

any U.S. worker referred or transferred pursuant to this assurance.

(f) *Other recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by § 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment. When 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. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an override. The employer shall not be required to provide for housing through an override.

(g) *Retaliation prohibited.* The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to § 216 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA (8 U.S.C. 1186);

(3) Testified or is about to testify in any proceeding under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to § 216 of the

INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA.

(h) *Fees.* The application shall include the assurance that fees will be paid in a timely manner, as follows:

(1) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, the fee for each employer-member receiving a temporary alien agricultural labor certification shall be \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. The joint employer association will not be charged a separate fee. Fees shall be paid by a check or money order made payable to "Department of Labor", and are nonrefundable. In the case of employers of H-2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H-2A workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the RA within 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

[52 FR 20507, June 1, 1987, as amended by 55 FR 29358, July 19, 1990]

§ 655.104 Determinations based on acceptability of H-2A applications.

(a) *Local office activities.* The local office, using the job offer portion of the H-2A application, shall promptly prepare a local job order and shall begin to

recruit U.S. workers in the area of intended employment. The RA should notify the State or local office by telephone no later than seven calendar days after the application was received by the RA if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the local office, whichever is earlier, the local office shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *Regional office activities.* The RA, upon receipt of the H-2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§ 655.101-655.103 of this part. If the RA determines that the application does not meet the requirements of §§ 655.101-655.103, the RA shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the RA determines that the application is not timely in accordance with § 655.101 of this part and that neither the first-year employer provisions of § 655.101(c)(5) nor the emergency provisions of § 655.101(f) apply, the RA may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.

(c) *Rejected applications.* If the application is not accepted for consideration, the RA shall notify the applicant in writing (by means normally assuring next-day delivery) within seven calendar days of the date the application was received by the RA with a copy to the local office. The notice shall:

(1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;

(2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in

order for the RA to accept the application for consideration;

(3) Offer the applicant an opportunity to request an expedited administrative review of or a *de novo* administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and

(4) State that if the employer does not request an expedited administrative-judicial review or a *de novo* hearing before an administrative law judge within the seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

(d) *Appeal procedures.* If the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge pursuant to paragraph (c)(3) of this section, the procedures at § 655.112 of this part shall be followed.

(e) *Required modifications.* If the application is not accepted for consideration by the RA, but