requirement that employers begin recruitment earlier than they are required to file applications would be inconsistent with the Congressionally set timeframes and thus beyond the Department's statutory authority.

The Department disagrees strongly with the premise that its revised recruitment steps are a violation of the statute. The INA is clear that the Department may not require an application for labor certification to be filed more than 45 days prior to the date of need. *See* 8 U.S.C. 1188(c)(1). The statute is silent on how the Department implements the certification process: It does not specify when the recruitment of U.S. workers should take place, whether prior to or subsequent to filing. The INA clearly contemplates at 8 U.S.C. 1188 that recruiting U.S. workers is a separate activity from filing and considering applications, and the statute does not provide any express timeframes during which recruitment must be conducted. There is thus nothing in the statute that prevents the Department from requiring employers to recruit before filing an application, much as it requires that recruitment be conducted prior to the filing of an application in other immigration programs. The Department has determined that program integrity would be improved by being able to review a preliminary recruitment report at the time the application is filed, a requirement that is consistent with both the intent and the language of the statute.

Several commenters opined that it was not feasible for employers to make accurate assessments of timeframes and the number of workers needed so far in advance and many questioned how effective an early recruitment period would be in helping employers to locate U.S. workers who would still be available at the time the work actually began. Additionally, many commenters believed the earlier recruitment would not benefit U.S. agricultural workers seeking employment because it is inconsistent with the traditional job-seeking patterns of these workers.

Some commenters expressed concern that extending the recruitment time would either not increase the number of U.S. worker applicants for a position, or would increase the number of U.S. workers who applied for a position but would not translate into more actual workers taking the jobs, as many would not report to work. A trade association also commented that the employer is put at risk because, by the time the jobs begin, U.S. applicants may have long since changed their minds or accepted other employment. A State government agency commented that most agricultural workers would not make a commitment to a job so far in advance of the start date. One individual employer believed the proposed pre-filing recruitment would actually have the opposite effect the Department anticipates because U.S. workers would be reluctant to make commitments so far in advance of the start date. An employer association recommended that the final regulation specifically permit employers to ask workers identified during the recruitment process to attest to or affirm their intentions to actually report to work to perform the jobs.

An association of growers/producers shared its data from the 2006–2007 season which shows only 9 percent of U.S. applicants applied during the first 15 days of the current 45-day recruitment period and questioned whether a longer timeframe would yield additional applicants. The association also reported 83 percent of the applicants who applied during the initial 15-days of the recruitment period failed to report for work on the date of need, as compared to a 60 percent failure-to-report rate for applicants who applied during the last 30 days of recruitment leading up to the date of need.

Some commenters stated that the current recruitment timeframes are adequate for identifying and hiring U.S. workers and others advocated alternate timeframes. Commenters presented a number of options for the recruitment timeframe, including the current

timeframe, and options ranging between 90 to 75 days prior to the date of need for beginning recruitment and 60 to 45 days prior to the date of need for filing the application. In the words of one trade association, which was representative of the comments received on this point: "For the sector for which H-2A is predominantly applicable—fruits and vegetables—the ability to predict months in advance when labor will be required is simply impossible."

The Department takes seriously its twin obligations, consistent with all H-2A statutory requirements, to ensure both that an adequate workforce is available to U.S. agricultural producers and that U.S. workers have a meaningful opportunity to apply for all open agricultural job opportunities. The Department believes it can best fulfill its statutory responsibilities by requiring employers to recruit in advance of filing, which will enable employers to submit preliminary recruitment reports with their applications, giving the Department better information than it has ever had before about the availability of U.S. workers before the Department is required by the tight statutory timeframes to make a determination on an application. The current pattern of forcing positive recruitment combined with the Department's near simultaneous evaluation of the application into a substantially narrow window of only 15 days is simply inadequate to address these workforce and program integrity needs. Based on the comments received, however, the Department has come to believe that requiring employers to seek and secure a workforce 120 days in advance of need may not be practicable, given the substantial likelihood that over such an extended period variables such as weather conditions, competition from other industries for available workers, and competition among farms and crops could intervene and result in increased labor uncertainty for employers.

The Final Rule accordingly shortens the pre-filing recruitment period described in the NPRM. Employers will be required to initiate recruitment no more than 75 days prior and no less than 60 days prior to the anticipated date of need. Reducing the pre-filing recruitment time period in this manner from the time period that was proposed, while simultaneously adjusting the Department's proposal by extending the referral period beyond the date of need (discussed further below), will ensure U.S. workers have access to these job opportunities, and enable employers to recruit effectively for U.S. workers without adversely affecting planting and

harvesting schedules. This revised recruitment schedule, which is closer in time to the employer's actual date of need, also addresses the commenters' concerns about the job search patterns of likely U.S. workers. The Department declines, at this time, to implement any requirement that U.S. workers affirm in writing their intent to show up for work when needed, as that is a contractual matter between the worker and the employer. The Department notes that it has afforded employers some flexibility in the Final Rule in § 655.110(e), "Requests for determinations based on nonavailability of able, willing, and qualified U.S. workers," to address situations where U.S. workers have failed to appear as promised.

(b) Section 655.102(b) General Attestation Obligation

(1) General Comments Regarding the Attestations

A group of farmworker advocacy organizations commented on the language in the proposed regulation that states "the employer shall attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply." The organization stated it is the employer's duty to hire all qualified U.S. workers who apply and believed the proposed language did not make this clear.

An association of growers requested that the language describing the time period for acceptance of referrals be modified by adding the word "first" before "begin to depart" because not all foreign workers depart on the same date. A professional association requested the regulation be changed to permit employers to stop local recruitment efforts no more than five days prior to the date of need rather than three days as proposed. This change was requested to accommodate the actual transit time required for workers to arrive from abroad. As discussed in more detail below, the points made by these commenters have been rendered moot by changes made to this provision.

(2) The "50 Percent Rule" and the Cessation of Recruitment

The Department sought comments on program users' experience with the "50 percent rule," which requires employers of H-2A workers to hire any qualified U.S. worker who applies to the employer during the first 50 percent of the period of the H-2A work contract. We received numerous comments and several commenters offered alternative approaches.

Several commenters questioned the Department's authority to make changes

to the 50 percent rule, citing the 1986 IRCA amendments which added the 50 percent rule to the INA as a temporary 3-year statutory requirement, pending the findings of a study that the Department was required to conduct regarding its continuation. In 1990, pursuant to what is now INA § 218(c)(3)(B)(iii), ETA published an Interim Final Rule to continue the 50 percent requirement. See 55 FR 29356, July 19, 1990. That rule was never finalized.

As the Department stated in the NPRM, since the 1990 publication of the Interim Final Rule continuing the 50 percent rule, it has gained substantial experience and additional perspective calling into question whether the Department's 1990 decision was in fact supported by the data contained in the 1990 study, and whether the rule is in fact a necessary, efficient and effective means of protecting U.S. workers from potential adverse impact resulting from the employment of foreign workers.

The Department received several comments in support of retaining the 50 percent rule as it is currently administered. Commenters asserted that the rule is an important method for granting U.S. workers job preference over foreign temporary workers and creates an incentive for pre-season recruitment of U.S. workers. Some commenters stated their belief that many U.S. workers gain jobs under the 50 percent rule and that its elimination would deprive many U.S. workers of jobs unfairly, although these commenters did not provide any data to support their assertion.

Several commenters believed that few employers have had to lay off H-2A workers under the 50 percent rule, and that the rule has enabled many U.S. workers to secure jobs, and that elimination of the rule would unfairly deprive them of those jobs. The commenters believed that by eliminating this rule, the Department may keep U.S. farmworkers from applying for jobs they would otherwise be able to take. Other commenters believed that for those U.S. workers who learn of an H-2A job, the proposal would eliminate the protections that safeguard against employers rejecting qualified U.S. workers.

One commenter argued that the 50 percent rule provides an incentive that should be maintained to create an attractive working environment, and that it is critical to the integrity of the H-2A program. The commenter asserted that it prevents growers from engaging in practices that are tolerated by H-2A workers only because of their greater economic vulnerability and in turn

ensures that labor standards are not driven down for U.S. workers unable to compete with H-2A workers who have no choice but to endure such conditions.

While one commenter admitted that they could not provide data regarding the cost and benefits of the 50 percent rule, they expressed the belief that employers will hire fewer domestic workers without it, thereby adversely affecting an already vulnerable population. A number of commenters noted that the elimination of the 50 percent rule would make it more difficult for traditional farm workers who move with crops along the traditional migrant streams to secure jobs. The commenter believed that U.S. workers will be "absolutely foreclosed" from much if not most H-2A related employment if they cannot be hired just before, at, and past the date of need. An obligation to continue to hire U.S. workers after the departure of any foreign workers to the U.S. for employment was viewed by the commenter as critical to maintaining and developing a U.S. agricultural workforce.

Finally, another commenter observed that the 50 percent rule has served as an important tool for ensuring that the H-2A program does not adversely affect U.S. workers, and that at a time of increasing unemployment, the Department should not choose this particular moment to abandon these long-standing labor protections for U.S. workers.

Several other commenters argued the 50 percent rule should be abolished. These commenters argued that H-2A users have long considered the 50 percent rule to be unfair and unreasonable. They observed that no other temporary or permanent worker program has an even remotely corresponding requirement. Commenters also observed that the 50 percent rule was purportedly designed to enable domestic workers to accept agricultural employment opportunities, but that its costs outweigh its benefits. Commenters shared experiences that many of the domestic workers who apply under the 50 percent rule do so to maintain government benefits under the Unemployment Insurance program (the UI program requires unemployed workers to show that they have actively sought employment each week in order to continue benefits). They also found that while the rule does not actually provide substantial additional employment to domestic workers, it creates needless insecurity and uncertainty for H-2A workers who are employed under H-2A contracts.

A commenter from a state agency asserted that the elimination of the rule would relieve the SWA from having to track these H-2A job orders and would remove unnecessary burdens on employers. The commenter believed that there is no tangible evidence that the rule produces the desired results of increasing employment of domestic workers:

My experience is that it is rare for [U.S.] workers to search our Internet postings for agricultural positions in the middle of a growing season. Employers find this requirement confusing and worrisome. Smaller employers have expressed concern that they could lose their fully trained and settled foreign worker(s), suddenly disrupting their operation. Unfortunately, their experience is that U.S. workers who drop in during a season have a tendency to not stay till the end of the contract period. If this practice had historically produced significant results, the government-mandated grower investment of time and money might be justifiable, but it has not.

One commenter stated that there is no need for the 50 percent rule where recruiting indicates that there are no or few local workers. The commenter also found no need for the rule in situations where the employers typically hire a large number of local workers. The commenter went on to argue that if the Department wants to retain the rule, it should do so only as a condition of approval of an application where there is evidence indicating that there are a relatively large number of local workers but the employer has indicated that it intends to hire few if any local workers.

A number of commenters observed that all available data support the view that relatively few U.S. workers desire employment in agriculture. They argued that it necessarily follows from this fact that the 50 percent rule provides almost no benefit to U.S. workers, yet its presence dissuades employers from participating in the program because of the uncertainty it creates. These commenters concluded that the rule should be abandoned. One commenter believed that if the Department wished to retain the rule, it should reserve the right to do so on a case by case basis, as a condition of approval for an application where the CO and SWA believed that insufficient local recruiting has been accomplished. The Department believes that this idea may have some merit, but has not devised a means to implement it at this time.

A number of agricultural employers commented that the rule requiring H-2A employers to hire any qualified U.S. worker during the first 50 percent of the H-2A work contract makes it very difficult for a producer to manage labor

supply and costs over the life of the contract. Commenters from state agencies found that the features of the rule are seldom completely understood by the growers who need the H-2A program, adding to their impression that the entire process is complicated and rife with red tape. Another State commenter found the rule to be antiquated and ineffective.

Another commenter observed that the rule has been disruptive and non-productive for both workers and employers and that its elimination will provide much-needed stability in the workforce obtained by the employer. A commenter found that a cost-benefit analysis of the situation indicates that continuing to recruit U.S. workers beyond the date of need results in no corresponding benefit. One farmer observed,

It's just not right that after I have made the best attempt to hire domestic workers that once halfway through the season I be forced to replace a trained H-2A worker. I really would prefer to hire local workers and keep that wage money at home, if I could find them.

Commenters from various farm bureaus around the country argued that under current conditions, the 50 percent rule is without foundation. They argued that anecdotal evidence shows that few, if any, employees referred for employment after the employer's date of need apply for or maintain their work status. They believed that agricultural employers, especially those with perishable crops, must be able to operate with greater certainty. Once an operation begins, the success of the work effort is the product of coordinated teamwork. Employers are willing to make strong recruitment efforts before the date of need, but they seek certainty and continuity once the work period has begun.

A commenter from a farming association found that the actual benefits of the 50 percent rule for domestic workers are, to all practical intent, illusory. The commenter strongly supported eliminating the rule entirely, arguing that such an approach would result in a substantial improvement in program operations. The commenter argued that while the Department has a statutory obligation to protect the rights of U.S. workers when implementing the program, it is necessary to strike a balance between the priority given to U.S. workers and the rights of employers, who have met all of the legal obligations that attach to employing H-2A workers. It went on to argue:

The current 50 percent rule, while seemingly a provision to protect U.S.

workers, is more disruptive to farm operations and a disincentive to program participation than it is a true protection for workers. There is no reason to mandate that a grower's obligations to find and recruit eligible U.S. workers should extend past the recruitment period; imposing such an obligation serves only to disrupt operations of the producer and does little to protect U.S. workers \* \* \*. The fact is, and all available data support this view, relatively few U.S. workers desire employment in agriculture \* \* \*. The work is arduous, episodic, taxing, requires relatively little skill and virtually no education. Within the U.S. economy the pay—while increasing—is relatively low. These jobs provide tremendous economic opportunity for migrant workers but are not perceived as offering the same benefit to U.S. workers. In fact, approximately 10 million individuals in the U.S. economy today choose to work in jobs which pay them less than they could earn in agriculture. The 50 percent rule provides virtually no benefit to U.S. workers yet its presence has clearly been a disincentive to program participation. It should be abandoned.

Other commenters offered alternatives to the 50 percent rule including a 25 percent rule, recognizing that referrals after the date of need may serve a useful purpose but extending through 50 percent of the contract completion might be too long. One farming association suggested that the obligation to accept domestic referrals should terminate not later than three days before the date of need.

A number of state agencies suggested that SWAs should leave job orders open for 30 days after the date of need and employers should be required to offer employment to any qualified and eligible U.S. workers who are referred during that time, also recognizing that the current 50 percent of the contract period is too long and perhaps too uncertain to manage.

Another commenter similarly recommended that employers be required to begin recruitment no more than 60 days prior to the date of need and continue until between one and 30 days after the date of need, with adjustments made according to the expected duration of the job opportunity. Under this commenter's proposal, the determination of the end date for recruitment should be no earlier than the date of need, but the 50 percent rule should be revisited and adjusted to lessen its potential negative impact on the agricultural employer's workforce. Finally, another commenter suggested a continued obligation of 50 percent of the work period or 30 days, whichever is longer.

It is clear to the Department from these comments that many view the current 50 percent rule as a substantially burdensome requirement

that does not provide a corresponding benefit to U.S. workers.<sup>3</sup> Others see the rule as benefiting U.S. workers by providing them expanded job opportunities. Based on the comments it has received and its substantial experience in operating the H-2A program, the Department believes that the 50 percent rule clearly does provide some benefits to U.S. workers, but that the rule creates substantial uncertainty for employers in managing their labor supply and labor costs during the life of an H-2A contract and serves as a substantial disincentive to participate in the program.

Based on the comments it received, the Department has decided to modify the rule. The requirements of 8 U.S.C. 1188(c)(3)(B)(iii) were fully satisfied when the Department promulgated interim final regulations on July 19,

<sup>3</sup> In December 2007, the Department commissioned a survey of stakeholder representatives to evaluate the effectiveness of the 50 percent rule as a mechanism to minimize adverse impacts of the H-2A program on U.S. farm workers. The Department had conducted a similar study of the impact of the 50 percent rule in 1990, but upon reviewing that study as part of the H-2A review which led to this recent NPRM the Department concluded that it was of limited utility because it covered only two states—Virginia and Idaho—and because, given the significant changes that have occurred in the field of agricultural employment over the last two decades, it was substantially out of date. The surveyors for the new study conducted interviews with a number of stakeholders to gather information on the impact of the 50 percent rule and how it is currently working. The surveyors queried a far more representative sample of entities affected by the 50 percent rule than the 1990 study had, including employers, state workforce agencies, and farm worker advocacy organizations.

While the new study identified a diversity of opinion about the value and effectiveness of the current 50 percent rule, the researchers found that the rule “plays an insignificant role in the program overall, hiring-wise, and has not contributed in a meaningful way to protecting employment for domestic agricultural workers.” See “Findings from Survey of Key Stakeholders on the H-2A ‘50 Percent Rule,’” HeiTech Services, Inc. Contract Number: DOJ069A20380, April 11, 2008. The researchers estimated that the number of agricultural hires resulting from referrals to employers during the 50 percent rule period was exceedingly small, with H-2A employers hiring less than 1 percent of the legal U.S. agricultural workforce through the 50 percent rule. All of the categories of surveyed stakeholders, including employers, state workforce agencies, and even farm worker assistance and advocacy organizations, reported that U.S. workers hired under the 50 percent rule typically do not stay on the job for any length of time when hired, frequently losing interest in the work when they learn about the job requirements. Many of the survey respondents, including representatives from each of the three groups, suggested that the rule should be either eliminated or modified.

The Department did not specifically rely on either of the two surveys in crafting the Final Rule. It does, however, believe that the information provided adds some additional depth to the discussion contained in this preamble. Accordingly, it has posted the studies on the Department's Web site.

1990. Nevertheless, the language of that provision suggests that when issuing regulations dictating whether agricultural employers should be required to hire U.S. workers after H-2A workers have already departed for the place of employment, the Department should weigh the “benefits to United States workers and costs to employers.” After considering its own experience and the experience of its SWA agents, the Department agrees, on balance, with those commenters who argued that the costs of the 50 percent rule outweigh any associated benefits the rule may provide to U.S. workers. It is beyond dispute that the obligation to hire additional workers mid-way through a season is disruptive to agricultural operations and makes it difficult for agricultural employers to be certain that they will have a steady, stable, properly trained, and fully coordinated work force. It is also apparent from the comments received that the current rule is poorly understood by employers, difficult for the SWAs to administer, and a disincentive for employers to use the H-2A program. Finally, the rule requires agricultural employers to incur additional unpredictable and unnecessary expenses, forcing them to choose between either hiring a greater number of workers than they actually need to complete their work part-way through a season, or discharging some or all of their H-2A workers, in which case the employer will lose its entire investment in those workers and will be required to incur the immediate additional expense to transport the workers back to their home countries. It is for all of these reasons that no other permanent or temporary worker program administered by the Department contains such a burdensome requirement, even though most of these programs are subject to similar statutory or regulatory requirements that the Secretary certify (1) that there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or services needed and (2) that the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is clear to the Department that the current 50-percent rule does provide some benefits to U.S. workers, since at least some U.S. workers secure jobs through referrals made pursuant to the rule. The number of such hires, however, appears to be quite small. Moreover, the comments indicate that many workers hired pursuant to the 50-

percent rule do not complete the entire work period, adding costs to employers and further diminishing the total economic benefits derived from the rule by U.S. workers. It is also relevant that under the Final Rule, the period of time that a job order is posted by a SWA prior to an employer's dates of need has been substantially expanded from the current rule, which will provide U.S. workers with more up-front information about agricultural job opportunities, rendering mandatory post-date-of-need hiring less necessary.

In sum, after considering the best information currently available, the Department has concluded that the benefits of the 50-percent rule to U.S. workers are not, on balance, sufficient to outweigh its costs. The Department has also determined that modifying or eliminating the 50-percent rule would not compromise the Department's ability to ensure that U.S. workers are not adversely affected by the hiring of H-2A workers, just as the absence of a 50-percent rule from the other permanent and temporary worker programs administered by the Department has never been thought to compromise the Department's ability to ensure that U.S. workers are not adversely affected by the hiring of foreign workers under those programs. If it is true, as some commenters suggested, that some U.S. agricultural workers simply drift from employer to employer without paying attention to actual advertising about agricultural job opportunities, the Department is confident that farm worker advocacy and assistance organizations will help to spread the word about advertised agricultural job openings, much as they do today. The available hiring and referral data strongly suggest, however, that such workers only rarely secure their jobs through the 50-percent rule today. It is also worth noting that to the extent workers can identify agricultural job openings before those jobs have started, they will gain the additional benefit of a longer period of employment.

Despite these conclusions, the Department is concerned that the sudden and immediate elimination of the 50-percent rule might prove disruptive to the access of some U.S. workers to agricultural employment opportunities. If some U.S. workers have become accustomed to the ability to secure H-2A-related employment after the jobs have already started, those workers may benefit from a transition period that will allow those workers to adjust their employment patterns. A transition period would also allow the Department to collect additional data

about the costs and benefits of mandatory post-date-of-need hiring under the new rule structure over a period of several years, allowing the Department to assure itself that its initial conclusions regarding the rule are sound.

For these reasons, the Department has created a five-year transitional period under the Final Rule during which mandatory post-date-of-need hiring of qualified and eligible U.S. worker applicants will continue to be required of employers for a period of 30 days after the employer's date of need. In determining precisely what form mandatory hiring should take during this transitional period, the Department considered all of the various options presented by commenters. Several commenters suggested limiting the period during which employers are required to engage in mandatory post-date-of-need hiring to 30 days. The Department has adopted this suggestion as the transitional period rule, both for ease of administration and to minimize the extent to which the various costs and considerations outlined above will burden employers during the transition. The Department believes that the use of this 30-day post-date-of-need mandatory hiring period during the five-year transition period will allow a smooth adjustment of the expectations of U.S. workers and will provide the Department additional time to collect data on the effect of the rule. At the end of the transition period, the mandatory post-date-of-need hiring requirements under the Final Rule will expire, and employers will only be required to accept referrals of U.S. workers until the first date the employer requires the services of H-2A workers. However, the Department intends to conduct a study of the impact of this transitional 30-day rule on U.S. workers and on employers during the five-year transition period, and under the rule retains the ability to indefinitely extend the 30-day rule by notice published in the **Federal Register** should the Department's study determine that the rule's benefits outweigh its costs.

We believe this framework addresses the concerns of many of the commenters, both for and against continuation of the 50-percent rule, and strikes an appropriate balance between the concerns of agricultural employers and the need to protect U.S. workers' access to the employment opportunities under the H-2A program. Having a set period of time during the transition period, not tied to a percentage of the contract length, will provide employers more predictability and be easier to administer for employers, workers and

SWAs making referrals. The language of § 655.102(b) as originally proposed implied that mandatory post-date-of-need hiring would no longer be required by the H-2A regulations. The language creating the transitional 30-day mandatory hiring period outlined above may be found at § 655.102(f)(3) of the Final Rule.

To the extent that the 30-day rule applies, the employer would require similar safeguards as under the 50-percent rule so long as the employer continues to have an affirmative obligation to hire U.S. workers beyond the date of need. Accordingly, the Department has included a provision in § 655.102(f)(3)(ii) of the Final Rule on the prohibition of withholding of U.S. workers. The provision is similar to the provision in § 655.106(g) of the current regulations, but has been modified to reflect the centralization of the application process with the NPC. Under the final rule, the CO, and not the SWA, receives and investigates the complaint and makes a determination whether the application of the 30-day rule should be suspended with respect to the employer.

#### (c) Section 655.102(c) Retention of Documentation

The Department proposed in the NPRM a 5-year retention requirement for all H-2A applications and their supporting documents. The vast majority of commenters who provided observations on this provision voiced concern with the proposed 5-year document retention period and recommended 3 years, stating that they did not have adequate staff to comply with the requirement or that it is not an industry standard and not legally consistent with other regulations and might even discourage use of the H-2A program. The Department has reconsidered its position and has changed the retention requirement to 3 years.

One commenter suggested that all record retention requirements and periods be combined into one section of the amended regulations to provide program participants with clearer guidance for these obligations. The Department agrees and has added a new § 655.119 to the regulatory text. The new section lists all the document retention requirements.

Another commenter requested that the Department add a sentence to the rule indicating that the employer is not liable for eliminating records after the retention period expires. The Department has not added an express provision to this effect, as we believe the cessation of the employer's

responsibility to retain the records after the retention period expires is self-evident. The Department suggests, however, that there may be some benefits to employers keeping records beyond the required 3-year period; if the employer later faces an allegation of fraud or some other alleged violation that has a statute of limitations of longer than 3 years, retained documents may help the employer defend itself. Indeed, if a proceeding or investigation relating to the retained records has already been initiated, it should be understood that the employer is obligated to retain the records that are the subject of the proceeding or investigation until it has come to a conclusion.

One commenter requested that the Department allow applicants who are denied certification to discard records 180 days after the denial. The Department has decided to eliminate the requirement to retain records pertaining to denied certifications in its entirety. If an application is denied on grounds of fraud or malfeasance, the Department expects that it will have already obtained copies of any documents necessary to prove the fraud or malfeasance during the process of denying the certification, and thus the retention of such documents by the employer would be needlessly duplicative. Under the Final Rule, any employer who has been denied certification can discard the records immediately upon receiving the denial notice, or, if the employer appeals the decision, whenever the decision to deny certification becomes final. If the denial is ultimately overturned on appeal and certification is granted, the application of course becomes subject to the document retention requirements for approved cases.

A SWA requested that we define who is responsible for monitoring the documentation and ensuring compliance. This Final Rule places responsibility squarely with the employer to maintain the documentation. The NPC, through the audit function as well as the other enforcement tools at its disposal, will ensure compliance. SWAs would not be responsible for monitoring documentation or ensuring compliance with this provision.

(d) Section 655.102(d) Positive Recruitment Steps

The Department proposed "positive recruitment" steps including posting a job order with the SWA serving the area of intended employment; placing three print advertisements; contacting former U.S. employees who were employed within the last year; and recruiting in

additional States designated by the Secretary as States of traditional or expected labor supply.

Many commenters, primarily employers and employer associations, expressed concerns with the specific proposed pre-filing recruitment steps. Many argued that the proposed longer recruitment period and increased advertising would simply increase the cost of the recruiting effort without increasing the benefits and that the increased steps were duplicative. These commenters believe that their workforce shortage problem is not due to a lack of awareness of available jobs, but rather is because of a lack of willing and available U.S. workers. They suggested that rules be promulgated to use only the current state employment service system and not require agricultural employers to perform a substantial prolonged search for U.S. workers before being able to apply for an H-2A labor certification. According to these commenters, the time required in the current rules is sufficient to identify and notify the U.S. work force of the availability of particular jobs.

Requiring pre-filing recruitment is, in the Department's view, essential to the integrity of an attestation-based process. Only with sufficient time for adequate recruitment can the Department ensure that the potential U.S. worker pool is apprised of the job opportunity in time to access that opportunity. The current recruitment time frame, in which employers file applications 45 days prior to the date of need, recruit for 15 days thereafter, and in which a CO must adjudicate the application no later than 30 days prior to need, has proven unworkable. COs are today certifying the absence of U.S. workers based on, at best, a handful of days of recruitment activity, which is insufficient to apprise U.S. workers of job opportunities through either the SWA employment service system or other positive recruitment activities.

The belief of some commenters that the time allotted in the present regulatory scheme for recruiting is sufficient to canvass the potential U.S. workforce is, in the Department's view, incorrect. The Department has heard significant concerns voiced by the farmworker advocate community that there is an inability to access job opportunities within the short recruitment period provided in the current system. The Department takes seriously these concerns about the length of the recruitment, particularly in light of the Department's modification of the 50 percent rule (discussed above with respect to § 655.102(b)) and the possibility that it will be phased out

entirely after a period of five years. The movement of the recruitment period to a time prior to the filing of the application provides a clear and well-defined time for the employer to make available and for the U.S. farmworker to access job opportunities, and provides the Department with better information with which to make its certification determination. The establishment of a 30-day post-date-of-need referral period for the next five years further ensures that the expectations of workers will not be unduly disrupted.

A trade association recommended SWAs be removed from the recruitment process altogether, and only be involved in the inspection of worker housing and workplace conditions after approval of the labor certification and visa and the commencement of work. A State agency representative recommended the SWAs receive copies of the ETA-750 (*Application for Temporary Employment Certification*) and ETA-790 not for review but to ensure the SWA would have access to accurate information.

The Department notes that it is statutorily prohibited at this time from amending the Wagner-Peyser regulations to remove SWAs from the H-2A process. See Public Law 110-161, Division G, Title I, Section 110. Nor does it believe such a step would be beneficial at this time. SWAs provide an effective means of completing many required activities, such as inspections of employer-provided housing. SWAs are also integral to the process of receiving and posting agricultural job orders. The Department declines to require that SWAs also receive the form ETA-750, as they will receive far more significant information in the form ETA-790 job clearance order request.

A group of farmworker advocacy organizations also claimed that the proposed changes to the recruitment process were inconsistent with INA requirements, portions of the Wagner-Peyser Act, and MSPA. The organization believed the proposed regulations changed the standards for employer recruitment efforts to the detriment of U.S. workers and did not address recruitment violations that had been uncovered in the past. Specifically, the organization objected to the elimination of the standard for positive recruitment based on comparable efforts of other employers and the H-2A applicant employer as found in the current regulation at § 655.105(a). This organization was also concerned about the elimination of the current provision requiring that "[w]hen it is the prevailing practice in the area of employment and for the occupation for

non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H-2A agricultural employers and shall provide an override which is no less than that being provided by non-H-2A agricultural employers.” 20 CFR 655.103(f). The organization made several recommendations for revisions regarding recruitment, including preserving the burden on the employer (under Departmental review) to identify and positively recruit in locations with potential sources of labor, and the obligation to work with the SWA to do so; retaining current regulatory provisions requiring that employers engage in the same kind and degree of recruitment for U.S. workers as they utilize for foreign workers; and requiring adequate compensation of farm labor contractors who find U.S. workers. Additionally, it recommended preserving the role of SWAs contained in the current regulations and detailed in the internal Departmental H-2A Program Handbook.

Other commenters expressed concern that the Department’s proposal to reduce the scope and type of required recruitment efforts while increasing the length of time to perform recruitment was primarily intended to streamline the program, but would not actually benefit U.S. workers. These commenters disagreed with the proposed rule’s elimination of the current regulatory requirement to contact farm labor contractors, labor organizations, nonprofits and similar organizations to recruit domestic employees. If the Department seeks to revise the current recruitment practices, in the opinion of these commenters, it would be more effective to maintain or increase current recruitment standards, while giving agricultural employers additional time within which to meet their obligations; otherwise the Department is reducing opportunities for U.S. workers.

One commenter suggested that the Department bolster word-of-mouth recruitment because it is, in the commenter’s opinion, the only way that U.S. workers find out about jobs in the agricultural sector and it encourages free-market competition as long as the information is accurate. This commenter believes too many H-2A employers do not provide accurate information to U.S. workers because it is in their best interests to hire H-2A workers who must stay tied to that employer for the entire agricultural season.

While the Department appreciates the concerns expressed, it believes these

concerns are misplaced in light of the recruitment methods that the Department will be requiring employers to undertake under the Final Rule. The Department will continue, and in some respects expand, those core positive recruitment requirements that have a proven track-record of providing cost-effective information to U.S. workers about available job opportunities. For example, the Final Rule retains the current requirement that employers run two newspaper advertisements in the area of intended employment, but expands that requirement, as laid out more fully in § 655.102(g), by requiring that one of the advertisements be placed on a Sunday, which typically is the newspaper edition that has the highest circulation. The Department declines, however, to continue obscure and difficult-to-administer provisions requiring employers and the Department to abstractly measure the amount of “effort” that employers put into their domestic positive recruitment, or to determine precisely what the prevailing practice is in a given area with respect to the payment of labor contractor override fees. Provisions that call for the measurement of employer effort require the Department to make highly subjective judgments and are extremely difficult to enforce. Moreover, the Department’s program experience has shown that most of the discontinued recruitment methods cited by commenters—radio ads and contacting fraternal organizations, for example—substantially add to the burden of using the program, but add little to the total amount of information about agricultural job opportunities that is made available to U.S. workers through the positive recruitment methods that are required by the Final Rule. The elimination of specific requirements to contact entities such as fraternal organizations does not mean that interested entities will be entirely deprived of information about open agricultural job opportunities. Rather, it means that interested entities should pay attention to newspaper advertisements and SWA job orders.

The Department appreciates the suggestion that it should develop methods for encouraging word-of-mouth as a recruitment tool, and that word-of-mouth is frequently a successful way for U.S. workers to learn about job opportunities. We do not believe that word-of-mouth recruitment can effectively be mandated by regulation, however. Rather, the Department anticipates that word-of-mouth communication will be instigated by the positive recruitment efforts that the

Final Rule requires, particularly through the assistance of farm worker assistance and advocacy organizations, which can spread the word about available job openings.

The Department takes seriously its statutory obligation to determine whether there are sufficient numbers of U.S. workers who are able, available, willing, and qualified to perform the labor or services involved in the petition and to ensure that U.S. workers’ wages and working conditions are not adversely affected by the hiring of H-2A workers. The Department believes that the positive recruitment methods it has selected for inclusion in the Final Rule—the use of newspaper advertisements, the state employment service system, contact with former workers, and recruitment in traditional or expected labor supply States—provide notice of job opportunities to the broadest group of potential applicants in an efficient and cost-effective manner, while avoiding burdening employers with requirements that have proven costly and at times difficult to administer without yielding clear benefits. The Department notes that employers stand to gain a great deal from recruiting eligible U.S. workers rather than incurring the considerable time and expense of securing foreign workers from thousands of miles away. The various provisions of these regulations, including wage, housing, and transportation requirements, ensure that it is virtually always more expensive for employers to hire H-2A workers than it is for them to hire U.S. workers outside the H-2A program. Thus, employers have significant incentives to use the positive recruitment methods prescribed by these regulations to maximum effect, and the Department is confident that these methods will adequately spread the word to U.S. workers about available job opportunities. The Department expects that many employers will also engage in additional recruitment efforts that can, in the absence of rigid and overly prescriptive regulatory requirements, be flexibly tailored to the particular circumstances of local labor markets.

#### (e) Section 655.102(e) Job Order

Proposed § 655.102(e) required that, prior to filing its application with the NPC, the employer place a job order, consistent with 20 CFR part 653, with the SWA serving the area of intended employment. The NPRM also required the job order to be placed at least 75 but no more than 120 days prior to the anticipated date of need.

Several commenters focused on the requirements for placement of the job order. Three commenters posited that the rule would create problems for program users by establishing requirements for acceptable job offers that are subject to the Department's discretion, while employers would have to conduct the recruitment before the terms and conditions of the employer's job offer have been reviewed and approved by the Department. According to these commenters, the rule is silent on what happens if, after the employer conducts the pre-filing recruitment, the Department does not approve the employer's job offer. Under the current program, the recruitment would be considered invalid, and the employer would be required to revise the job offer and repeat the recruitment. This situation, according to these commenters, introduces an unacceptable degree of uncertainty and risk into the process. A trade association further commented that, because there will be no prior approval of the job offer by the NPC, all SWAs would be independently interpreting and making decisions about the job offers, and believed that such a process would lead to inconsistencies among SWAs. The association was also concerned there would be inconsistency between what a local SWA employee would accept and what the CO would later find acceptable. The association recommended retaining the existing process as an option for employers.

The Department requires that the employer submit an acceptable job order (current form ETA-790) to the appropriate SWA for posting in the intrastate and interstate clearance system. The ETA-790 describes the job and terms and conditions of the job offer: the job duties and activities, the minimum qualifications required for the position (if any), any special requirements, the rate of pay (piece rate, hourly or other), any applicable productivity standards, and whether the employee is expected to supply tools and equipment. This form is submitted to the SWA for acceptance prior to the employer's beginning positive recruitment. As long as the employer's advertisements do not depart from the descriptions contained in the accepted job order, the advertisements will be deemed acceptable by the Department. Thus, employers should place advertisements after the form ETA-790 has been accepted for intrastate/interstate clearance, eliminating any chance that recruitment will later be rejected by the NPC due to problems

with the job offer and corresponding advertisements.

The Department also does not anticipate significant problems in uniform decision making among SWAs. SWAs will be, as they have been for some time, the primary arbiter of whether job descriptions and job orders are acceptable. In response to comments on the subject, however, the Department has clarified in the text of the rule that employers may seek review by the NPC of a SWA rejection, in whole or in part, of a job description or job order. The regulations have also been revised to permit the NPC to direct the SWA to place the job order where the NPC determines that the applicable program requirements have been met and to provide the employer with an opportunity for review if the NPC concludes that the job order is not acceptable. This modification renders concrete what has long been the informal practice with respect to H-2A related job orders, as the NPC has worked hand-in-hand with the SWAs to ensure that job orders comply with applicable requirements. It is also implicit in the status of the SWAs as agents of the Department, assisting the Department in the fulfillment of its statutory responsibilities.

One trade association noted that the job order must be filed in compliance with part 653, and that § 653.501 requires that the employer give an assurance of available housing as part of the job offer. This commenter opined that this would be impossible to do since employers cannot guarantee the availability of housing that far in advance for purposes of using the proposed housing voucher. The Department's disposition of the proposed housing voucher, discussed below, renders this comment moot.

The same commenter noted that § 653.501(d)(6) requires that the SWA staff determine whether the housing to be provided by the employer meets all of the required standards before accepting a job order, and argued that this would be an impossible task 120 days before the actual date of need, as the proposed rule purported to allow. As explained above in the discussion of § 655.102(a), the Department has amended the timeframe for recruitment by moving the first date for advertising and placement of the job order to no more than 75 days and no fewer than 60 days prior to the date of need. Moreover, in response to the comments received, the Department has specified in the Final Rule that SWAs should place job orders into intrastate and interstate clearance prior to the completion of the housing inspections required by 20 CFR

653.501(d)(6) where necessary to meet the timeframes required by the governing statute and regulations. This will maximize the time that job orders are posted, providing better information to workers. The Final Rule further directs SWAs that have posted job orders prior to completing a housing inspection to complete the required inspections as expeditiously as possible thereafter. This provision is consistent with the current regulations, which already permit job orders to be posted prior to the completion of a housing inspection pursuant to § 654.403. If a SWA notes violations during a subsequent housing inspection, and the employer does not cure the violations after being provided a reasonable opportunity to do so, the corresponding job order may be revoked. With these amendments, the Department believes it has adequately addressed the concerns contained in this comment.

In addition, a group of farmworker organizations objected to the use of the language "place where the work is contemplated to begin" in describing which SWA should receive a job order when there are multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State. It believed this language would allow employers to choose where they wanted to recruit U.S. workers simply by "contemplating" that the work would begin in an area unlikely to have U.S. workers. The Department received other comments that supported this requirement. After considering these comments, the Department has revised the language of the provision to state that an employer can submit a job order "to any one of the SWAs having jurisdiction over the anticipated worksites." The revised language affords employers some flexibility in determining where to initially send job orders, but it does not allow employers to use this flexibility to avoid recruitment obligations, as § 655.102(f) provides that the SWA that receives the job order "will promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the job order as anticipated worksites." Thus, no matter where the job order is initially sent, the scope of required recruitment will be the same, covering all areas in which anticipated worksites are located.

A sentence has also been added to the Final Rule, simply as a procedural direction to the SWAs, that "[w]here a future master application will be filed by an association of agricultural employers, the SWA will prepare a single job order in the name of the

association on behalf of all employers that will be duly named on the Application for Temporary Employment Certification.”

(f) Section 655.102(f) Intrastate/ Interstate Recruitment

The proposed regulation instructs the SWA receiving an employer's job order to transmit a copy to all States listed as anticipated worksites and, if the worksite is in one State, to no fewer than three States. Each SWA receiving the order must then place the order in its intrastate clearance system and begin referral of eligible U.S. workers.

The Department received some general comments regarding the referral process for U.S. workers. One group of farmworker advocacy organizations expressed concern about the lack of referrals by SWAs to H-2A employers in the past and believed the proposed regulation would not cure this deficiency. One association of agricultural employers expressed concern regarding the ability of the SWAs to adequately handle the referral process.

The Department believes these concerns are misplaced, especially under a modernized system in which SWA responsibilities with respect to each H-2A application is reduced. A core function of the SWA system is the clearance and placement of job orders and the referral of eligible workers to the employers who placed those job orders. Past program experience demonstrates the occurrence of a sufficient number of referrals to sustain this requirement.

One SWA commented that although the NPRM states the purpose of removing the SWA is to remove duplication of effort, one important duplicative effort is retained—the requirement for sending job orders to other labor supply States and neighboring States. This agency suggested that if the job orders are uploaded to the national labor exchange program, then the transmittal of job orders to other States is unnecessarily duplicative. Other commenters recommended all agricultural job orders be posted in an automated common national job bank.

The Department acknowledges the potential benefits of a national online system for posting job offers. However, automating interstate job clearance would require regulatory reforms that the Department is currently constrained from undertaking by Congress. See Public Law 110-161, Division G, Title I, Section 110. There is currently no online national exchange organized under the auspices of the Department to

which such jobs could be posted. The Department's former internet-based labor exchange system, America's Job Bank, was disbanded in 2007 because the private sector provides much more cost-effective and efficient job search databases than the federal government can provide. The Department, however, does not wish to impose mandatory participation in such job databases on SWAs or employers at this time. Because the Department already has an existing system in place for handling interstate job orders, and given the current legal and operational constraints of changing that system, the Department has determined that the only feasible and prudent approach at this time is to continue to require SWAs to process the interstate job orders in accordance with 20 CFR Part 653.

An association of growers/producers opposed the requirement for transmitting job orders to additional States and recommended the job orders be circulated only in the State where the job is located. This association also suggested that any out of State notifications should list only the location of the job offer and never list the employer's name.

The Department's circulation of the job order to any States that are designated by the Secretary as labor supply States is required by statute. Section 218(b)(4) of the INA prohibits the Secretary from issuing a labor certification after determining that the employer has not “made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.” The interstate recruitment must be conducted “in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer.” The Department does not have the ability to eliminate or alter the requirement absent Congressional amendment.

At the same time, the Department does not read the statutory language to require the Secretary to designate traditional or expected labor supply States with respect to all States in which H-2A applications may be filed. Rather, the Department believes that the statutory language is most reasonably read to require the Secretary to make a determination for each area (which the Secretary has elected to do on a State-by-State basis) whether, with respect to agricultural job opportunities in that

area, there are other areas (which the Secretary has also elected to examine at the State-by-State level) in which “there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.” In other words, the Department reads the statute as contemplating that with respect to agricultural job opportunities in certain States at certain times, as a factual matter there simply will not be other States in which there are “a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.” Under this reading of the statute, the word “where” in 8 U.S.C. 1188(b)(4) essentially means “if”: If the Secretary determines that the statutory criteria have been met, then she is required by the statute to designate the area of traditional or expected labor supply, but if the Secretary determines that the statutory criteria have not been met, then the requirement is simply inapplicable. This sensible reading of the statute comports with the realities of the agricultural sector: The pattern of seasonal migrant work has clearly changed over time, and in some cases older patterns have become well-established while others have fallen away. The changeable nature of the agricultural labor flow, which is highly dependent upon weather patterns, crop distribution, the availability of transportation, and even the price of gasoline, are all recognized under this system of flexible, fact-specific designations by the Secretary.

A group of farmworker advocacy organizations pointed out that the proposed regulations do not provide a timeframe for how long the local SWA can wait before placing the H-2A job order into interstate clearance, and only require the SWA to “promptly transmit” the job offer. The Department does not believe that its requirement of “prompt” transmission requires further clarification, however. Posting job orders is one of the core functions of the SWAs, and the Department is confident the SWAs will continue to act responsibly in promptly transmitting and posting job orders as they have in the past.

The organization was also concerned about the clarity of the instructions to be followed by SWAs for circulating job orders among other States. The proposed regulations require the SWA to transmit a copy of the open job order to all States listed in the employer's application as anticipated worksites or, if the employer's anticipated worksite is

within a single State, to no fewer than three States, including those designated as traditional or expected labor supply States. However, the organization believed the proposed regulation would be read to not require any additional job order circulation by the SWA if the employer has anticipated worksites in two States, and thus would provide less circulation of job orders and no contact of labor supply States in such situations. The Department agrees and has clarified the language of § 655.102(f)(1) by removing the phrase, "If the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State" to make clear that job orders with locations in more than one State must be circulated to any traditional or expected labor supply States designated by the Secretary for either of the work locations.

An attorney for an association of growers/producers suggested the H-2A process could be further improved by allowing State officials to affirm that employers need agricultural workers in their State. The Department believes it cannot implement such an affirmation process, as similar processes for determining the unavailability of U.S. workers have been found to be insufficient for the factual determination required by the Secretary. See *First Girl, Inc. v. Reg. Manpower Admin. DOL*, 361 F. Supp. 1339 (N.D. Ill. 1973) (availability of U.S. workers could not be determined by generic listing of available workers listed with state agency).

A public legal service firm recommended that the Department require employers to circulate all job orders in Texas, which they said is a traditional agriculture labor surplus state. If the commenter's factual assertions about labor availability in Texas are correct, the Department would expect that Texas will frequently be designated as a labor supply State. The Department is cognizant of the changeable nature of worker flows, however, and therefore does not wish to require the mandatory inclusion of one or more specific States in the designation process. It is subject to question, for example, whether significant numbers of agricultural workers in Texas would be willing to accept seasonal employment in Alaska or Hawaii. Rather, the Department will rely on annually updated information in designating labor supply States to ensure the accuracy of the assertions that farm workers are indeed available in the purported labor supply State and that recruitment there for out of State jobs would not take needed workers away from open agricultural jobs in the

labor supply State. In response to these concerns, however, the Department notes it will announce, at least 120 days in advance of the Secretary's annual designation, an opportunity for the public to offer information regarding States to be designated.

Finally, a group of farmworker advocacy organizations expressed concern regarding the content of job orders placed by agricultural associations. It objected to the placement of job orders with a range of applicable wage offers with a statement that "the rate applicable to each member can be obtained from the SWA."

In promulgating this rule, the Department made no changes to current practice. An association is permitted to pay a different wage for each of its members, should it choose to do so, as long as that wage meets the criteria established in the regulations (now found at § 655.108). U.S. workers seeking a job opportunity from or within an association can acquire from the SWA a list of member locations and the wages associated with each so that the worker can make a fully informed decision as to which job, if any, the worker wishes to apply.

We made several minor edits that are consistent with the above discussion to the language of § 655.102(f) for purposes of clarity. Some language was also moved to other sections or deleted, again for purposes of clarity and without substantive effect. Section 655.102(f)(3), which describes the recruitment period during which employers are required to accept referrals of U.S. workers, was added to the rule for reasons described at length in the discussion of the 50 percent rule under § 655.102(b).

#### (g) Section 655.102(g) Newspaper Advertisements

The Department proposed that in addition to the placement of a job order with the SWA, employers be required to place three advertisements (rather than the current two) with a newspaper or other appropriate print medium. Most who commented on this suggestion believed the additional advertising would result in additional costs without any additional benefits. An association of growers/producers stated: "Additional newspaper advertising is a very expensive alternative of recruiting workers in today's world and should not be the only method allowed."

A trade association also questioned the expansion of the advertising requirements in the proposed regulations and commented that newspapers are not a usual or even occasional source of labor market

information for farm workers. The association and other commenters referenced the National Agricultural Worker Survey (NAWS) which reported that percent of seasonal crop workers (both legal and illegal) learn about jobs from a friend or relative or already know about the existence of the job (although how such knowledge is attained was not reported). The association further commented that the proportion of workers who learn about their jobs from a "help wanted" ad was apparently too small even to warrant inclusion in the report. Several of these commenters suggested it would be more efficient to simply allow for posting to the SWA's job bank which is more practical, less expensive, and reaches applicants more readily.

A few employers objected to the very concept of newspaper advertising. One employer objected to having to advertise in a newspaper, commenting that newspaper advertisement is "not only expensive, but doesn't find any hiding sheep shearers." Another employer objected to the increase in required newspaper advertising for U.S. workers "when it is clear that local workers are simply not available for seasonal jobs." Many commenters were particularly concerned that increasing the number of ads from two to three in addition to requiring that one be placed in a Sunday edition would greatly increase employer costs. One trade association commented that it is likely that in the typical situation an employer's advertising costs would increase by three to four times under the proposed regulations, adding hundreds to thousands of dollars to the employers' application costs. That commenter did not provide data supporting this conclusion, however.

Several commenters were in favor of the proposal to increase advertising and expressed support for the additional ad in the expectation it would provide additional notice to the target population. An association of growers/producers supported the increase in advertisements from two to three, believing it would enhance the ability of an eligible U.S. worker to identify and apply for agricultural job openings before the job begins. A farmworker/community advocacy organization agreed that requiring three instead of two advertisements would be a step toward improving the recruitment of U.S. workers.

The Department appreciates that a newspaper ad frequently may not, of itself, result in significant numbers of U.S. workers applying for employment. However, such advertising has been required for decades and remains the central mechanism by which jobs are

advertised, especially to workers who may have only limited access to the Internet. The ads may not necessarily be seen by all farmworkers, but may be, and indeed are, seen by those who participate in the greater farm work community and who can pass along a description of the jobs ads through "word-of-mouth." Newspaper advertising remains, along with the state employment service system network, an objective mechanism by which notice of upcoming farm work can be assessed by the Department and communicated to those who are interested.

The study referenced by many commenters suggesting that most referrals in the agricultural sector take place through word-of-mouth rather than through newspaper advertisements was actually conducted by the Department, and, as noted above, the Department acknowledges that word-of-mouth frequently results in U.S. workers learning about job opportunities. However, the Department believes it would be nearly impossible to effectively implement and enforce a word-of-mouth regulatory standard. The Department believes the combination of job orders and required newspaper advertisements are cost-effective, easily administrable, and readily enforceable, and will make job information available in ways that will result in word-of-mouth referrals.

Although it may be true that few agricultural workers themselves read such advertisements, others do read them, including farm labor advocacy organizations, community organizations, faith-based organizations, and others who seek out such opportunities on behalf of their constituents. The newspaper becomes a very visible source of information for such organizations that are in turn able to spread the word to workers. Through publication to this wide audience, the information ultimately reaches those for whom it is intended.

The Department appreciates the substantial concern raised by a number of commenters regarding the placement of multiple ads and has thus revised its proposal on the number of ads that must be placed in the area of intended employment. The Department has decided to revert from the proposed three to the existing rule's requirement for two ads. The Department is retaining its proposal, however, to require that one of the newspaper advertisements be run on a Sunday, as that is typically the newspaper edition with the broadest circulation and that is most likely to be read by job-seekers.

In response to the various comments about the proposed advertising

requirements, the Department is also slightly modifying the language of § 655.102(g)(1) to provide some limited flexibility in selecting the newspaper in which the job advertisement should be run. The Final Rule clarifies that the newspaper must have a "reasonable distribution." Thus, advertisements need not be placed in the New York Times, even if the New York Times is the newspaper of highest circulation in a given area, but also cannot be placed in a local newspaper with such a small distribution that it is unlikely to reach local agricultural workers. The Final Rule also clarifies that the newspaper must be "appropriate to the occupation and the workers likely to apply for the job opportunity," but deletes the modifier requiring that the newspaper must be the "most" appropriate. This change was made out of a recognition that in many areas there are multiple newspapers with a reasonable distribution and that are likely to reach U.S. workers interested in applying for agricultural job opportunities, and that as long as these criteria are met, an employer's positive recruitment should not be invalidated. If an employer is uncertain whether a particular newspaper satisfies these criteria, it can seek guidance from the local SWA or the NPC.

The Final Rule also instructs employers not to place the required newspaper advertisements until after the job order has been accepted by the SWA for intrastate/interstate clearance; this replaces the time frame contained in the NPRM and shifts the initiation of recruitment back to the submission to and clearance by the SWA of the job order. This ensures that advertisements reflect the job requirements and conditions accepted by the SWA and minimizes the risk that employers' advertisements will later be determined to be invalid by the NPC.

One commenter suggested that a better alternative to employer-placed advertisements would be for the Department to maintain an up-to-date database listing advertisements for farming and ranching jobs and directing interested workers to contact the SWA in the States where the jobs were located. The commenter believed this approach would expand the variety of U.S. workers to select more varied jobs in a larger geographic area. The Department does not disagree; however, as noted above, amending the current job order clearance process is not an option at this time.

A private citizen commented that the SWA, not the employer, is in the best position to know which newspaper is most likely to reach U.S. workers, and

that the SWA should, therefore, continue to have a role in determining where advertising is conducted. Nothing, of course, prevents an employer from consulting with the SWA regarding the most appropriate publication in which to place advertising and thus ensure compliance with the regulations, particularly in instances in which a professional, trade or ethnic publication is more appropriate than a newspaper of general circulation. In fact, a representative of a State government agency suggested the advertising requirements should be limited to local area media and trade publications where available, and that the specific publications should be agreed to by the employer and the SWA based on the potential for attracting candidates and historical experience. While we are not incorporating this suggestion for coordination into the regulation as a requirement, we note that the regulation at § 655.102(g)(1) already requires the ads to be placed in the "newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity."

(h) Section 655.102(h) Contact With Former U.S. Workers

The Department proposed that employers be required to contact by mail former U.S. workers as part of the recruitment process. A group of farmworker organizations objected to the requirement and commented: "if DOL had intended to come up with the least effective way of contacting former employees, it could not have selected a better method than by mail." This organization was concerned because they claimed a majority of farm workers are not literate in English or their primary language and, therefore, might not understand the written communication and the regulation does not require the written communication to be in any language other than English. The organization also recommended contact by telephone or through crew leaders or foremen as alternative methods of contact. In response, we have modified this provision in the Final Rule to permit employers to also contact former U.S. workers through alternative effective means, and document those means in some manner (telephone bills or logs, for example).

Additionally, the organization believes many workers would be missed by the proposed mailing effort because the proposed regulation limits the requirement to contacting former

workers “employed by the employer in the occupation at the place of employment, during the previous year” and does not require that H-2ALCs contact a growers’ former workers who did not work for the H-2ALC during the previous season. The Department declines to adopt a requirement that employers contact workers who did not work for them during the previous season, as such a requirement would be quite impractical, and the other positive recruitment requirement methods included in the Final Rule are intended to reach such workers. It is not at all clear how H-2ALCs would even gain access to the necessary contact information for former employees of other employers, and in the judgment of the Department such a requirement would be excessively burdensome.

One association of growers/producers suggested the proposed rule be modified to allow employers the ability to deny work to employees hired in previous years who demonstrated an unsatisfactory work history/ethnic even if the worker was not terminated for cause. A trade association and other commenters expressed concern about former employees who were the subject of no-match letters from the Social Security Administration and requested a safe harbor or common sense exception in such situations.

The Department appreciates that employers that do not participate in the H-2A program generally are not required to rehire employees who have a poor work history. The Department also appreciates that employers frequently may allow short-term workers who prove to be poor performers to finish their job terms if it is easier and, in light of potential litigation risks, less costly than firing them. There is a countervailing concern, however, that if the Department allowed employers to reject former workers who completed their previous job term on the alleged ground that the workers were actually poor performers, it would open the door for bad actor employers to reject former workers on the basis of essentially pretextual excuses. The Department has therefore decided to address employers’ concerns about poorly performing workers by creating an exception allowing employers not to contact certain poor performers, but only in the narrow circumstance where the employer provided the departing employee at the end of the employee’s last job with a written explanation of the lawful, job-related reasons for which the employer intends not to contact the worker during the next employment season. The employer must retain a copy of the documentation provided to

the worker for a period of 3 years, and must make the documentation available to the Department upon request. The Department will review the propriety of the employer’s non-contact in such situations on a case-by-case basis. The Department believes that the insertion of this provision is responsive to the comment in that it relieves employers from the burden of being required to rehire truly poorly performing workers, while ensuring that workers who will not be recontacted are aware of the employer’s intentions and reasons well in advance of the next employment season and have the opportunity to bring reasons they regard as pretextual to the Department’s attention.

With respect to the comment about no-match letters, we note that employers are not required to hire a worker who cannot demonstrate legal eligibility to work. Receipt of a no-match letter may give rise to a duty on the employer’s part to inquire about work eligibility, but the letter in and of itself is not sufficient legal justification to refuse to hire a U.S. worker.

One trade association expressed concern about the related requirement for documenting contact with former employees and stated, “This requirement could reasonably be interpreted to mean that the employer must maintain a copy of its correspondence with each former employee demonstrating that it had been mailed. The only practical way to do this would be to send each letter by certified mail or some other means providing evidence of attempt to deliver. Such a requirement would be unnecessarily burdensome and costly.” The association recommended this be simplified by requiring the employer to keep a copy of the form of the letter sent and a statement attesting to the date on which it was sent and to whom. Additionally, the association questioned what kind of documentation would demonstrate that the employee “was non-responsive to the employer’s request.” The association suggested the employer’s recruitment report should be sufficient to document which employees were responsive and requiring documentation of non-responsiveness is unreasonable.

The Department does not intend this requirement to be overly burdensome to employers and agrees that copies of form letters together with the employer’s attestation that the letters were mailed to a list of former employees would be sufficient to meet the requirements of this provision. The Department also agrees that the recruitment report can be used to sufficiently document the non-

responsiveness of former employees. The Department inserted language into the Final Rule clarifying the Department’s expectations regarding the type of documentation that should be maintained.

(i) Section 655.102(i) Additional Positive Recruitment

(1) Designation of Traditional or Expected Labor Supply States

In the NPRM, the Department continued to impose on employers the requirement that the employer make “positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed,” as mandated by 8 U.S.C. 1188(b)(4). The Department proposed that each year the Secretary would make a determination with respect to each State in which employers sought to hire H-2A workers whether there are other States in which there a significant number of eligible, able and qualified workers who, if recruited, would be willing to make themselves available for work in that State. The Department also proposed to continue the current regulatory provision stating that the Secretary will not designate a State as a State of traditional or expected labor supply if that State had a significant number of local employers recruiting for U.S. workers for the same types of occupations. The Department proposed to publish an annual determination of labor supply States to enable applicable employers to conduct recruitment in those labor supply States prior to filing their application. The Department received several comments on this provision.

A group of farmworker advocacy organizations opined that the Department’s proposal contravenes the H-2A statutory requirements regarding positive recruitment. The organization believes the Department’s proposal will result in employers not competing with one another for migrant workers and workers not receiving job information even though a particular job in another State may offer a longer season, a higher wage, or better work environment. Another farmworker advocacy organization commented that it makes no sense in a market economy which recognizes competition as good to stop requiring employers to recruit for farmworkers in areas where other employers are seeking farmworkers. A labor organization commented that this

provision demonstrates a lack of understanding of farmworker recruitment and what it believes is an inappropriate desire to ease the recruitment obligations for growers at the expense of U.S. farmworkers. This organization recommended the current positive recruitment rules should be retained and enforced. A U.S. Senator was concerned that the NPRM would cost American workers jobs because they would not have access to information about jobs in other areas.

Employers seeking farmworkers are statutorily required to recruit out-of-State if the Secretary has determined that other States contain a significant number of workers who, if recruited, would be willing to pick up and move in order to perform the work advertised in accordance with all of its specifications. The commenters referenced above appear to believe that the Department's proposal is a new regulatory provision. That is incorrect. The current regulations at 20 CFR 655.105(a), which have been in place for 20 years, specify that Administrator, OFLC should "attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations." This longstanding provision reflects two judgments on the part of the Department. First, it reflects the Department's reading that 8 U.S.C. 1188(b)(4) was intended to require out-of-State advertising only in areas with a surplus labor supply, and was not intended to deleteriously impact farmers in certain areas by instituting federal program requirements that would draw away their local workers. Second, it reflects the Department's judgment that where a "significant" number of local employers are already recruiting U.S. workers in a given area for the same types of occupations, there is already significant competition for workers in that area and the addition of further out-of-State advertising would likely be futile. The Department's program experience in applying this limitation over a long period of time leads it to believe that it has worked well in practice to aid program administration and avoid the imposition of unnecessary program expense. The Department notes that this limitation does not mean that out-of-state recruitment will cease in States where workers are being locally recruited, since SWAs will continue to have discretion to post job orders in those States where appropriate.

Several commenters sought more information on the methodology that would be used in making the

determinations about labor supply States. A group of farmworker/community advocacy organizations voiced its concern that "The annual survey is flawed in many respects and not designed to identify sources of labor at the time of need." The organization was also concerned about the timing and specificity of the survey to be used. A representative of a State Workforce Agency requested additional information about the designation of labor supply States for the logging industry in her State. A trade association commented that "the same types of occupations" should mean something more than merely agricultural work. An individual commenter believed that just because an employer in a State may request H-2A workers for a certain crop activity for a certain time period should not mean that State should not be considered a labor supply State for other crop activities and time periods.

The Department has addressed many of these concerns by modifying the provision to allow for notice to be published in the **Federal Register** at least 120 days before the announcement of the annual determination, allowing anyone to provide the Department with information they believe will assist the Secretary in making her determination about labor supply states. The Department will consider all timely submissions made in response to this notice. In addition to the information presented by the public, the Department expects that it will continue to consult SWAs, farmworker organizations, agricultural employers and employer associations, and other appropriate interested entities. As discussed above, the "same types of occupations" language in the Final Rule has been carried over from the current regulations, and the Department intends to apply the term in the same manner that it has in the past. The Department agrees that the phrase is not intended to lump all agricultural work together as the "same type of occupation."

#### (2) Required Out-of-State Advertising

The Department proposed that each employer would be required to engage in positive recruitment efforts in any State designated as a labor supply State for the State in which the employer's work would be performed. This recruitment obligation would consist of one newspaper advertisement in each designated State.

Several commenters felt the newspaper advertisement requirements were too burdensome on employers and that the additional time and expense of recruiting in traditional or expected

labor supply States should be borne by the Department rather than the employer. An association of growers/producers recommended that the regulation only require SWAs to send the job orders to those States designated as labor supply States as they do now. A United States Senator recommended that after the employer has satisfied the intrastate recruitment requirements and has attested that insufficient domestic workers are available, the burden of proof that U.S. workers are unavailable should shift to the Department.

The Department does not consider a requirement to place a single out-of-state advertisement in each designated labor supply state to be unjustifiably onerous on employers and is of the opinion at this time that the potential benefit to be gained in locating eligible and available U.S. workers outweighs the costs of the advertising. This is required in the current program and the Department has received little negative feedback on the burden of such advertising. The Department does not agree that this is an expense the Department should bear, beyond the expense of the interstate agricultural clearance system that the Department already finances. The INA at sec. 218(b)(4) is clear that it is an employer who must engage in such out-of-state positive recruitment, not the Department.

Several associations of growers/producers commented that placing newspaper advertisements should be limited to no more than three States, to avoid the possibility that the Department could require recruitment in 50 States and the additional territories because the language in the companion recruitment provision for SWAs at § 655.102(f) reads "no fewer than 3 States." A United States Senator also endorsed a limit on the number of States in which an employer is required to recruit and suggested the Department should provide a means of indemnifying employers from liability associated with mandatory out-of-State advertising.

The Department anticipates the number of States to be so designated will be no more than three for any one State, but that the number of States designated will vary by State. In some cases, no State or only one or two States may meet the relevant criteria. In response to these comments, the Department has added to the Final Rule language specifying that "[a]n employer will not be required to conduct positive recruitment in more than three States designated in accordance with paragraph (i)(1) for each area of intended employment listed on the employer's application." This is

generally consistent with past practice concerning required out-of-State recruitment, as employers have only very rarely been required to conduct advertising in more than three States of traditional or expected labor supply. Providing this modest cap will provide employers with needed certainty regarding expected advertising costs.

A farmworker advocacy organization believed the requirement should be for three advertisements, not one, in each designated State and also recommended that the Department require that the language predominant among agricultural workers in the region be used. A representative of a State government agency commented that the proposed regulations were not clear as to how an employer's ad in another State would be handled. The individual commented that the advertising instructions indicate interested applicants should contact the SWA, but asserted that this procedure would not work well for an ad placed out of State and recommended the ads placed out of State should advise applicants to contact the employer directly. Another commenter recommended the newspaper ads in other States should direct all applicants to the SWA and the SWA should then refer them to the employer's SWA. An association of growers/producers recommended the required newspaper advertisements should contain only the job specifications and the SWA contact information.

The Department agrees that more clarity on the mechanics of out-of-state recruitment is appropriate. The Department has added language to the regulation to clarify that one advertisement is to be placed in each State identified for the area of intended employment as a traditional or expected labor supply State. The Department declines to require more than one ad in each State, which would be a significant departure from the advertising requirements under the current regulations and would add additional program expense. In response to comments, and out of recognition that employers often will not be well-versed in the characteristics of out-of-State newspapers, the Department has included language in the Final Rule specifying that its annual **Federal Register** notice will not only announce the designation of labor supply States, but will also specify the acceptable newspapers in the designated States that employers may utilize for their required out-of-State advertisements. In no case will an employer be required to place an ad in more than one newspaper in a labor supply State. In response to

comments, the Final Rule has also been modified to specify that ads should refer interested employees to the SWA nearest the area in which the advertisement was placed. The SWA will then refer eligible individuals to the SWA of the employer's State. The Department believes these procedures will provide a workable advertisement-and-referral system to provide farmworkers information about available jobs and to supply needed labor to prospective users of the H-2A program.

(j) Section 655.102(j) Referrals of Verified Eligible U.S. Workers

The Department proposed to require SWAs to "refer for employment only those individuals whom they have verified through the completion of a Form I-9 are eligible U.S. workers." These provisions are consistent with the Department's statutory mandate. Although the INA prohibits the referral of workers where it is known that they are unauthorized to work in the United States, this rule clarifies and spells out the Department's expectations. Based upon comments received and the Department's experience with this requirement, which has been in effect administratively since the issuance of TEGL 11-07, Change 1 on November 14, 2007, and with respect to which ETA has provided recent training webinars for SWAs, the Department believes that SWAs should be required to verify the identity and employment authorization of referred workers by completing USCIS Form I-9 in accordance with DHS regulations at 8 CFR 274a.2 and 274a.6. The NPRM, ETA's written guidance, and an opinion by the Solicitor of Labor, all of which have been shared with SWAs over the past year, explain both the rationale for the SWA verification requirement.

Comments on this subject were received from a national association representing state agencies, 12 individual SWAs, several civil rights and labor advocacy organizations, members of Congress, and numerous employer groups and individual employers. Commenters supporting the proposal generally cited the longstanding need for a reliable employment service system that is based on affirmative verification and refers only workers who are authorized to work in the U.S. Commenters opposing the proposal raised a variety of legal, programmatic, resource-related, and policy-based concerns.

Many commenters considered the employment verification requirement to be a change in policy after decades of contrary Departmental interpretation.

Another argued that the requirement runs afoul of the Department's FY08 Appropriations Act, Public Law 110-161, Division G, Title I, Section 110, in which Congress prohibited ETA from finalizing or implementing any rule under the Wagner-Peyser or Trade Assistance Acts until each is reauthorized.

The Department has always required that SWAs fulfill the requirements of the INA to refer only eligible workers by verifying their employment authorization. Recent instructions by the Department (including TEGL 11-07, Change 1) have clarified the way that employment verification is required to be accomplished. To the extent that these requirements were thought by some to represent a shift in Departmental policy, they are now being clearly stated in the Department's regulations. The Department has not reviewed the H-2A regulations comprehensively since the current program's inception in 1986. After a top-to-bottom review of the program requested by the President in August 2007, the Department is revising and modifying a number of established practices based on program experience, years of feedback from stakeholders, and changing economic conditions.

As discussed in the NPRM our clarification of SWAs' obligation to affirmatively verify employment eligibility is in direct response to longstanding concerns about the reliability of SWA referrals. The referral of workers not authorized to work undermines the integrity of the H-2A program, can harm U.S. workers, and can disrupt business operations.

Many commenters argued that the requirement is inconsistent with INA provisions at 8 U.S.C. 1324a, and DHS regulations at 8 CFR 274a.6, which permit but do not require SWAs to verify employment eligibility for individuals they refer. The USCIS regulations expressly permit SWAs to verify the identity and employment authorization of workers before making referrals, and certainly do not prohibit such verification. See 8 CFR 274a.6. The Acting General Counsel of DHS has issued an interpretive letter stating that while the USCIS regulations do not require SWAs to verify the eligibility of workers before referring them, those regulations do not prevent other agencies with independent authority from imposing such a requirement. See November 6, 2007 letter from Gus P. Coldebella, DHS Acting General Counsel, to Gregory F. Jacob, Senior Advisor to the Secretary of Labor. The Department is now exercising its independent statutory authority under

the INA to require through regulation that SWAs verify employment eligibility of referrals. Further, to ensure that the regulated community has appropriate notice of the specific requirement, and to ensure a standard process for verification remains in place consistent with the procedures already approved by Congress, we have clarified in the regulatory text that states must at a minimum use the I-9 process for purposes of verification. The Department also strongly suggests (but does not require), as it did in the NPRM, that States utilize the DHS-administered E-Verify system. State agencies with procedures that do not comply with the minimum requirements of the Form I-9, however, such as verification through scanned documents transmitted over the Internet, must revise their processes to ensure that agricultural referrals are made only as a result of in-person verification.

The INA requires that employers execute a Form I-9 for all new employees. Some commenters interpreted the NPRM to shift this employer responsibility to SWAs. A subset of these commenters raised concern that removing responsibility for verification from agricultural employers alone would be unfair to other, non-agricultural employers who would still be required to complete the Form I-9 form.

This Final Rule does not govern employment eligibility verification, nor does it seek to change, for purposes of H-2A labor certification, the basic responsibility of employers under the INA. As we strongly cautioned in the NPRM, a SWA's responsibility to perform threshold, pre-referral verification exists separate from an employer's independent obligation under the Immigration Reform and Control Act of 1986 to verify the identity and employment authorization of every worker to whom it has extended a job offer. However, the governing statute does permit employers to rely on an employment verification conducted by the SWA to fulfill their statutory responsibilities. The INA—at sec. 274A(a)(5)—exempts employers from the verification requirement and provides a “safe harbor” from legal liability to employers, regardless of industry, who unwittingly hire an unauthorized worker where the hire is based on a SWA referral made in compliance with 8 CFR 274a.6, requiring appropriate documentation from the SWA certifying that verification has taken place. As discussed more fully below, the Department requires in this Final Rule that SWAs provide documentation

meeting the requirements of sec. 274A(a)(5) of the INA and 8 CFR 274a.6 to each employer at the time the SWA refers the verified worker to the employer. Employers must retain a copy of the SWA certificate of verification just as it would retain a copy of Form I-9. Employers must still verify employment eligibility for workers who do not have a state certification that complies with all of the applicable statutory and regulatory requirements.

Some commenters were concerned that employers who hire SWA-referred workers may seek to hold SWAs responsible for referring unauthorized workers. The Department expects that any referrals a SWA makes to individual employers will comply with the requirements of Federal law, including those established in this Final Rule. For example, the preamble to the proposed rule directs SWAs to provide all referred employees with adequate documentation that verification of their employment has taken place, and clarifies that employers may invoke “safe harbor” protection only where the documentation complies with all statutory and regulatory requirements. We have clarified in the Final Rule the SWA's obligation to complete Form I-9 and provide evidence of such completion by providing the employer with a certification that complies with the DHS requirements for such certificate at 8 CFR 274a.6. However, employers have no obligation to hire a job applicant, whether or not referred by the SWA, who does not present the employer with appropriate documentation evidencing the applicant's work eligibility. As stated in the NPRM, an employer will not be penalized by the Department for turning away applicants who are not authorized to work. Additionally, as long as a SWA complies with the process established by DHS for State Workforce Agencies and undertakes good faith efforts to establish the employment eligibility of referred workers, it will not incur any potential liability. Although the Department certainly intends to hold SWAs responsible for complying with all program requirements, just as it has in the past, the Department is not aware of any basis under which SWAs could be held liable to third parties for failing to properly perform their employment verification responsibilities in the absence of willful or malicious conduct.

Many commenters raised a concern that these new procedures would have an unlawful, disparate impact on a protected class, or at least make states vulnerable to legal claims of disparate impact that would require the expenditure of significant resources to

defend. More specifically, these commenters felt that to the extent the verification process is not applied to non-agricultural workers, it would have a disparate impact on agricultural workers, many of whom are Hispanic, and that could be perceived as unlawful discrimination on the basis of race or ethnicity. Some commenters were concerned that states would be forced to expend significant resources to defend lawsuits or, alternatively, that in order to protect against lawsuits, would be forced to apply the verification procedures to all job referrals.

The requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. The eligibility requirement is established by statute and is similar to verification requirements to gain access to other similar public benefits. *See, e.g.,* Section 432, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, 110 Stat. 2105 (employment eligibility verification requirement for most federal public benefits for needy families). As this regulation governs the H-2A foreign labor certification program, the clarification made here is limited to that program and to agricultural job referrals, but the Department proposed an analogous provision in the H-2B NPRM published on May 22, 2008, seeking to extend the same procedural employment verification requirements to that program. More generally, the clarification of the requirement in this regulation does not mean the Department's policy is limited only to agricultural referrals, as the Department's expectation is that SWAs will do what they can, including exercising their authority under 8 U.S.C. 1324a, to avoid expending public resources to refer unauthorized workers to any job opportunities, regardless of program area. The employment verification provisions included in this regulation are part of a much broader, concerted effort—one that includes regulation, written guidance, and outreach and education—to address longstanding weaknesses in the system and to strengthen the integrity of foreign labor certification activities.

Some commenters opined that the employment eligibility verification requirement presents an obstacle to employment for, and will reduce the pool of, the U.S. workers it is designed to protect. For example, these commenters stated that States are increasingly moving toward web-based employment services. The commenters believe an in-person verification requirement will require potentially

onerous visits by job seekers who they believe currently could be referred to work without ever visiting a workforce center. The commenters stated that, especially in the larger States, this will present a greater and perhaps insurmountable hurdle for a larger number of U.S. workers, who will be discouraged from travelling great distances to obtain a job referral.

In practice, an in-person verification requirement will not significantly change the operation of referrals in most States. In the Department's program experience, States often require that agricultural job applicants visit the workforce center to receive information on the terms and conditions of the job, which must be provided prior to referral. *See* 20 CFR 653.501(f) (placement of the form within local offices). While we do not disagree that an in-person verification requirement may impact the decisions of a limited number of otherwise eligible workers, at this juncture the impact is speculative and does not outweigh the significant value of verification. Moreover, it is a problem that SWAs may be able to adjust to by designating or creating additional in-person locations where eligibility can be verified. This is not a problem unique to SWAs given that workers often must travel great distances to reach a prospective employer, who then (absent a SWA certification) would be required to verify work eligibility. Although employment eligibility verification does require some amount of time and effort, Congress has determined that simple convenience must cede to the overarching goal of achieving a legal workforce and the Department has drafted its regulations accordingly.

Commenters opposing the eligibility provision uniformly complained that the verification requirement would add potentially significant workload and strain the already inadequate resources of many State Workforce Agencies. Many saw it as an unfunded federal mandate in violation of the Unfunded Mandates Reform Act. More than one referred to the Department's recent inclusion of the requirement as a condition for receiving further labor certification grant funding.

As stated in the preamble to the NPRM, the Department is not insensitive to the resource constraints facing state agencies in their administration of the H-2A program. However, as we stated in the NPRM, we do not believe that the requirement will result in a significant increase in workload or administrative burden. We have provided training to SWAs to meet

their obligations in this context and will continue to do so.

In addition, notwithstanding funding limitations, there is a strong, longstanding need for a consistent and uniform verification requirement at the state government level. Verification is a statutory responsibility of the Department and the SWAs under the INA and the Wagner-Peyser Act, and the Department has further determined employment verification is a logical and necessary condition for the issuance of foreign labor certification grants to states. Precisely to ensure that available federal funding supports verification activities, the Department has added the verification requirement as an allowable cost under the foreign labor certification grant agreement. While cognizant of the challenges posed by funding limitations, we expect states to comply as they do with other regulatory requirements and other terms and conditions of their grant.

Commenters raised a number of concerns with the use of E-Verify, including potential system problems, delays and inaccuracies. The Department strongly encourages state agencies to use the system, which provides an additional layer of accuracy and security over and above the basic I-9 process, but it has not mandated use of E-Verify. SWAs can comply with this Final Rule without the use of E-Verify.

One commenter pointed out that the regulation does not describe the penalties to SWAs for non-compliance or delayed compliance with this requirement, or the implications for H-2A employers who may seek services from SWAs that are not in compliance with the requirement. For instance, the commenter inquired whether, if the Department were to suspend Foreign Labor Certification grant funding, employers would be required to accept referrals funded exclusively by Wagner-Peyser funding. The commenter also inquired whether the SWA in an employer's state would be required to verify the work eligibility of a worker that was referred to it by a non-compliant out-of-State SWA. As the verification requirement is implemented, the Department's guidance will evolve in response to the experience of the regulated community and our own. We do note that these problems already exist under the Department's current regulations and policies, and the Department is working through them as they arise. The problems are substantially alleviated by the fact that virtually every State and territory administering the H-2A program has already agreed to come into compliance with the employment

eligibility verification requirements established by current Departmental policies, minimizing the chance that a State will need to be de-funded due to non-compliance or that non-compliant referrals will be made by out-of-State SWAs. Nevertheless, we do not discount the importance of the questions posed by the commenter, but see them as issues of implementation that should be addressed, as they arise, through appropriate guidance.

In addition, we note that the SWA may not refuse to make a referral and the employer may not refuse to accept a referral because of an E-Verify tentative nonconfirmation (TNC), unless the job seeker decides not to contest the TNC. SWAs and employers may not take any adverse action, such as delaying a referral or start date, against a job seeker or referred worker based on the fact that E-Verify may not yet have generated a final confirmation of employment eligibility.

#### (k) Section 655.102(k) Recruitment Report

The Department proposed requiring employers to submit an initial recruitment report with their applications and to supplement that report with a final recruitment report documenting all recruitment activities related to the job opportunity that took place subsequent to the filing of the application. The Department proposed that the initial recruitment report to be filed with the application be prepared not more than 60 days before the date of need, and that the supplemental, final report be completed within 48 hours of the date H-2A workers depart for the worksite or 3 days prior to the date of need, whichever is later. Many individuals and members of agricultural associations expressed concern that recruitment reports will not simplify the application process and will instead inflict an undue burden on employees of small farms. Some agricultural associations argued that having two recruitment reports will double the work for employers and stated that the supplemental report is not justified because of its limited utility in resolving compliance issues.

The Department disagrees that a supplemental recruitment report will have limited benefit, given the Department's intended use of supplemental reports in the event of an audit. The supplemental recruitment report will provide assurance to the Department that an employer has complied with all of its obligations with respect to the domestic workforce. Compliance throughout the program, including after filing of an application,

is necessary for the appropriate enforcement of the H-2A program and its requirements. By requiring a supplemental report, the Department is not requiring a duplicative effort but is in fact effectively requiring employers to split the current comprehensive total report (of all referrals that are required to be reported) into two smaller, more manageable reports. The Department does not believe that this splitting of the comprehensive total report will require significantly more effort on the part of employers.

Several commenters specifically mentioned the timing of the recruitment report as the biggest problem with the requirement. One farm association noted that since the initial application cannot be submitted without the recruitment report, and the recruitment report must be prepared not more than 60 days prior to the date of need, the application itself cannot be filed until 60 days ahead of time. In order to rectify this issue, the commenter believed the application itself should be required to be filed not more than 60 days prior to the date of need. Another farm association suggested that the timeline for the recruitment report be moved up to no later than 45 days before the date of need, rather than 60 days before the date of need. The Department also received comments in support of the supplemental recruitment reports.

The Department has learned through experience that if recruitment is begun no more than 45 days before the date of need, it is virtually impossible for the Department to receive an adequate recruitment report by the time it is statutorily required to make a certification determination 30 days before the date of need. As discussed above, we have in response to comments amended the timeframe for pre-filing recruitment to reflect a recruitment period closer to the date the workers are needed. In addition, in accordance with the revisions to the time frame specified in § 655.102(e) for submitting job orders, the original proposal regarding the timing of the filing of recruitment reports has been revised in the Final Rule and now provides that the initial recruitment report may not be prepared more than 50 days prior to the employer's date of need. The Final Rule also revises the proposed timing for the completion of the supplemental recruitment report, and now requires the employer to update the recruitment report within 2 business days following the last date that the employer is required to accept referrals; that is, the end of the recruitment period as specified in § 655.102(f)(3). With respect to

employers who wish to file an *Application for Temporary Employment Certification* prior to 50 days before the date of need, they are welcome to do so to initiate processing of the application, but the application will not be considered to be complete, and thus eligible for a final determination, until the initial recruitment report is submitted.

Finally, the Department has made additional clarifying edits to the regulatory text. These edits are to ensure this provision comports with other sections of this Final Rule, to improve readability, and to clarify its requirements. These include the deletion of the redundant phrase "who applied or was referred to the job opportunity" which appeared twice in the NPRM paragraph (k)(2) (which is now (k)(1)(iii)); simplifying the reference to the contents of the supplemental recruitment report through the use of cross-references; and placing the paragraph regarding the updating of recruitment reports before the paragraph regarding document retention requirements. In addition, the Department has added a requirement that the recruitment report must contain the original number of openings advertised. This last addition will enable the Department to grant an employer a partial certification in the event it can meet part but not all of its need through the recruitment of U.S. workers.

#### Section 655.103 Advertising Requirements

The Department proposed detailed instructions for the content of the newspaper advertisements to be placed by employers as part of the required pre-filing recruitment in § 655.103. A few comments were received on the specific contents of the ads. Other comments regarding the rule's advertising requirements are discussed in the section of the preamble pertaining to § 655.102(g).

An association of growers/producers commented that the advertising requirements are inefficient and wasteful, particularly when "numerous virtually identical ads are appearing at the same time." Another association suggested that employers be allowed to advertise jobs by simply referencing the job order placed with the SWA, and suggested that employers should not be required to include all of the detailed information contained in the proposed regulation. Another association suggested that if more than one grower is simultaneously recruiting in an area covered by only one newspaper, their ads should be combined and placed by

the SWA. The association suggested that the names of the growers could all be provided in the ad, but applicants would be directed to the SWA to get additional information about the jobs and referrals to the employers.

The Department has considered but declines to adopt these suggestions at this time. The Final Rule significantly clarifies the H-2A advertising requirements. The Department believes that it has struck a careful and appropriate balance, based on its program experience, between the expense of advertising to employers and workers' need for basic job information when considering whether to pursue advertised employment opportunities.

The Final Rule contains several clarifying and conforming changes to the proposed text for § 655.103, none of which are substantive. The Final Rule also paraphrases in § 655.103 the equal treatment requirement already stated in § 655.104(a). Section 655.103 requires that an employer's recruitment "must contain terms and conditions of employment which are not less favorable than those that will be offered to the H-2A workers."

#### Section 655.104 Contents of Job Offers

##### (a) Section 655.104(a) Preferential Treatment of Aliens

The Department's proposed regulation stated: "The employer's job offer shall offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." A group of farmworker advocacy organizations opposed the removal of the words "U.S. worker" from this section of the rule. This commenter believes that the proposed wording allows employers to treat U.S. workers less favorably than H-2A workers.

While the Department does not agree that the new wording would have allowed employers to treat U.S. workers any less favorably than H-2A workers, the words "U.S. worker" have been reinserted.

##### (b) Section 655.104(b) No Less Than Minimum Offered

The NPRM proposed that the "job duties and requirements specified in the job offer shall be consistent with the normal and accepted duties and requirements of non-H2A employers in the same or comparable occupations and crops in the area of intended employment and shall not require a combination of duties not normal to the occupation." Several commenters expressed concern that the proposed requirements would prove unworkable,

unadministrable, and exceedingly difficult for employers to comply with, as what is “normal” and “accepted” are substantially subjective determinations. All of the commenters who provided input on this provision suggested that the Department should not second guess an employer’s business decision regarding an occupation’s job duties when they are unique to that employer. These commenters believe that the Department’s proposal would give the Department more discretion to deny an application than is contemplated by the statute.

The Department agrees with the basic thrust of these comments. Section 218(c)(3)(A) of the INA requires the Department, when determining whether an employer’s asserted job qualifications are appropriate, to apply “the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.” There is a substantial difference, however, between job duties and job qualifications; job qualifications typically describe the minimum skills and experience that an employee must have to secure a job, while job duties describe the tasks that qualified workers are expected to perform. The Department agrees that, as a general matter, employers are in a far better position than the Department to assess what job duties workers at a particular establishment in a particular area can reasonably be required to perform in an H-2A eligible position.

The Department is therefore altering this provision to conform more closely to the language of the statute, and is limiting the restriction in § 655.104(b) to job qualifications. The Department is aware that this may mean that at times a U.S. worker wishing to perform one type of job duty, such as picking asparagus, may be required by an employer to perform an additional job duty, such as harvesting tobacco, in order to secure an agricultural job. It is not at all uncommon, however, for jobs in the United States to include multiple job duties, some of which workers may view as more desirable than others. There is nothing in the statute governing the H-2A program indicating that Congress intended to require agricultural employers to allow prospective workers to selectively choose which job duties they want to perform and which job duties they do not, with regard to a particular job opportunity. In the Final Rule, this provision states that “[e]ach job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by employers that do not use

H-2A workers in the same or comparable occupations and crops.”

The Department is sensitive, however, that in certain circumstances a listed job duty may act as a de facto job qualification, because the listed duty requires skills or experience that agricultural workers may not typically possess. When such circumstances arise, the Department reserves the right to treat the listed job duty as a job qualification, and to apply the “normal” and “accepted” standard that is set forth in the statute and restated in the regulations in determining whether the qualification is appropriate.

One commenter suggested that this provision should be made consistent with those in the PERM regulations at 20 CFR 656.17. The Department declines to apply the PERM standard to the H-2A program, as that standard is based on a substantially different statutory structure. The Department is confident that the revised standard for § 655.104(b) that is set forth in the Final Rule, which hews closely to the language of sec. 218(c)(3)(A) of the INA, is appropriately tailored to the H-2A program and will prove workable in practice.

#### (c) Section 655.104(c) Minimum Benefits

A group of farmworker advocacy organizations pointed out that proposed § 655.104 does not correlate exactly to current § 655.102(b). Specifically, in this commenter’s opinion the proposed section does not require the employer to pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period as required in the current regulation. According to this commenter, under the proposed rule, H-2A workers would have only contract law as their primary enforcement tool. With proposed § 655.104(c) stating that every job offer must include the wage provisions listed in paragraphs (d) through (i) of this section but no longer requiring precisely what the current § 655.102(b)(9)(i) requires, this commenter argued that workers will be left at a disadvantage if the employer fails to specify the required wage provisions in the work contract.

The Department appreciates this commenter’s analysis. However, we do not agree that the employer will no longer be bound to pay the employee the wage promised, nor that the only enforcement tool available is through contract law. Under the new program

the employer’s attestation required under § 655.105(g) is an enforceable program requirement. The failure of an employer to comply with any program requirement subjects the employer to the Department’s enforcement regime.

A commenter pointed out the illogical consequences of rigid rules governing wages for agricultural workers. It is the commenter’s contention that the Department should add a phrase at the end of § 655.104(c) that would not force employers to pay the NPC prescribed wage until the date of need and instead would allow employers to pay U.S. workers a mutually agreed upon wage between the time they recruit the workers and the date the H-2A workers are needed in order to train the U.S. worker and retain them until and throughout the period of the H-2A contract. The commenter reports that if they do not offer those U.S. workers employment immediately, they will most likely not be available when the H-2A work begins. The commenter believes that any employment prior to the date of need and prior to the date that foreign H-2A workers arrive should not be governed by the H-2A contract or its wage provisions.

The Department agrees that the H-2A required wage takes effect on the effective start date of the H-2A contract period. However, the Department does not believe that any changes to the regulatory text need to be made under this section because § 655.105(g) provides that the requirement to pay the offered wage applies only during the valid period of the approved labor certification. U.S. workers who are hired in response to H-2A recruitment and who perform work for an employer before the date of need specified in the H-2A labor certification are not required by these regulations (but may be required by contract) to be paid the H-2A wage until the period of the H-2A contract begins, without regard to the type of work performed.

A group of farmworker advocacy organizations argued that under the proposed rule, employers would no longer be required to disclose in job offers their obligation to provide housing to workers. That is incorrect. Section 655.104(c) provides that “[e]very job offer accompanying an H-2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.” Paragraph (d) of that section provides, in turn, that “[t]he employer must provide housing at no cost to the worker, except for those U.S. workers who are reasonably able to return to

their permanent residence at the end of the work day.”

(d) Section 655.104(d) Housing

Section 218(c)(4) of the INA requires employers to furnish housing in accordance with specific regulations. The employer may fulfill this obligation by providing housing which meets the applicable Federal standards for temporary labor camps or providing housing which meets the local standards for rental and/or public accommodations or other substantially similar class of housing. In the absence of local standards, the rental and/or public accommodations or other substantially similar class of housing must meet State standards, and in the absence of State standards, such housing must meet Federal temporary labor camp standards. By statute, the determination of whether employer-provided housing meets the applicable standards must be made no later than 30 days before the date of need. The Department proposed three changes to the current housing requirements.

First, the Department proposed allowing employers to request housing inspections no more than 75 and no fewer than 60 days before the date of need. The Department further proposed that the NPC would, as required by statute, make determinations on H-2A applications 30 days before the employer's date of need, even if the housing referenced in the application had not yet been physically inspected by the SWA, so long as (1) the employer requested a housing inspection within the time frame specified by the regulations and (2) the SWA failed to conduct the inspection for reasons beyond the employer's control. Under the Department's proposal, SWAs would have the authority and the responsibility under such circumstances to conduct post-certification housing inspections prior to or during occupancy. If such a post-certification housing inspection identified deficiencies that the employer failed to act promptly to correct, the proposal provided that the SWA would inform the NPC of the deficiencies in writing so that the NPC could take appropriate corrective action, potentially including revocation of the labor certification. The Department proposed these changes in part to alleviate the problems SWAs currently face in trying to conduct large numbers of required housing inspections during the short 15-day window provided by the statute between the time that applications are required to be filed (45 days before the date of need) and the time that the Department is required to make a

determination on the application (30 days before the date of need). The changes were also intended to avoid penalizing employers for the failure of SWAs to comply with their legal duty to meet the timeframes established by the statute.

The Department heard from a number of SWAs on the issue of timely housing inspections, many of which declared their ability to conduct housing inspections within the 15-day window. One SWA acknowledged that at times delays may occur in conducting housing inspections, but attributed those delays to incomplete or inaccurate information being provided to inspectors. This SWA suggested that providing a copy of the job order with the housing inspection request would alleviate the problem of inspectors investigating the wrong housing. Finally, an anonymous commenter tied the delays in housing inspections to a lack of funding at the state level.

The Department recognizes that many SWAs conduct housing inspections in advance of the statutory deadline of 30 days before the date of need, but cannot ignore the fact that SWA delays in conducting housing inspection have in many instances resulted in labor certification determinations being made by the Department outside of the statutorily required timeframes. This result is not acceptable to the Department or to employers seeking H-2A certification. As one employer commenter stated:

[u]ntimely housing inspections are one of the most common reasons for delays in making labor certification determinations. Therefore, the provision in the proposed regulations for making a pre-application housing inspection, and the provision that certification will not be delayed if a timely housing inspection is not made, and that occupancy of the housing is permitted, are important improvements in the program.

While employers and employer associations favored the proposed conditional labor certifications, several commenters representing employer interests had concerns with the proposed requirement that housing inspections be requested no fewer than 60 days before the date of need. Employers stated that in some parts of the U.S., housing may still be winterized 60 days before the date of need and therefore may be unavailable for inspection, or unable to pass inspection. In certain areas, inspection agencies require that the employer rent the housing before an inspection is conducted and the earlier time frame for requesting an inspection requires employers to pay an additional month or two of rent for the housing,

substantially adding to the cost of providing housing. Other growers stated that current inspection procedures prohibit the inspection of occupied housing and therefore this proposal would require that regulations be adjusted to permit inspection of occupied housing. Some said that the earlier time frame for requesting housing inspections may be before many farmers plant their crops, let alone know the dates of the harvest.

Commenters representing employer interests also included questions concerning implementation of the proposal. Many argued that employers should be provided a specific and reasonable period of time for abatement of violations found in post-determination inspections conducted by SWAs, and that employers who correct violations within the specified period should not be penalized for the violations. One employer association argued that “the fact that employers continue to face consequences for having deficient housing will prevent any adverse effects for workers.” Employers also questioned the proposed requirement that housing inspection requests be made in writing, and some employers recommended that the Department provide training to SWA staff on conducting housing inspections of occupied housing. Finally, one employer commented that in the state in which he operates, the state's Department of Health conducts inspections of temporary labor camps and that to require SWAs to conduct these inspections would result in confusion.

Employee advocacy organizations and state agencies expressed concern that the granting of pre-inspection labor certification determinations could potentially result in cases where housing is not inspected prior to occupancy, which in turn could result in workers being housed in substandard conditions. Several commenters objected to this proposed revision stating that pre-occupancy housing inspections are an effective incentive for employers to take corrective action, thus ensuring that workers are housed in safe and sanitary housing. Other commenters urged the Department to continue the requirement that housing be inspected before workers arrive.

A few comments from both organizations representing employer interests and from organizations representing employee interests questioned the Department's legal authority to establish a requirement that housing inspections be requested more than 45 days before the date of need, which is the earliest date that the

Department may under the statute require applications to be filed. One commenter asserted that the proposed changes contradict the Department's Wagner-Peyser regulations requiring that the housing be inspected to determine compliance with applicable housing safety and health standards before a job order can be posted (and, thus, before the housing can be occupied).

The Department has carefully considered the comments and has determined that the framework of the Department's original proposal strikes an appropriate balance between the need to ensure that housing for H-2A workers meets all applicable safety and health standards, that agricultural employers are able to secure H-2A workers in a timely manner, and that the Department complies with the statutory requirement to render a determination no fewer than 30 days before the date of need. To ensure that SWAs have adequate time to complete housing inspections before the statutory deadline of 30 days before the date of need, the Final Rule requires employers to request housing inspections no fewer than 60 days before the date of need, except when the emergency provisions contained in § 655.101(d) are used. The Department is eliminating in the Final Rule the proposed restriction on housing inspections being requested more than 75 days before date of need. Eliminating this restriction will provide SWAs additional flexibility to manage the workload of completing required inspections with respect to those cases where an employer's housing is ready for inspection well in advance of the date of need.

The INA at 8 U.S.C. 1188(c)(3)(A) expressly requires the Secretary of Labor to make a determination on an employer's application for temporary labor certification no fewer than 30 days before the employer's date of need. The INA also requires that the Secretary make a determination as to whether employer-provided housing meets the applicable housing standards by the same deadline—no fewer than 30 days before the employer's date of need. Although the Department has delegated its statutory housing inspection responsibilities to the SWAs, the statutory deadline applicable to that responsibility continues to apply. This is made explicit by § 655.104(d)(6)(iii) of the Final Rule, which states that “[t]he SWA must make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under sec.

218(c)(3)(A) of the INA, which is 30 days before the employer's date of need.”

Some commenters read the language of sec. 218(c)(4) of the INA as prohibiting the Secretary from making a determination on an employer's application for temporary labor certification until the employer's housing has been physically inspected. The Department strongly disagrees with that interpretation. The language of sec. 218(c)(4) is not phrased as a limitation on the Secretary's duty under sec. 218(c)(3)(A) to make determinations on applications no later than 30 days before the employer's date of need. In fact, the language of sec. 218(c)(4) does not require that housing inspections be completed prior to the Secretary's certification determination, although Congress certainly could have phrased the requirement that way had it wanted to do so. Instead, the language of sec. 218(c)(4) is most naturally read as imposing a statutory duty on the Department to complete required housing inspections “prior to the date specified in paragraph (3)(A)” —which, as noted previously, is 30 days before the employer's date of need. The provision does not specify what consequence should follow in the event that the Department fails to comply with this mandate. Presumably, however, if Congress had intended that the primary consequence of the government's failure to meet its statutory responsibility to complete housing inspections in a timely manner would be to penalize employers by releasing the Department from its independent statutory responsibility to make determinations on applications no later than 30 days before the employer's date of need—a deadline that was indisputably established to ensure that employers can secure needed H-2A workers in a timely fashion without undue delays caused by the government—it would have said so explicitly.

Of course, the Department greatly prefers that housing inspections be conducted prior to certification, as this gives the Department the strongest possible assurance that “the employer has complied with the criteria for certification” as required by sec. 218(c)(3)(A)(i) of the INA. To this end, the Final Rule requires that employers make requests for housing inspections no fewer than 60 days before the employer's date of need, ensuring that SWAs have adequate time to meet the statutory deadline for conducting housing inspections. Moreover, SWAs remain under an express statutory and regulatory mandate to complete housing inspections by 30 days before the

employer's date of need, an obligation that the Department expects SWAs will not take lightly. The Department therefore believes that under the Final Rule, post-certification housing inspections will be the very rare exception rather than the rule.

The Department has never read sec. 218(c)(3)(A)(i), however, as requiring that the government directly observe for itself that the employer has satisfied all of the statutory criteria for certification. For example, under the current regulations a substantial portion of required recruitment takes place after a certification has been made, and SWAs typically do not conduct pre-certification inspections of rental housing or public accommodations secured by employers pursuant to sec. 218(c)(4). It is important to note that under the Final Rule employers are required to provide or secure housing that meets all applicable standards, and that a certification cannot be granted, with or without an inspection, unless the employer has attested that its housing fully complies with those standards. Sanctions and penalties may be imposed for violations of the attestation requirements and the housing standards, including revocation of a labor certification, regardless of whether a pre-certification housing inspection was conducted.

As to commenters who argued that it is unacceptable that housing might in some rare circumstances be occupied by H-2A workers before it is inspected, the Department notes that under MSPA, U.S. workers often occupy agricultural housing before it is inspected, and the Department has not seen any data indicating that this arrangement has caused harm to U.S. workers. The Department does not believe that H-2A workers will be harmed by this rule when being afforded the same level of protection that Congress has afforded to U.S. workers. Moreover, the Department believes that any chance that H-2A workers would be placed in substandard housing under the Final Rule—a possibility that can never fully be guarded against as a practical matter, and occurs on occasion even under the current rule—is minimized by the fact that a certification cannot be granted unless the employer has attested that its housing fully complies with all applicable standards. If this attestation is later shown to be false, the employer risks substantial penalties, including the possibility of a revoked labor certification and/or debarment.

The Department is not persuaded by employers' arguments for specific language allowing employers in all cases to abate housing violations

without penalties where the housing has already been occupied. Penalties for failing to meet the applicable standards help ensure compliance. As with all Department investigations to determine compliance with Federal safety and health standards for housing, however, the employer is as a matter of practice provided a reasonable opportunity to correct or abate any violations that are found. This also is true when the SWA or other state agency conducts the inspection. Time frames for abatement are directly related to the severity of the violation and its potential impact on the safety and health of the workers. Therefore, language in this regulation specifying an abatement period for the correction of housing violations is unnecessary. Current regulations at 29 CFR 501.19(b) and the Final Rule at §§ 655.117 and 655.118 address the factors considered by the Department in determining the appropriateness of penalties and sanctions. The Department will continue to ensure that the penalties assessed and sanctions imposed for violations of housing safety and health standards are appropriate to the violation.

The Department is cognizant that requiring employers to request housing inspections no fewer than 60 days before the date of need may present a challenge to some employers. However, we believe that overall this requirement will be beneficial to employers, workers and the SWAs by allowing more time for the SWAs to schedule and conduct pre-occupancy housing inspections, and more time for employers to correct any deficiencies prior to the arrival of the workers. The Department expects that SWAs will continue to work with employers on the scheduling of housing inspections and that SWAs will endeavor to minimize the expense to the SWA and maximize the benefit to the employer and workers by avoiding scheduling inspections of facilities at times that they are not winterized or otherwise unlikely to pass inspection. In response to comments about obstacles that currently exist in some jurisdictions to securing timely housing inspections, the Department has also included an instruction to SWAs in the Final Rule not to adopt rules or restrictions that would inhibit their ability to conduct inspections by 30 days before the date of need, such as requirements that rental housing already be formally leased by the employer before the SWA will conduct an inspection, or rules that occupied housing will not be inspected. It is solely the employer's responsibility, however, to ensure that the SWA has access to the housing to be inspected so

that the inspection may take place. For the reasons set forth in the discussion of § 102(a) concerning the Final Rule's pre-filing recruitment requirements, the Department does not agree that the statute prohibits the Department from requiring that housing inspection requests be submitted to SWAs prior to the date that applications must be submitted to the NPC.

The Department also disagrees that the possibility that some housing inspections will take place after certification under the Final Rule violates the Wagner-Peyser regulations. The current regulations at 20 CFR 654.403 already permit job orders to be posted prior to the completion of a housing inspection. If an SWA identifies violations during a subsequent housing inspection, and the employer does not cure the violations after being provided a reasonable opportunity to do so, the corresponding job order may be revoked. Although some commenters expressed the view that the regulatory process under § 654.403 is more protective of workers because § 654.403(e) requires that the SWA "shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this subpart," that provision is actually less protective of workers than the Final Rule. The Final Rule unequivocally recapitulates the statutory requirement that housing inspections be completed no later than 30 days before the employer's date of need, a date that is actually earlier than that required by the conditional access provisions set forth in § 654.403. Thus, both the Final Rule and § 654.403 contain clear mandates for pre-occupancy inspections. Significantly, however, § 654.403 does not specify any particular consequence if an SWA fails in its duty to conduct the required pre-occupancy inspection; under that provision, it is only if the SWA fulfills its duty to conduct the required inspection and finds violations that the employer's job order is removed from clearance. Thus, in specifying that the Department will adhere to its statutory obligation to make certification determinations on applications no later than 30 days before the employer's date of need even where an SWA has failed in its statutory duty to conduct the required housing inspection in a timely fashion, the Department is not depriving workers of any protections that they have under § 654.403. Both provisions fundamentally depend on SWAs to protect workers by fulfilling their responsibilities under the law—and the

Department notes that in its experience, the SWAs take those responsibilities very seriously.

The Department is retaining the proposed requirement that the employer's request for housing inspections must be in writing. This requirement provides the employer with the documentation necessary to demonstrate that their request for a housing inspection was made within the required time frame.

While the Department refers to the SWAs as the entities responsible for making housing inspections related to labor certification determinations, the Department does not intend to limit the flexibility afforded SWAs in fulfilling this requirement. For example, some SWAs have agreements with other State agencies for conducting housing inspections and it is not the Department's intention to change such arrangements.

Finally, in response to concerns that SWA staff is not sufficiently trained to conduct inspections of occupied housing, the Department anticipates that there will be additional training of SWA staff on the conduct of housing inspections.

The Department's second housing-related proposal was the creation of a housing voucher as an additional option employers could use to meet the H-2A housing requirements. The Department did not explain in detail in the NPRM how such a voucher program would work, but instead requested suggestions and comment from the public about how the program should be constructed and operated. The Department's NPRM did, however, propose to include several safeguards in the voucher program to ensure that workers would be provided housing meeting the applicable safety and health standards, including requirements that the voucher could not be used in an area where the Governor of the State has certified that there is inadequate housing available in the area of intended employment. Other safeguards included the provision that the voucher could only be redeemed for cash paid by the employer to a third party, that the housing obtained with the voucher had to be within a reasonable commuting distance of the place of employment and that workers could "pool" their vouchers to secure housing (e.g., to secure a house instead of a motel room) but that such pooling may not result in a violation of the applicable safety and health standards. The Department also included as a safeguard the requirement that if acceptable housing could not be obtained with the voucher, the employer would be required to provide

housing meeting the applicable safety and health standards to the worker. The Department requested comments on whether such a program would adequately balance the needs of employers and workers and how such a program should operate. The Department received a number of comments from employers, employer associations, employee advocacy organizations and State agencies on the housing voucher option.

A number of comments from stakeholders representing both employer and employee interests led us to conclude that the proposal was not well understood. Several commenters stated that “the voucher program would effectively eliminate the requirement that all housing for H-2A workers must meet health and safety standards.” Some employer associations stated that they supported the concept of “using vouchers to provide housing in lieu of actually providing housing” while another commenter asserted that the housing voucher option would “undermine Congressional intent by eliminating the requirement that employers provide non-local workers with free housing that meets the basic safety and health standards.”

While noting a few concerns with the proposal (e.g., the employer’s responsibility for violations of safety and health standards at housing obtained by the voucher), employers and employer associations generally praised the Department for the much needed flexibility a voucher program would create. Some commenters opined that the use of housing vouchers would “greatly stimulate H-2A participation” and “would encourage others to use legal workers.” Other commenters stated that the H-2A current requirement to provide housing to workers is a serious impediment to program participation and that the implementation of a housing voucher option would make the H-2A program more usable and effective.

Comments from individuals and organizations representing employee interests criticized the voucher option, stating that the proposed safeguards were illusory and provided no substantive protections to workers. Virtually all criticism of the proposal, including from SWAs, misunderstood the Department’s position and assumed health and safety standards would not apply to housing obtained with a voucher. Many commenters argued that the voucher idea “ignores the reality of the situation for both U.S. and H-2A workers” in that many farmworkers, particularly H-2A workers, do not have the resources to conduct a long-distance

housing search, such as access to the Internet, knowledge of the area, and language difficulties. Several found it unreasonable to expect that a worker will travel from another country, or even across the State, for employment and be able to quickly find a motel or landlord that will accept vouchers for a short-term stay.

The comments received from SWAs on the housing voucher option were generally opposed to the proposal and also reflected a misunderstanding of the Department’s proposal. One SWA cited concerns that a voucher would eliminate established standards that ensure safety and healthful conditions of housing. Another SWA argued that “[t]he use of vouchers and the failure to cover the full cost of housing reflects an unrealistic understanding of the housing market for seasonal workers.” Another SWA suggested that it would be impossible for the Governor to determine whether there was inadequate housing available in the area since the SWAs would not be the recipient of the labor condition applications, and therefore, would not know the number of workers in need of housing.

Some commenters criticized the Department’s proposal on the grounds that many basic questions about how the voucher would function were not adequately addressed in the NPRM, including the lack of: A mechanism for determining the amount or value of the voucher; a definition of “reasonable commuting distance;” criteria to be used in determining whether the employer made a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment; and standards to be used in the Governor’s certification of insufficient housing for migrant workers and H-2A workers in the area of intended employment. Other commenters took issue with the Department’s proposal to allow workers to “pool” the vouchers, claiming that such pooling would result in workers overpaying for overcrowded and/or substandard housing. Several commenters questioned the Department on the rationale for not allowing the voucher to be redeemed for cash by the employee to a third party.

The requirement that employers furnish housing that meets applicable safety and health standards is a statutory requirement in the INA. The Department does not have authority to waive this statutory requirement, nor did the Department intend to do so in proposing a voucher option. In proposing a voucher option, the Department sought comment on how

best to provide much needed flexibility to employers in fulfilling their obligation to furnish housing while ensuring that workers are not housed in substandard conditions. After reviewing the comments received on this proposal, the Department is persuaded that it should drop the proposal at this time because it would be extremely difficult to implement. The extent to which the Department’s proposal was misunderstood by commenters on all sides also caused the Department concern that, if implemented, the proposal would result in numerous program violations and become a substantial enforcement problem. If, in the future, the Department is able to design an effective, enforceable and viable alternative, it will develop a proposal and request public comment.

We are sympathetic to the concerns of many growers and employer associations who supported the proposal and noted that the cost of providing housing is a major deterrent for many to participate in the H-2A program and that in many parts of the country, restrictive building and zoning codes can prevent growers from building housing to accommodate workers. The Department notes that many of these problems can be overcome by employers under the statute and the Final Rule by securing “housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation.” These options do not require employers to build and furnish their own housing. As is noted in ETA Handbook No. 398, there is nothing to preclude an employer who does not actually own housing on his/her property from renting non-commercial housing from other individuals or entities. If there are areas where rental and public accommodation options, including non-commercial housing, are not readily available, it is difficult to imagine how workers could have secured housing in those areas through the use of a voucher, such that the voucher program would not have been viable in those areas anyway.

Third, the Department proposed in the NPRM to clarify and codify additional limited flexibility under certain circumstances to make post-certification changes to housing. The Department’s current policy<sup>4</sup> allows the employer to substitute rental or public accommodations for certified housing in the event that certified housing becomes unexpectedly unavailable for reasons

<sup>4</sup> Training and Employment Guidance Letter 11-07, Change 1 (November 14, 2007).

outside of the employer's control. The employer is required to notify the SWA in writing of the housing change and the qualifying reason(s) for the change, and provide evidence that the substituted housing meets the applicable safety and health standards. The SWA may inspect the substitute housing to determine compliance with applicable safety and health standards. The NPRM sought to clarify and codify this policy and included a provision for the SWA to notify the CO of any housing changes and the results of housing inspections conducted on substitute housing. Employer commenters and commenters representing employer interests universally favored the clarification in the proposal:

The inclusion of language that permits employers to use substitute housing in the event that their approved housing becomes unavailable for reasons beyond their control will be beneficial for the obvious reason that in the rare circumstances where this occurs, an employer has a housing option without being in violation.

Commenters on behalf of employees questioned the Department's authority to propose such a change and thought the proposed change would result in workers being housed in substandard housing saying:

[T]his change is not permitted by the statute [INA 218(c)(4)] and would encourage potentially fraudulent "bait and switch" tactics perpetrated by H-2A employers with respect to employer-provided housing.

Commenters also questioned which standards are the applicable standards to the substitute housing.

The Department maintains that this additional limited flexibility with respect to substitute housing is the best approach in those rare circumstances where the certified housing becomes unavailable for reasons beyond the employer's control. The Department believes that the requirements that the substitute housing be rental or other public accommodations and that the employer provide evidence that the new housing meets the applicable safety and health standards offer workers the necessary protections. Indeed, the proposal in no way lessens the applicable housing standards, as substitute housing must meet the standards that typically apply to H-2A housing of the same type. Failure to create a substitute housing provision could leave H-2A employers in the untenable position of having workers arrive at the worksite and having no permissible place to house them. Therefore, the Department has included this provision in the Final Rule. This Final Rule specifically references the

applicable standards to which rental or public accommodation housing, including substitute housing, is subject.

The Department has made several modifications to this provision in the Final Rule for purposes of clarity and to conform the standard to the structure of the rest of the Final Rule. First, the proposal states that the unavailability provision would apply in "situations in which housing certified by the SWA later becomes unavailable." To ensure that the full range of applicable situations is covered, the Final Rule provides that the unavailability provision applies where housing becomes unavailable "after a request to certify housing (but before certification), or after certification of housing." There is no reason to exclude housing that has not yet been inspected from the scope of the provision, since the initially designated housing has become unavailable anyway. Second, the phrase "applicable housing standards" has been replaced in the Final Rule with "the local, State, or Federal housing standards applicable under paragraph (d)(1)(ii) of this section," which is more specific. Third, the phrase "in accordance with the requirements of paragraph (d)(1)(ii) of this section" has been added to the end of the second sentence of the provision, and the phrase "from the appropriate local or State agency responsible for determining compliance" has accordingly been deleted as unnecessary; as noted in the discussion of paragraph (d)(1)(ii), that paragraph has been separately modified to reflect the evidentiary standard that is currently in place in ETA Handbook No. 398. For the same reason, the proposal's admonition that SWAs "should make every effort to inspect the accommodations prior to occupation, but may also conduct inspections during occupation, to ensure that they meet applicable housing standards" has been removed in the Final Rule. As current ETA Handbook No. 398 explains at page II-15, "[i]f DOL standards are not applicable, no pre-occupancy inspections need be conducted, and the employer need only document to the RA's satisfaction that the housing complies with the local or State standards which apply to the situation." To the extent that some SWAs may typically inspect rental or public accommodation housing despite the fact that they are not required by these rules to do so, they should make every effort to inspect substitute housing prior to occupation.

The Department received comments on other housing-related issues for which no changes were proposed. A

number of commenters noted that the text of proposed § 655.104(d)(1)(i) referred to employer-owned housing, whereas the current regulation at § 655.102(b)(1)(i) and the preamble to the proposed rule referenced employer-provided housing. The Department did not intend to change the current requirements for employer-provided housing and has corrected this inadvertent reference to "employer-owned" housing in the regulatory text.

A group of farmworker advocacy organizations commented that, in its view, all rental and/or public accommodations should be required by the Department, at a minimum, to meet the Federal standards for temporary labor camps. The commenter asserted that State and local standards for rental and/or public accommodation housing may in many instances be grossly inadequate, and that the application of Federal minimum standards is therefore essential. The Department does not believe, however, that it has the authority under the INA to impose such a minimum requirement. Section 218(c)(4) of the INA expressly provides that to satisfy their housing obligation employers may, at their option, either "provide housing meeting applicable Federal standards for temporary labor camps" or "secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation." An employer that secures rental and/or public accommodations that meet all of the applicable local standards has satisfied its housing obligation under the statute. The statute provides that rental and/or public accommodation housing does not need to meet Federal temporary labor camp standards unless there are no "applicable local or State standards." The Department is not at liberty to issue regulations that are inconsistent with the structure of employer housing obligations under the INA.

A few commenters urged the Department to relieve employers in certain border communities (e.g., Yuma, AZ) of the requirement to provide housing to H-2A workers from Mexico who are able to commute back to their homes across the border on a daily basis. According to one association commenter, Yuma, Arizona employers have traditionally attracted tens of thousands of seasonal workers daily, approximately half of whom reside in the U.S. while the other half choose to maintain their residences in Mexico. This association believes that requiring employers in such instances to provide housing and transportation not only hinders participation but ignores reality.

The INA at sec. 218(c)(4) requires employers to provide housing to all H-2A workers. The Department does not believe it has a legal basis upon which to permit employers to employ H-2A workers without providing those workers with housing. Of course, there is no statutory requirement that workers actually reside in the employer-provided housing. So, an H-2A worker who resides within commuting distance of a home across the border could presumably return home each night if the worker wanted to, provided the employer didn't require its workers to reside in specific housing as a condition of the work agreement. Nevertheless, the employer would be required by statute to make appropriate housing available to the worker.

Some commenters suggested that U.S. Department of Agriculture sec. 514 Farm Labor Housing Loans should be made available for the construction of housing used for H-2A workers. The Department has no authority to allocate Farm Labor Housing Loans, but has passed along the comment to the USDA.

Several commenters raised specific concerns about the attestation process as related to housing for agricultural workers. These commenters believe that the attestation process will lead to abuses in housing because there is no process in place for establishing compliance with the housing inspection request. Pursuant to the Final Rule, housing inspections are still required to be completed by SWAs. The Department believes that the extended timeframes for required pre-certification housing inspections will give the housing inspectors more time to complete inspections and should actually lead to more thorough inspections that in turn will help ensure violations are corrected.

So as not to inadvertently alter the availability of the conditional access provisions of § 654.403, which were cited favorably by some commenters, the Department has added language to § 655.104(d)(6)(i) clarifying that the required attestation "may include an attestation that the employer is complying with the procedures set forth in § 654.403."

Finally, the Department notes it has made several non-substantive changes to the text of § 655.104(d) to provide clarity. For example, the NPRM noted the obligation to provide housing to those workers who are not reasonably able to return to their permanent residence "within the same day." The Department has amended this phrase to "at the end of the work day" to clarify that a work day may go beyond the same 24-hour period (for example, a late shift

may not necessarily end within the same day but would still be considered part of the same work day after which an H-2A worker could not be reasonably expected to return to the home residence). For the same reason, the term "without charge" has been amended to read "at no cost to the worker," in order to ensure clarity and understanding. The Department has also included language in § 655.104(d)(1)(ii) to clarify the kind of documentation that employers are expected to retain if they secure rental and/or public accommodations for their workers to show that the accommodations comply with the applicable legal standards. The language is taken directly from ETA Handbook No. 398, which provides at page I-26 that such documentation "may be in the form of a certificate from the local or State Department of Health office or a statement from the manager or owner of the housing." In addition, non-substantive changes have been made to comport with plain English standards (for example, the use of active voice, such as the change in § 655.104(d)(6)(iii) to read "The SWA is required by Section 218(c)(4) of the INA to make its determination"). Finally, a provision that is in the current regulation regarding charges for public housing, which was inadvertently omitted from the NPRM and whose absence was noted by several commenters, has been restored.

(e) Section 655.104(e) Workers' compensation

The NPRM proposed to continue the current requirement that the job offer must contain a statement promising that workers' compensation insurance will be provided. This is a statutory requirement. The INA at Section 218(b)(3) requires the employer to provide the Secretary with satisfactory assurances that "if the employment for which certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment." One commenter noted the State of Washington has an unusual Worker's Compensation statute that requires workers to contribute 50 percent of the premium unless the employer is self-insured, whereas the NPRM required the employer to provide such insurance at no cost to the worker. The intent of the workers' compensation provision in the INA is to ensure that no worker is

left without insurance in those States that exclude agricultural work from coverage. In fact, Section 218(b)(3) provides that if "employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the workers' employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment" (emphasis added). Where the employment in question is covered by State workers' compensation law, but subject to certain rules applied by the State, the statutory provision is inapplicable. Therefore, the Department has modified language in § 655.104(e) to clarify that the employer should follow State law, but if the State excludes the type of employment for which the certification is being sought, then the employer must purchase the insurance at no cost to the worker.

Other commenters complained that the Department no longer requires submission of proof of Worker's Compensation Insurance. These commenters believe that employers circumvent this requirement by having inadequate coverage or by allowing the coverage to lapse after receiving certification, or by not buying it at all because State law does not require it. The Department is confident that the attestation-based application system will allow the Department to enforce these provisions because these attestations are made under penalty of perjury. If it is revealed during an audit that an employer fraudulently claimed to have met all program requirements, the employer would be subject to penalties, including debarment from the program.

Other changes made to the language of this provision were non-substantive, and made for purposes of clarification, or (as in the case of the recordkeeping language) to conform to changes made elsewhere in the rule.

(f) Section 655.104(f) Employer-Provided Items

The NPRM proposed to continue the current requirement that employers provide workers with "all tools, supplies, and equipment required" to perform the duties of the job. The NPRM allowed employers to require workers to provide tools or equipment where the employer can demonstrate such a practice was "common" in the area of employment.

The Department received one comment relating to its proposal, asserting that the Department should

not have deleted the current language mandating approval from the Department if employers seek to require employees to purchase any tools and equipment because it is common practice to do so. The “common practice” standard is not new, but has been carried over from the current regulation. Whether a common practice exists will still be a determination of fact to be decided by the Department and not by the employer. The only change in this determination is that the employer will now bear the burden of proof in the event of an audit or investigation to show that the practice claimed is common. In determining whether a practice is “common” in a particular area, the Department will apply a simple mathematical formula. If an employer can demonstrate that 25 percent of non-H-2A workers in the crop activity and occupation in the particular area are required to provide tools or equipment, the Department will consider the practice to be “common.” This simple standard will be relatively easy to administer, and will ensure that employers have fair notice of their legal obligations.

Clarifying language was also inserted referencing the requirements of sec. 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m) (FLSA), which does not permit deductions for tools or equipment primarily for the benefit of the employer that reduce an employee’s wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

(g) Section 655.104(g) Meals

Section 655.104 (g) concerns the provision of meals to workers and the amount employers may charge workers for meals each day. Although the Department proposed no changes to this section, a few comments were received stating that the amount allowed to be charged/reimbursed does not reflect the true cost of the employer’s providing or the worker’s purchase of meals. Section 655.114 provides for annual adjustments of the previous year’s allowable meal charges based upon Consumer Price Index (CPI) data. Each year the maximum charges allowed are adjusted from the charges allotted the previous year by the same percentage as the twelve-month percent change in the CPI for all Urban Consumers for Food (CPI-U for Food) between December of the year just concluded and December of the year prior to that. The Department reminds employers of their ability to petition for higher meal charges, a practice that has been continued in the Final Rule in § 655.114. The amount of the meal charge, which in the NPRM

was listed in § 655.104(g), has for purposes of clarity been listed instead in § 655.114.

(h) Section 655.104(h) Transportation

Existing regulations at § 655.102(b)(5) require employers to provide or pay for workers’ daily subsistence and transportation from the place from which the worker has come to the place of employment. The employer is to advance these costs to the worker when it is the prevailing practice of non-H-2A employers in the occupation and area to do so. If the employer has not advanced transportation and subsistence costs or otherwise provided or paid for these costs and the worker completes 50 percent of the work contract period, the employer is required to reimburse the worker for these costs at that time. The Department proposed no change to this requirement, but sought comments and information on the costs and benefits to employers and workers of continuing to require employers to pay for the workers’ inbound and outbound (return) subsistence and transportation costs.

The Department received several comments on this requirement. Some comments from employers and employer associations advocated that employers and employees should share the costs of workers’ inbound subsistence and transportation. These commenters argued that both employees and employers benefit from the H-2A employment relationship and therefore should share the costs. Others suggested that the employees should bear the full cost of their inbound subsistence and transportation, arguing that the inbound travel employment once they are in the country. Some commenters also noted that no other nonimmigrant work-related program requires employers to pay for the workers’ inbound subsistence and transportation.

Comments from employee advocates urged the Department to continue the requirement that employers provide or pay for workers inbound subsistence and transportation costs, asserting that inbound subsistence and transportation costs:

[a]re necessary for many reasons—to attract U.S. workers; to encourage employers to fully employ the workers in whom they have invested and to recruit only those workers needed; \* \* \* and, because farmworkers wages are so low, to prevent farmworkers from becoming even more deeply indebted (and more exploitable) or from seeking low-cost transportation that is often unregulated and deadly.

While there was disagreement among commenters on the current requirement that employers pay inbound subsistence and transportation, there was agreement

that employers should continue to pay for workers’ outbound transportation. Employer and worker advocate commenters agreed that payment of outbound travel is a critical means to help ensure that workers depart the U.S. at the end of their H-2A contract.

Many comments addressed the timing of reimbursement to workers for inbound subsistence and transportation costs. Most commenters referenced the appellate court’s decision in *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), which held that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses (and visa and immigration fees) paid by the workers employed by the growers under the H-2A program. Under the FLSA, pre-employment expenses incurred by workers that are properly business expenses of the employer and primarily for the benefit of the employer are considered “kick-backs” of wages to the employer and are treated as deductions from the employees’ wages during the first workweek. 29 CFR 531.35. Such deductions must be reimbursed by the employer during the first workweek to the extent that they effectively result in workers’ weekly wages being below the minimum wage. 29 CFR 531.36.

Although the employer in the *Arriaga* case did not itself make direct deductions from the workers’ wages, the Court held that the costs incurred by the workers amounted to “de facto deductions” that the workers absorbed, thereby driving the workers’ wages below the statutory minimum. The Eleventh Circuit reasoned that the transportation and visa costs incurred by the workers were primarily for the benefit of the employer and necessary and incidental to the employment of the workers and stated that

“[t]ransportation charges are an inevitable and inescapable consequence of having H-2A foreign workers employed in the United States; these are costs which arise out of the employment of H-2A workers.” Finally, the court held that the growers’ practices violated the FLSA minimum wage provisions, even though the H-2A regulations provide that the transportation costs need not be repaid until the workers complete 50 percent of the contract work period. The Eleventh Circuit noted that the H-2A regulations require employers to comply with applicable federal laws, and in accepting the contract orders in this case, the ETA Regional Administrator informed the growers in writing that their obligation

to pay the full FLSA minimum wage is not overridden by the H-2A regulations.

Comments from employers recommended continuing the Department's requirement that workers be reimbursed at the 50 percent point of the work contract, stating that the current policy appropriately balances the interests of employers and employees by creating an incentive for employees to complete at least half of the contract. Many employers urged the Department not to require immediate reimbursement to workers and that the Department:

should explicitly state that an employer of H-2A workers does not have an obligation under the INA, the Fair Labor Standards Act ("FLSA"), or DOL regulations to reimburse a worker's in-bound transportation expense until the 50 percent point of the work contract and that if a worker's payment of inbound transportation and subsistence costs reduces his/her first week's wage below the minimum wage, such reduction does not result in a violation of the FLSA.

Employee advocates, on the other hand, pressed the Department to require employers to comply with the FLSA which, they state, requires the reimbursement of costs at the beginning of employment when those costs are for the benefit of the employer and effectively reduce the workers' weekly income below the minimum wage. Another employee advocate suggested that the Department consider requiring H-2A employers to advance to workers inbound costs and to pay referral fees to domestic labor contractors to encourage the movement of low-wage U.S. workers to labor shortage areas.

After due consideration of the comments, the Department has determined to continue the current policy of requiring employers to provide or pay for workers' inbound and outbound subsistence and transportation and the corresponding requirement for reimbursement of such inbound costs upon the worker's completion of 50 percent of the work contract period. Thus, reimbursement at the 50 percent point is all that the Final Rule requires pursuant to the Department's rulemaking authority under the INA. Moreover, the Department believes that the better reading of the FLSA and the Department's own regulations is that relocation costs under the H-2A program are not primarily for the benefit of the employer, that relocation costs paid for by H-2A workers do not constitute kickbacks within the meaning of 29 CFR 531.35, and that reimbursement of workers for such costs in the first paycheck is not required by the FLSA.

The FLSA requires employers to pay their employees set minimum hourly wages. 29 U.S.C. 206(a). The FLSA allows employers to count as wages (and thus count toward the satisfaction of the minimum wage obligation) the reasonable cost of "furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. 203(m). The FLSA regulations provide that "[t]he cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable [costs within the meaning of the statute] and may not therefore be included in computing wages." 29 CFR 531.3(d)(1). The FLSA regulations further provide examples of various items that the Department has deemed generally to be qualifying facilities within the meaning of 29 U.S.C. 203(m), see 29 CFR 531.32(a), as well as examples of various items that the Department has deemed generally not to be qualifying facilities, see 29 CFR 531.3(d)(2), 29 CFR 531.32(c).

Separate from the question whether items or expenses furnished or paid for by the employer can be counted as wages paid to the employee, the FLSA regulations contain provisions governing the treatment under the FLSA of costs and expenses incurred by employees. The regulations specify that wages, whether paid in cash or in facilities, cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally, or "free and clear." 29 CFR 531.35. Thus, "[t]he wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash. For example, if the employer requires that the employee must provide tools of the trade that will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act." *Id.* The regulations treat employer deductions from an employee's wages for costs incurred by the employer as though the deductions were a payment from the employee to the employer for the items furnished or services rendered by the employer, and applies the standards set forth in the

"kick-back" provisions at 29 CFR 531.35 to those payments. Thus, "[d]eductions for articles such as tools, miners' lamps, dynamite caps, and other items which do not constitute 'board, lodging, or other facilities'" are illegal "to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the Act." 29 CFR 531.36(b).

In sum, where an employer has paid for a particular item or service, under certain circumstances it may pursuant to 29 U.S.C. 203(m) count that payment as wages paid to the employee. On the other hand, when an employee has paid for such an item or service, an analysis under 29 CFR 531.35 is required to determine whether the payment constitutes a "kick-back" of wages to the employer that should be treated as a deduction from the employee's wages.

The *Arriaga* court seems to have assumed that all expenses necessarily fall into one of these two categories—that either they qualify as wages under 29 U.S.C. 203(m) or they constitute a "kick-back" under 29 CFR 531.35. See *Arriaga*, 305 F.3d at 1241-42 (stating that if a payment "may not be counted as wages" under 29 U.S.C. 203(m), then "the employer therefore would be required to reimburse the expense up to the point the FLSA minimum wage provisions have been met" under 29 CFR 531.35 and 29 CFR 531.36). That is incorrect. For example, if an employer were to give an employee a valuable item that was not "customarily furnished" to his or her employees, the employer would not be able to count the value of that item as wages under 29 U.S.C. 203(m) unless the employer "customarily furnished" the item to his or her employees. Nevertheless, since the employee paid nothing for that item, it clearly would not constitute a "kick-back" of wages to the employer that would have to be deducted from the employee's wages for purposes of determining whether the employer met its minimum wage obligations under 29 U.S.C. 206(a). Similarly, if a grocery employee bought a loaf of bread off the shelf at the grocery store where he or she worked as part of an arms-length commercial transaction, the payment made by the employee to the employer would not constitute a "kick-back" of wages to the employer, nor would the loaf of bread sold by the employer to the employee be able to be counted toward the employee's wages under 29 U.S.C. 203(m). Both parties would presumably benefit equally from such a transaction—it would neither be primarily for the benefit of the employer, nor would it be primarily for the benefit of the employee.

Expenses paid by an employer that are primarily for the employer's benefit cannot be counted toward wages under 29 U.S.C. 203(m). See 29 CFR 531.3(d). Similarly, expenses paid by an employee cannot constitute a "kick-back" unless they are for the employer's benefit. See 29 CFR 531.35. An analysis conducted under 29 U.S.C. 203(m) determining that a particular kind of expense is primarily for the benefit of the employer will thus generally carry through to establish that the same kind of expense is primarily for the benefit of the employer under 29 CFR 531.35. Each expense, however, must be analyzed separately in its proper context.

The question at issue here is whether payments made by H-2A employees for the cost of relocating to the United States, whether paid to a third party transportation provider or paid directly to the employer, constitutes a "kick-back" of wages within the meaning of 29 CFR 531.35. If the payment does constitute a "kick-back," then the payment must, as the *Arriaga* court decided, be counted as a deduction from the employee's first week of wages under the FLSA for purposes of determining whether the employer's minimum wage obligations have been met.

The Department does not believe that an H-2A worker's payment of his or her own relocation expenses constitutes a "kick-back" to the H-2A employer within the meaning of 29 CFR 531.35. It is a necessary condition to be considered a "kick-back" that an employee-paid expense be primarily for the benefit of the employer. The Department need not decide for present purposes whether an employee-paid expense's status as primarily for the benefit of the employer is a *sufficient* condition for it to qualify as a "kick-back," because the Department does not consider an H-2A employee's payment of his or her own relocation expenses to be primarily for the benefit of the H-2A employer.

Both as a general matter and in the specific context of guest worker programs, employee relocation costs are not typically considered to be "primarily for the benefit" of the employer. Rather, in the Department's view, an H-2A worker's inbound transportation costs either primarily benefit the employee, or equally benefit the employee and the employer. In either case, the FLSA and its implementing regulations do not require H-2A employers to pay the relocation costs of H-2A employees. *Arriaga* misconstrued the Department's regulations and is wrongly decided.

As an initial matter, any weighing of the relative balance of benefits derived by H-2A employers and employees from inbound transportation costs must take into account the fact that H-2A workers derive very substantial benefits from their relocation. Foreign workers seeking employment under the H-2A nonimmigrant visa program often travel great distances, far from family, friends, and home, to accept the offer of employment. Their travel not only allows them to earn money—typically far more money than they could have in their home country over a similar period of time—but also allows them to live and engage in non-work activities in the U.S. These twin benefits are so valuable to foreign workers that these workers have proven willing in many instances to pay recruiters thousands of dollars (a practice that the Department is now taking measures to curtail) just to gain access to the job opportunities, at times going to great lengths to raise the necessary funds. The fact that H-2A farmworkers travel such great distances and make such substantial sacrifices to obtain work in the United States indicates that the travel greatly benefits those employees. Many of the comments received by the Department support this conclusion.

Most significantly, however, the Department's regulations explicitly state that "transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment" are qualifying "facilities" under 29 U.S.C. 203(m). 29 CFR 531.32(a). As qualifying facilities, such expenses cannot by definition be primarily for the benefit of the employer. 29 CFR 531.32(c). The wording of the regulation does not distinguish between commuting and relocation costs, and in the context of the H-2A program, inbound relocation costs fit well within the definition as they are between the employee's home country and the place of work.

The *Arriaga* court ruled that H-2A relocation expenses are primarily for the benefit of the employer in part because it believed that under 29 CFR 531.32, "a consistent line" is drawn "between those costs arising from the employment itself and those that would arise in the ordinary course of life." 305 F.3d at 1242. The court held that relocation costs do not arise in the ordinary course of life, but rather arise from employment. *Id.* Commuting costs and relocation costs cannot be distinguished on those grounds, however. Both kinds of expenses are incurred by employees

for the purpose of getting to a work site to work. Moreover, an employee would not rationally incur either kind of expense but for the existence of the job. Both the employer and the employee derive benefits from the employment relationship, and, absent unusual circumstances, an employee's relocation costs to start a new job cannot be said to be primarily for the benefit of the employer.

That is not to say that travel and relocation costs are never properly considered to be primarily for the benefit of an employer. The regulations state that travel costs will be considered to be primarily for the benefit of the employer when they are "an incident of and necessary to the employment." 29 CFR 531.32(c). This might include, for example, a business trip, or an employer-imposed requirement that an employee relocate in order to retain his or her job. Relocation costs to start a new job will rarely satisfy this test, however.

In a literal sense it may be necessary to travel to a new job opportunity in order to perform the work, but that fact, without more, does not render the travel an "incident" of the employment. Inbound relocation costs are not, absent unusual circumstances, any more an "incident of \* \* \* employment" than is commuting to a job each day. Indeed, inbound relocation costs are quite similar to commuting costs in many respects, which generally are not considered compensable. Cf. DOL Opinion Letter WH-538 (August 5, 1994) (stating that travel time from home to work is "ordinary home-to-work travel and is not compensable" under the FLSA); *Vega ex rel. Trevino v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (finding travel to and from work and home not compensable activity under Portal-to-Portal Act). In fact, there is no reason to believe that the drafters of 29 U.S.C. 203(m) and 206(a) ever intended for those provisions to indirectly require employers to pay for their employees' relocation and commuting expenses. To qualify as an "incident of \* \* \* employment" under the Department's regulations, transportation costs must have a more direct and palpable connection to the job in question than merely serving to bring the employee to the work site.

Taking the *Arriaga* court's logic to its ultimate conclusion would potentially subject employers across the U.S. to a requirement to pay relocation expenses for all newly hired employees—or at least to pay relocation expenses for all newly hired foreign employees, since international relocation is perhaps less "ordinary" than intranational

relocation. That simply cannot be correct. The language of 29 U.S.C. 203(m) and 206(a) and their implementing regulations provide a very thin reed on which to hang such a seismic shift in hiring practices, particularly so many years after those provisions have gone into effect. Nor does the fact that H-2A workers are temporary guest workers change the equation. Even assuming that H-2A workers derive somewhat less benefit from their jobs because they are only temporary, that fact alone would not render the worker's relocation expenses an "incident" of the temporary job. If it did, ski resorts, camp grounds, shore businesses, and hotels would all be legally required to pay relocation costs for their employees at the beginning of each season—again, a result that is very difficult to square with the language and purpose of 29 U.S.C. 203(m) and 29 CFR 531.35.

A stronger argument could be made, perhaps, that employers derive a greater-than-usual benefit from relocation costs when they hire foreign guest workers such as H-2A workers, because employers generally are not allowed to hire guest workers unless they have first attempted but failed to recruit U.S. workers. Thus, such employers have specifically stated a need to hire non-local workers. Given the substantially greater benefit that foreign guest workers generally derive from work opportunities in the United States than they do from employment opportunities in their home countries, however, the Department believes that this at most brings the balance of benefits between the employer and the worker into equipoise. Moreover, the employer's need for non-local workers does nothing to transform the relocation costs into an "incident" of the job opportunity in a way that would render the employee's payment of the relocation expenses a "kick-back" to the employer. If it did, courts would soon be called upon every time an employer hired an out-of-state worker to assess just how great the employer's need for the out-of-state employee was in light of local labor market conditions. Conversely, the courts would also have to inquire into the employee's circumstances, and whether the employee had reasonably comparable job prospects in the area from which the employee relocated. Again, the Department does not believe such a result is consistent with the text or the intent of the FLSA or the Department's implementing regulations.

It is true, of course, that H-2A employers derive some benefit from an H-2A worker's inbound travel. To be

compensable under the FLSA, however, the question is not whether an employer receives *some* benefit from an item or paid-for cost, but rather whether they receive the *primary* benefit. Significantly, despite the fact that employers nearly always derive some benefit from the hiring of state-side workers as well, such workers' relocation costs generally have not been considered to be "primarily for the benefit of the employer." That is so because the worker benefits from the travel either more than or just as much as the employer.

The Department obligated H-2A employers to pay H-2A workers' transportation costs not because it believed that the workers were entitled to such payments under the FLSA, but rather in the discharge of its responsibilities under the INA to insure the integrity of the H-2A program. The Department carefully crafted its regulation to give H-2A workers a strong incentive to complete at least 50 percent of their work contract. The practical effect of the Arriaga decision, however, is to require H-2A employers to pay for H-2A workers' inbound transportation costs without any reciprocal guarantee that the workers will continue to work for the employer after the first workweek. The Department believes that the payment of such transportation costs unattached to a reciprocal guarantee that the needed work will ultimately be performed substantially diminishes the benefit of the travel to the employer, and certainly would not allow the travel to be considered primarily for the employer's benefit.

In sum, the Department believes that the costs of relocation to the site of the job opportunity generally is not an "incident" of an H-2A worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H-2A employer. The Department has publicly stated that "in enforcing the FLSA for H-2A workers, the Department's general policy is to ensure that workers receive transportation reimbursement by the time they complete 50 percent of their work contract period (or shortly thereafter) rather than insisting upon reimbursement at the first pay period." The Department continues to believe that this is the appropriate interpretation of the interplay between the H-2A program regulations and the FLSA in regards to transportation reimbursement. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.

The current regulation uses the phrase "place from which the worker has departed" to describe the beginning point from which employers are required to provide or pay for inbound transportation and subsistence, and, if the worker completes the work contract period, the ending point to which employers are required to provide or pay for outbound transportation and subsistence. This phrase has at times been interpreted by the Department to mean the worker's "home," or the place from which the worker was recruited. Most recently, the phrase was addressed in ETA Training and Employment Guidance Letter No. 23-01, Change 1 (August 2, 2002): "'Home' is where the worker was originally recruited." While the Department proposed no changes to this regulatory language or interpretation, comments were received on this point. One agricultural association suggested that the Department clarify that transportation from and back to the place from which the worker came to work should be considered to require transportation from or to the site of the U.S. Consulate that issued the visa. This commenter stated:

For the past 20 years the phrase "from the place from which the worker has come to work for the employer to the place of employment," has meant payment of transportation from the location of the U.S. Consulate which issued the H-2A visa to the place of employment of the petitioning employer. Although the Department in its memoranda refers to "place of recruitment" its examples of how this rule works speaks only of transportation from and back to the worker's home country. There is no mention of the worker's village. This interpretation is in line with the INA and DHS regulations which do not allow a worker to enter the U.S. until that foreign worker has an H-2A visa. Thus, the worker cannot "come to work for the employer" until he or she has an H-2A visa. It is at the point that the worker has the H-2A visa that he or she is eligible to go to work for the employer.

The Department finds this to be a compelling argument. It is the Department's program experience that workers, particularly H-2A workers, gather in groups for processing and transfer to the U.S. The logical gathering point for these workers is at the U.S. Consulate location where the workers receive their visa. In most countries that send H-2A workers to the U.S., such processing is usually centrally located (in Monterrey, Mexico, for example, rather than in Mexico City or another Consulate location). Designating the Consulate location where the visa is issued provides the Department with an administratively consistent place from which to calculate charges and

obligations. We have therefore made corresponding changes in the regulatory text to clarify that the “place from which the worker has departed” for foreign workers outside of the U.S. is the appropriate U.S. Consulate or port of entry.

Finally, the Department sought to clarify that minimum safety standards required for employer provided transportation between the worker’s living quarters (provided or secured by the employer pursuant to INA sec. 218(c)(4)) and the worksite are the standards contained in MSPA (29 U.S.C. 1841). The Department does not seek to apply MSPA to H-2A workers and has no authority to do so. This clarification is intended to remove any ambiguity concerning the appropriate minimum vehicle safety standards for H-2A employers and should simplify compliance for those H-2A employers that also employ MSPA workers.

Other changes to the language of the proposed provision—most significantly, the notation that an employer’s return transportation obligation under § 655.104(h)(2) applies where “the worker has no immediately subsequent H-2A employment”—are non-substantive and have been made for purposes of clarification.

(i) Section 655.104(i) Three-Fourths Guarantee

The Department chose, in the NPRM, to continue the so-called “three-fourths guarantee,” by which it ensures that H-2A workers are offered a certain guaranteed number of hours of work during the specified period of the contract, and that if they are not offered enough hours of work, that they are paid as though they had completed the specified minimum number of work hours. In doing so, the Department suggested some minor changes to make the guarantee easier to apply in practice.

One grower association objected to the continuation of the three-fourths guarantee. They stated that it needs to be eliminated because it is arcane, is seldom understood by the growers, and complicates the system by creating more “red tape” for the growers. Other commenters supported the rule, but commented on the nuances of the changes made to the rule under the NPRM. A few commenters expressed the view that the guarantee deters employers from over-recruiting, which may create an oversupply of workers and drive wages down, and also assures long-distance migrants that attractive job opportunities exist. However, some commenters also believe that the guarantee requirement results in employer abuses, such as employers

misrepresenting the length of the season. They suggested the Department add language to allow workers to collect the three-fourths guarantee “based on the average number of hours worked in a particular crop region and upon a showing of having worked through the last week in which the employer offered work to a full complement of his workforce.”

The Department believes the rule provides essential protection for both U.S. and H-2A workers, in that it ensures their commitment to a particular employer will result in real jobs that meet their reasonable expectations. The Department also believes the rule is not easy to abuse or circumvent, as it is based on a simple mathematical calculation. For those employers that might try to evade their responsibilities, the Department has enforcement measures and penalties to act as a deterrent.

Changing the three-fourths guarantee to be based on a per-crop harvest calculation using an average of hours worked rather than a contract period would make it nearly impossible to track and enforce the guarantee. To require employers to keep track of workers on a per-crop basis and allow the workers to collect money based on the three-fourths guarantee when the U.S. workers transition from one employer to another during the peak harvesting times appears patently unfair and the Department is not willing to create such an option.

Two commenters also suggested that the Department take out the reference to “work hours” and return the term “workday” because the commenters believed that the employer might otherwise submit job orders based on a “bogus” hourly work day or work week. The Department believes that this concern is misplaced. The new terminology proposed by the Department is no more susceptible to abuse than the old terminology is; under either phrasing, employer fraud requires submitting false calculations of work. The Department purposely added the sentence with “work hours” and kept the old references to “workday” in the NPRM to make the formula for calculation of the total amount guaranteed easier to understand and calculate. The end result is the same under either phrasing, however.

A farm bureau requested that we insert language at the end of § 655.104(i)(1) to protect employers from the costs resulting from U.S. workers who voluntarily abandon employment in the middle of the contract period and then return at the end of the contract period or from those

U.S. workers who show up in the middle of the contract period. This commenter does not believe that an employer should have any liability under the three-fourths guarantee rule for such unreliable employees. The guarantee has never applied to workers who voluntarily abandon employment or who never show up for the work, provided notice of such abandonment or no-show is provided to DOL within the time frames for reporting an abandonment that are set forth in § 655.104(n). The Department has further clarified that provision in the Final Rule by defining abandonment of the job as the worker failing to report for work for 5 consecutive days.

Farmworker advocates expressed concern that the Department would not enforce this provision. The Department appreciates the concerns raised and assures the public it intends to enforce this provision fully, as it intends to implement the entire rule.

Another commenter requested clarification on what hours an employer may count toward the three-fourths guarantee when an employee voluntarily works more than the contract requires. The commenter asked for language to be inserted into § 655.104(i)(3) stating that all hours of work actually performed including voluntary work over and above the contract requirement can be counted by the employer. The Department believes that this principle was already made clear by § 655.104(i)(1), but it has added the requested language for purposes of clarification.

In proposed § 655.104(i)(4) the Department sought to reiterate the employer’s obligation to provide housing and meals to workers during the entire contract period, notwithstanding the three-fourths guarantee. The proposed paragraph, while properly entitled “Obligation to provide housing and meals,” inadvertently discussed an obligation to provide meals and transportation. Two comments were received on this paragraph. One employer association suggested that the text of the paragraph be revised to reflect that employers are not obligated to provide housing to workers who quit or are terminated for cause. One employee advocacy organization commented that the clarification that the employer is not allowed to shut down the labor camp or the camp kitchen during the contract period is a positive change. The Department has modified the paragraph to clarify that it is the employer’s obligation to provide housing and meals during the contract period that is not affected by the three-fourths guarantee,

and to clarify that employers are not obligated to provide housing to workers who voluntarily abandon employment or are terminated for cause.

Finally, in the NPRM the Department inadvertently deleted some qualifying phrases from this provision that are contained in the current regulation, and has accordingly in the Final Rule reverted to the language of the current regulation. Section 655.104(i)(3) discusses an employee's failure to work in the context of calculating whether the period of guaranteed employment has been met. The Final Rule reinserts the phrase currently in the regulations at § 655.102(b)(6)(iii) permitting an employer to count "all hours of work actually performed (including voluntary work over 8 hours in a workday or the worker's Sabbath or Federal Holidays)." The Final Rule also reinserts as § 655.104(i)(4) the statement found in the current regulation at § 655.102(b)(6)(iv) that an employer is not liable for payment of the three-quarters guarantee to an H-2A worker whom the CO certifies has been displaced because of the employer's compliance with its obligation under these rules, where applicable, to accept referrals of U.S. workers after its date of need.

(j) Section 655.104(j) Records

The NPRM proposed continuing the "keeping of adequate and accurate records" with respect to the payment of workers, making only minor modifications to the current regulation. The Department received several comments specific to the provisions of this section.

A commenter requested that the Department eliminate the requirement for employers to provide information to the worker through the worker's representative upon reasonable notice. The Department does not believe this requirement should be eliminated because it is the Department's goal to encourage the availability of information to workers. Another commenter suggested refinements to the provision, including suggesting that a "worker's representative" be defined and documented in some manner so as to prevent the theft of information under the guise of disclosure to worker's representatives, and also to require disclosure of records within five days instead of upon "reasonable" notice.

The Department agrees that it did not clarify in sufficient detail how a designated worker's representative should be identified so as to prevent unauthorized disclosure of records, and it accordingly has added language to the Final Rule stating that appropriate

documentation of a designation of representative status must be provided to the employer.

Instead of changing the term "reasonable" notice in the Final Rule to refer to a specific number of days, however, the Department has instead decided to adopt in § 655.104(j)(2) of the Final Rule the standard for production of records that is currently found at 29 CFR 516.7 and that the WHD uses under the FLSA. The Secretary can already request most H-2A records kept pursuant to this rule under the FLSA, and having one standard will help to avoid confusion in the regulated community.

(k) Section 655.104(k) Hours and Earnings Statements

The Department did not receive any comments on this section. However, the Department made non-substantive punctuation changes to the provision in the Final Rule to reflect plain language standards.

(l) Section 655.104(l) Rates of Pay

In the NPRM, the Department proposed to require employers to pay the highest of the adverse effect wage rate, the prevailing wage rate, or the Federal, State, or local minimum wage. The Final Rule retains this requirement, with some minor non-substantive clarifications to the text of the provision; comments specific to the issue of actual rates that will be required and the timing of their application are dealt with in the discussion of § 655.108.

Because this provision discusses the use of piece rates, several commenters took the opportunity to suggest changes to how piece rates are treated within the H-2A program. Worker advocates argued for reinstatement of the pre-1986 rules regarding piece rate adjustments. Some employers argued that the Department should not attempt to regulate piece rates at all. As the NPRM did not propose changes to the now long-standing procedures for the regulation of piece rates, the Department did not adopt any of these suggested changes in the Final Rule.

The NPRM proposed a modest change to the regulation governing productivity standards. Under existing regulations, an employer who pays on a piece rate basis and utilizes a productivity standard as a condition of job retention must utilize the productivity standard in place in 1977 or the first year the employer entered the H-2A system with certain exceptions and qualifications. The NPRM proposed to simplify this provision by requiring that any productivity standard be no more than

that normally required by other employers in the area.

No commenter explicitly opposed the change in the methodology by which acceptable productivity standards are determined, but several employers asked for additional flexibility to be allowed to use a productivity standard even if the majority of employers in the area do not utilize one. We believe the "normal" standard, which the Department will retain in the Final Rule, will provide adequate flexibility for employers while ensuring that the wages and working conditions of U.S. workers are not adversely affected by the use of productivity rates not normal in the area of intended employment. Clarifying language has been added to the provision supplying the Department's interpretation of the term "normal" to mean "not unusual." The Department has long applied this meaning of the term "normal" in the H-2A context. See, e.g., ETA Handbook No. 398 at II-7 ("The terms 'normal' and 'common', although difficult to quantify, for H-2A certification purposes mean situations which may be less than prevailing, but which clearly are not unusual or rare."); *id.* at I-40 (noting that the Department will carefully examine job qualifications, which are required by statute to be "normal" and "accepted," if the qualifications are "unusual"). It is also within the range of generally accepted meanings of the term. See, e.g., Black's Law Dictionary 1086 (8th ed. 2004) ("The term describes not just forces that are constantly and habitually operating but also forces that operate periodically or with some degree of frequency. In this sense, its common antonyms are *unusual* and *extraordinary*."); Webster's Unabridged Dictionary 1321 (2d ed. 2001) (supplying "not abnormal" as one of several definitions). Thus, "normal" does not require that a majority of employers in the area use the same productivity standard. If there are no other workers in the area of intended employment that are performing the same work activity, the Department will look to workers outside the area of intended employment to assess the normality of an employer's proposed productivity standard.

With respect to other provisions in the NPRM, some commenters argued that the Department is required by statute to use a "prevailing" standard with respect to all practices permitted by the regulations. These commenters argued that the use of anything less than a "prevailing practice" standard necessarily adversely affects U.S. workers. The Department disagrees. The Department notes that with respect to

many types of practices, it may not even be possible to determine what the “prevailing” practice is. For example, there may be a wide range of productivity standards used by employers in a given area, none of which is used by 50 percent of employers or with respect to 50 percent of workers. Furthermore, many practices are not readily susceptible to averaging: For example, with respect to practices regarding the frequency with which workers are paid, some employers may pay workers at the end of each week, others at the end of every two weeks, and others twice a month. If one third of employers used each method, which practice would be “prevailing”?

The Department has examined each type of employment practice and each type of working condition that is addressed by this rule to determine what parameters or limits are necessary to ensure that U.S. workers will not be adversely affected. With respect to productivity standards, the Department has determined that a range of practices are acceptable, and that it is unlikely that U.S. workers will be adversely affected if H-2A employers use a productivity standard that is not unusual for non-H-2A employers to apply to their U.S. workers. The Department will not, however, certify applications containing unusual productivity standards that are clearly prejudicial to U.S. workers.

(m) Section 655.104(m) Frequency of Pay

The Department proposed in the NPRM to continue the requirement of the current regulation that the employer must state in the job offer the rate of frequency that the worker is to be paid, based upon prevailing practice in the area but in no event less frequently than twice a month. The Department received one comment on this provision noting that weekly or daily earnings are “always” the prevailing practice in agriculture, never bi-weekly, and that the Department should accordingly require weekly payment. After considering this comment, the Department has determined that it would be difficult, and not at all cost-effective, to use surveys to determine the frequency with which employers in a given area typically pay their employees. The Department has therefore decided to retain the minimum requirement that employees must be paid at least twice monthly, but has dropped the reference to the use of prevailing practices. The Department notes that this modest change affects only the frequency with which workers

are paid, and not the amount to which they are entitled.

(n) Section 655.104(n) Abandonment of Employment

The NPRM included a provision stating that the employer is not required to pay the transportation and subsistence expenses of employees who abandon employment, provided the employer notifies the Department or DHS within 2 workdays of abandonment. One association of farm employers argued that this requirement was unreasonable in that the typical practice is termination 3 days beyond the abandonment or “no show” of the worker. An employer opined that this requirement should create an obligation on the part of the Department to help employers locate and pursue remedies against employees who voluntarily abandon employment without returning to their home country.

The Department acknowledges the need for clarification in the provision to ensure that the requirement begins to run only when the abandonment or abscondment is discovered. The Department has therefore added language to the provision clarifying that the employer must notify DOL and DHS no later than 2 workdays “after such abandonment or abscondment occurs.” The Department has added further clarification to ensure that employers must meet the identical standards for notification to DOL as to DHS, so that a worker is deemed to have absconded when the worker has not reported for work for a period of 5 consecutive work days without the agreement of the employer. The Department has extended this standard to a worker’s failure to report at the beginning of a work contract. This is intended to clarify for the employer that the same standard of reporting applies for both agencies. The Department declines to include provisions prescribing new employer remedies against workers who abandon the job, but notes that abandonment of a job may result in a worker being ineligible to return to the H-2A program.

(o) Section 655.104(o) Contract Impossibility

The current and proposed regulations contain a provision that allows an employer to ask permission from the Department to terminate an H-2A contract if there is an extraordinary, unforeseen, catastrophic event or “Act of God” such as a flood or hurricane (or other severe weather event) that makes it impossible for the business to continue.

One commenter noted that the proposed regulation eliminates a current requirement that “the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker,” and stated that U.S. workers, in particular, would benefit from such an effort. The Department declines to adopt this suggestion, as it believes the workers themselves will be in a better position to find alternative job opportunities than an employer whose business enterprise has been substantially impacted by an Act of God. In response to this comment, the Department has, however, added language to the Final Rule specifying that the H-2A worker may choose whether the employer terminating the H-2A contract should pay to transport them “to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker’s next certified H-2A employer (but only if the worker can provide documentation supporting such employment).” The limitation providing that a worker who requests transportation to the next employer must provide documentation of that employment will help to ensure that H-2A workers who do not have subsequent employment inside the United States return to the country from which they came to the United States rather than remaining in the United States illegally.

To conform to similar changes made elsewhere in the rule, the Final Rule clarifies that “for an H-2A worker coming from outside of the U.S., the place from which the worker (disregarding intervening employment) came to work for the employer is the appropriate U.S. consulate or port of entry.”

Other changes to the language of the proposed rule are non-substantive and have been made for purposes of clarifying the provision or to conform to changes made elsewhere in the Final Rule.

(p) Section 655.104(p) Deductions

The Department, in the NPRM, proposed requiring employers to make assurances in their application that they will make all deductions from the workers’ paychecks that are required by law. A group of farmworker advocacy organizations asserted that the Department was skirting its responsibility under *Arriaga* by allowing “reasonable” deductions to be taken from a worker’s paycheck without any mention of the FLSA. This commenter believes that the Department inappropriately removed clarifying language in the current regulation that

“an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA.” This commenter opined that workers under the H-2A program are entitled to full coverage under the FLSA, and that the Department should not make regulatory changes which suggest otherwise. By eliminating this language from the rule, this commenter believes the Department would effectively undermine the rights of farm workers to be paid the minimum wage free and clear of costs imposed on them for inbound transportation and visa costs, as established by case law.

The Department does not agree with this commenter’s characterization of the applicability of the FLSA to H-2A workers, including regarding inbound transportation. Nevertheless, we have returned the deleted language to the Final Rule to clarify that employers must of course comply with all statutory requirements applicable to them.

(q) Section 655.104(q) Copy of Work Contract

The NPRM contained the provision found in the current regulation specifying that a copy of the work contract must be provided to the worker no later than the date the work commences. One group of farmworker advocacy organizations pointed out that this proposed regulation does not require that the work contract be given to the employee in the employee’s native language and believed that these regulations as proposed are contrary to the requirements in MSPA for domestic workers. The Department has decided to make no substantive changes to this provision. Employers seeking to hire H-2A workers, as with all employers seeking to recruit agricultural workers under the Wagner/Peysers system, must file a Form ETA 790 with the SWA. This Form provides the necessary disclosures for MSPA purposes. The form itself is bilingual. In addition, section 10(a) of the Form specifically requires that the summary of the material job specifications be completed by the employer in both English and Spanish. The changes made to the language of the provision in the Final Rule are non-substantive and were made to provide better clarity.

Section 655.105 Assurances and Obligations of H-2A Employers

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H-2A program. The Department received many comments

expressing approval of the new attestation-based process, and others opposed to such a change. Still other commenters expressed general approval of the new attestation-based approach but suggested changes to the attestations and the process of submitting such attestations.

The Department received two comments regarding the substantive obligations imposed on employers through the attestations. One commenter requested that the Department add another attestation that employers will not confiscate workers’ passports. Another commenter requested that the Department impose substantial penalties on employers who lure H-2A workers away from contract jobs before the termination of their contracts. This commenter believes that such a practice victimizes both the employer, who loses laborers, and the employee, who loses status under U.S. law when they prematurely terminate a contract.

The Department is not aware that the confiscation of passports is a widespread practice among agricultural employers hiring H-2A workers. However, where evidence of such practice is found, it would likely indicate the presence of other practices prohibited by the H-2A regulations, such as the withholding of pay and other program entitlements. In such situations, the Department possesses mechanisms under this Final Rule to investigate and take appropriate action against such unscrupulous employers, both through program actions including revocation and debarment and through direct enforcement with civil fines and debarment.

On the subject of changes of employment, the proposed companion regulation to the Department’s NPRM, issued by USCIS at 73 FR 8230, Feb. 13, 2008, underscored that H-2A workers are free to move between H-2A certified jobs, and proposed to provide even greater mobility toward that end. The ability of workers to move to new H-2A employment when the current H-2A contract is completed is not something the Department wishes to discourage. A worker who abandons a job before its conclusion must be reported to DOL and DHS, and, depending on the reason for the abandonment, such abandonment may result in a violation of H-2A status and the consequent inability to commence employment with another employer. Such abandonment may also adversely affect a worker’s future eligibility to participate in the H-2A program.

One commenter requested that we allow substitution of H-2A workers at

the port of entry without having to file a new petition. An *Application for Temporary Employment Certification* is filed without the names of the foreign workers. Substitution of workers is permitted by the DHS companion rule.

(a) Section 655.105(a)

The attestation obligation set forth in § 655.105(a) in the NPRM requires the employer to assure the Department that the job opportunity is open to any U.S. worker and that the employer conducted (or will conduct) the required recruitment, and was still unsuccessful in locating qualified U.S. applicants in sufficient numbers to fill its need. This assurance was criticized by a farm bureau because it believes that it is impossible for employers to state they “will conduct” recruitment as required in the regulations and at the same time attest that they were unsuccessful in finding any U.S. workers. The Department has clarified this language in the Final Rule to enable employers to attest that the employer “has been” unsuccessful in locating U.S. workers sufficient to fill the stated need.

One group of advocacy organizations believes the Department should retain the language from the current § 655.103(c), which states: “Rejections and terminations of U.S. workers. No U.S. worker will be rejected for *or terminated from* employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the SWA.” (Emphasis supplied.) This commenter requests that the provision against termination should be added to the assurance found in the new § 655.105(a), specifically where it states: “Any U.S. workers who applied for the job were rejected for only lawful, job-related reasons.”

The Department declines to add language regarding terminations at this location in the regulations. The provision at issue is an attestation by an employer regarding the hiring of U.S. workers, not their termination. The termination of U.S. workers for inappropriate reasons is already covered under the regulations by the prohibition in § 655.105(j), discussed below.

The Department added several clarifications and conforming changes to the text of the proposed provisions. First, the Department added language clarifying that the employer must attest that it will keep the job opportunity open to qualified U.S. workers “through the recruitment period,” which is defined at § 655.102(f)(3). Second, the Department added language clarifying that the employer must attest that it has

hired and will hire all U.S. workers who apply for the job and are not rejected for lawful, job-related reasons. Third, and relatedly, the Department added language stating that an employer must attest that "it will retain records of all rejections as required by § 655.119." Other changes to the language of the provision were minor and non-substantive, and made for purposes of providing additional clarity.

(b) Section 655.105(b)

The Department proposed in the NPRM that employers be required to offer terms and conditions that are "normal to workers similarly employed" and "which are not less favorable than those offered to the H-2A workers." One commenter believed that this standard is not sufficiently protective of the wages and working conditions of U.S. farmworkers to meet the statutory precondition that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers. According to this commenter, a practice applying to a small percentage of workers may still be considered "normal." This commenter opined that this criterion violates the statute, because requiring anything less than the prevailing practices of non-H-2A employers with respect to job terms will necessarily harm U.S. workers, either by putting downward pressure on wages and conditions and/or by facilitating job offers that are meant to deter U.S. workers from applying and accepting work.

For reasons that have already been discussed above, the Department disagrees. Where the Department has identified particular terms or working conditions that have an important impact on U.S. workers—such as wages or the obligation to provide tools—it has inserted provisions addressing them directly. Not every term or condition attaching to a job, however, threatens to negatively impact the wages and working conditions of U.S. workers simply because it is not a "prevailing" condition. An employer may, for example, be the only employer in the area that grows a particular crop, or that requires the use of a particular tool. Such requirements generally do not threaten to adversely affect U.S. workers and are not improper for employers to impose. Moreover, as noted above, it is often very difficult, if not impossible, to determine what the "prevailing practice" is with respect to certain types of job terms and working conditions. Other specific provisions in the regulations safeguard against job qualifications, terms, and working

conditions that are deliberately designed by employers to discourage U.S. workers from applying for job openings.

Because the Department has indicated in the Final Rule the specific standard (i.e., "common," "normal," "prevailing") that applies to each type of covered job term and working condition, the Department has deleted language from the proposed rule that might have been understood to apply a catch-all requirement to all job terms and working conditions that they be "normal to workers similarly employed in the area of intended employment." Retaining this language would have resulted, in some instances, in application of different standards to the same job requirements, potentially creating substantial confusion. The deleted language might also have been misconstrued as applying to job terms and working conditions that are not elsewhere addressed in the Final Rule. The Department never intended for the deleted language to apply to such peripheral job requirements; those job terms and working conditions that the Department considers to be central to H-2A work and to preventing an adverse effect on U.S. workers—such as wages, housing, transportation, tools, and productivity requirements—have each been specifically addressed elsewhere in the Final Rule. The Final Rule retains the requirement that employers must offer job terms and working conditions that "are not less than the minimum terms and conditions required by this subpart." This language ensures that employers must attest to their adherence to the standard specified in the Final Rule for each covered job term and working condition.

(c) Section 655.105(c)

The Department proposed in the NPRM to continue to require that the employer submitting an application attest that the job opportunity being offered to H-2A workers is not vacant because the former occupants are on strike or locked out in the course of a labor dispute involving a work stoppage. The language of the proposed provision has been modified in the Final Rule by reverting to the language in the current regulation at § 655.103(a), which provides that the employer must assure the Department that "[t]he specific job opportunity for which the employer is requesting H-2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute." The Department is reverting to the current regulatory language to

clarify that the Department will evaluate whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individual case-by-case basis. As the Department's current ETA Handbook No. 398 explains at page II-23, the Department must ensure that "the specific positions vacant because of the dispute will not be included in any otherwise positive H-2A certification determination or redetermination."

The purpose of the strike/lock-out provision is to ensure that striking U.S. workers are not replaced with temporary foreign workers, thereby adversely affecting such workers. However, if an agricultural employer needs twenty workers, and only ten of the positions are vacant because workers are on strike, the employer should not be prohibited from hiring H-2A workers to fill the ten job openings that are not strike-related. Hiring foreign workers to fill positions of U.S. workers that are on strike is likely to adversely affect the U.S. workers, but hiring H-2A workers to fill positions that are not vacant because of a strike would not. The language of this provision in the Final Rule is also more consistent with the Department's statutory authority to withhold a labor certification where granting the certification would adversely affect the wages and working conditions of U.S. workers.

Comments regarding the NPRM's labor dispute provisions, which overlap with the contents of § 655.109(b)(4)(i) of the NPRM, are addressed in the discussion of that section below.

(d) Section 655.105(d)

The NPRM included a provision that required the employer to attest it would continue to cooperate with the SWA by accepting referrals of all eligible and qualified U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the date the H-2A workers departed or three days prior to the date of need, whichever was later. The language of the provision in the Final Rule has been modified to render it consistent with § 655.102(f)(3), which specifies that employers must continue to accept referrals until the "end of the recruitment period" as defined in that provision.

The only comment that the Department received on this section is discussed in greater detail under the Department's discussion of the 50 percent rule in § 655.102(b), above.

(e) Section 655.105(e)

No comments were received on § 655.105(e)(1) regarding the attestation promising to comply with all labor laws. Comments received on § 655.105(e)(2)

pertaining to the housing attestation are addressed in the discussion of §§ 655.102(e) and 655.104(d). Comments received on § 655.105(e)(3) pertaining to the workers' compensation attestation are addressed in the discussion of § 655.104(e). Finally, comments received with respect to § 655.105(e)(4) about the transportation attestation are addressed in the discussion of § 655.104(h) and the comments received in connection with § 655.105(e)(4) regarding worker protections are addressed in the discussion of the section on revocation at § 655.117. Several minor non-substantive modifications have been made to the text of the provision for purposes of clarity and to conform to changes made elsewhere in the Rule.

(f) Section 655.105(f)

Several comments were received on § 655.105(f), which as published in the NPRM required employers to notify the Department and DHS within 48 hours if an H-2A worker leaves the employer's employ prior to the end date stipulated on the labor certification. The commenters thought that 48 hours was not enough time to accomplish this especially in light of DHS' requirement that proof of notification be kept for up to one year. The commenters thought it was unfair to require the employer to comply with this requirement and incur the added expense of sending the notice by certified mail. One commenter went on to say that such notice is not needed in all cases. The commenter cited the example of an employee transferring to another employer with approval to do so by the Department and DHS and asks why the employer should still be required to provide notification in such cases. According to this commenter, notification should only be required if the H-2A worker absconds from the work site.

The notification is necessary in all circumstances because the early separation of a worker impacts not only the rights and responsibilities of the employer and worker but also implicates DOL's and DHS's enforcement responsibilities. For instance, an employer would no longer be responsible for providing or paying for the subsequent transportation and subsistence expenses or the "three-fourths guarantee" for a worker who has separated prior to the end date stipulated on the labor certification, either through voluntary abandonment or termination for cause. There is no requirement that the notification be made by certified mail, however. A file copy of a letter sent by regular U.S. mail, with notation of the posting date,

will suffice. In addition, the Department revised the notification requirement in the Final Rule to reflect that a report must be made no later than 2 workdays after the employee absconds, which, consistent with DHS, has been defined as 5 consecutive days of not reporting for work. The text of this provision has been modified accordingly.

The Department also received comments on this section relating to notification when H-2A workers leave their home country for the first place of intended employment. The Department believes those comments pertain to requirements in the DHS NPRM published February 13, 2008 rather than the Department's NPRM of the same date.

(g) Section 655.105(g) Offered Wage Assurances

Comments received pertaining to the offered wage are addressed in the response to comments on § 655.108. The Department added language to the text of this provision in the Final Rule to clarify that, as a matter of enforcement policy, the adverse effect wage rates that are in effect at the time that recruitment is initiated will remain valid for the entire period of the associated work contract. This enforcement policy will honor the settled expectations of workers and employers regarding their respective earnings and costs under an H-2A work contract and will avoid surprises that might give rise to disputes. It will also be an easy rule for the Department to administer, particularly when calculating payments due under the three-quarters guarantee. Because H-2A contracts never last more than a year, locking in wage rates for the duration of a contract in this manner will not significantly prejudice workers or employers in the event that wage rates happen to rise or fall during the middle of a work contract.

(h) Section 655.105(h) Wages Not Based on Commission

Comments pertaining to the offered wage are addressed in the response to comments on § 655.108.

(i) Section 655.105(i)

The NPRM contained an assurance requiring the employer to attest that it was offering a full-time temporary position whose qualifications are consistent with the "normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations or crops." This was a continuation of current obligations.

The Department received several comments relevant to this provision.

One commenter opined that the Department should scrutinize employer applications that offer U.S. workers a 30-hour work week arguing that such a requirement is not normal and is meant to dissuade U.S. workers from applying when in reality H-2A workers would work 50-60 hours a week. The commenter argues, under the new rule, it will become impossible for the Department to deny an application because the standard for what is "normal" is so lax.

The word "normal" in § 655.105(i) does not refer to the requirement that the jobs be full-time, but rather to the qualifications provision in that section. Thirty hours a week is the minimum to be considered full-time employment in the H-2A program and the Department has, as a clarification, provided that definition of full-time in this section in the Final Rule. Moreover, other provisions in these regulations (see, e.g., §§ 655.103, 655.105(b)) prohibit giving H-2A workers more favorable job terms than were advertised to U.S. workers, which include the number of hours of employment.

Another commenter noted that requirements that the job duties be normal to the occupation and not include a combination of duties not normal to the occupation has led to frequent disputes, particularly in specialty areas of agriculture. This commenter noted that there is a distinction between restrictive requirements that are clearly contrived for the purpose of disqualifying domestic workers and those directly designed to producing specialized products, utilizing unusual production techniques or otherwise seeking to distinguish their products in the marketplace.

The Department agrees that the INA was not meant to require employers to adhere to timeworn formulas for production in the H-2A or any other employment-based category, and that job duties for which there is a legitimate business reason are permissible. The requirement that job qualifications be "normal" and "accepted," however, is statutory and cannot be altered. Section 218(c)(3)(A) of the INA requires the Department, when determining whether an employer's asserted job qualifications are appropriate, to apply "the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops." For the reasons provided in the discussion of § 655.104(b) of the Final Rule above, the Department has deleted the phrase "in that they shall not require a combination of duties not normal to the

occupation” from the NPRM to conform to the language of the statute.

In the Final Rule, the language of this provision has been modified in one additional respect to conform to the language of § 655.104(b). The provision now states that job qualifications must not “substantially deviate from the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations or crops.”

(j) Section 655.105(j) Layoffs

The Department in its NPRM added a new provision prohibiting employers from hiring H-2A workers if they laid off workers within a stated time frame, unless such laid-off workers were offered and rejected the H-2A positions. Two commenters saw the new provision on layoffs as unnecessary and unworkable. One commenter saw this as contrary to the section on unforeseeable events and also illogical because many employers request a contract period of ten months. This would mean that employers would be unable to lay off workers at the end of one season, because the new season begins within 60 days and the proposed 75-day requirement will not have lapsed. Another commenter suggested a change to the language in this section to include a caveat that such layoffs shall be permitted where the employer also attests that it will offer or has offered the opportunity to the laid-off U.S. worker(s) beginning on the date of need, and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

The Department agrees, in general, with the changes proposed by the commenters. We have accordingly modified the language of the provision in the Final Rule to limit the effect of the provision to 60 days on either side of an employer’s date of need. This modification is also consistent with the revised timetables for recruitment in the Final Rule. This 120-day protective period will provide U.S. workers important protections during the period of time that H-2A workers are being recruited and through the beginning of the work season, which is the period of time that U.S. workers are most vulnerable to layoffs related to the hiring of H-2A workers, while avoiding most of the problems cited by the commenters. We also agree that a laid off worker must be qualified for the opportunity and that U.S. workers may only be rejected for lawful, job-related reasons, a limitation that preserves an employer’s right to reject those workers it knows to be unreliable.

(k) Sections 655.105(k) and (l) Retaliation and Discharge

One commenter reasoned that the Department has weakened its own enforcement ability by eliminating the word “discharge” from the list of prohibited retaliatory acts against a worker who files a complaint or testifies against the employer, consults with an attorney, or asserts any rights on behalf of himself/herself or other workers.

The Department believes it has, in fact, strengthened its enforcement ability by addressing discharge separately in § 655.105(l). By making this a separate assurance, the employer acknowledges even more obviously the prohibition against discharge as retaliation.

One group of farmworker advocacy organizations commented that the NPRM’s proposed language requiring employers to attest that they will not discharge any person “for the sole reason” that they engaged in protected activity under § 655.105(k) would substantially weaken the anti-retaliation language in the current regulations. The Department agrees with this commenter that a “sole reason” standard would impose an inappropriately high burden on retaliation claimants. A retaliation claimant should only be required to prove that protected activity was a contributing factor to the discharge. Thus, the Department has modified the language of § 655.105(l) to require employers to attest that they will not discharge any person “because of” protected activity under § 655.105(k).

Section 655.104(k)(4) provides that an employer may not retaliate against an employee who has consulted with an employee of a legal assistance program. This provision does not, however, provide employees license to aid or abet trespassing on an employer’s property, including by persons offering advocacy or legal assistance. No matter how laudable the intent of those offering advocacy or legal services, an employee does not have the legal right to grant others access to the private property of an employer without the employer’s permission. A farm owner is entitled to discipline employees who actively aid and abet those who engage in illegal activity such as trespassing. Absent any evidence of a workers’ actively aiding or abetting such activity, however, an employer’s adverse action against an employee in response to that employee meeting with a representative of an advocacy or legal services organization, particularly on the worker’s own time and not on the employer’s property, would be viewed as retaliation.

Several minor non-substantive modifications were made to the text of the provision for purposes of clarity and style.

(l) Section 655.105(m) Timeliness of Fee Payment

The Department received one comment on this section and has addressed it in the comments on § 655.118 on debarment, below.

(m) Section 655.105(n) Notification of Departure Requirements

The Department did not receive any comments on this provision. For purposes of simplicity, and to avoid any potential conflict with DHS’s regulations, the phrase “another employer and that employer has already filed and received a certified *Application for Temporary Employment Certification* and has filed that certification in support of a petition to employ that worker with DHS” has been deleted from the Final Rule and replaced with the terms “another subsequent employer.” This change is non-substantive; subsequent employers still cannot legally employ H-2A workers without an approved labor certification.

(n) Section 655.105(o) and New Section 655.105(p) Prohibition on Cost-Shifting

The Department included in the NPRM a provision prohibiting employers from shifting costs for activities related to obtaining labor certification to the worker and further requiring the employer to contractually forbid its agents from accepting money from the H-2A worker for hiring him or her. The Department received several comments in relation to this provision.

A State Workforce Agency expressed concern that this prohibition will create another disincentive for U.S. employers to use the program because it gives the impression that workers will be able to request reimbursement from the employer for any monies paid to a recruiter. The Department notes in response that the H-2A rule does not require the employer to reimburse the H-2A worker for any recruitment-related fees he or she may pay. Rather, with an exception discussed below, the rule requires the employer to contractually forbid any foreign recruiters it hires from charging the H-2A worker any fees in order to be hired or considered for employment. This may mean that employers are required to pay foreign recruiters more than they do today for the services that they render, but the Department considers this a necessary step toward preventing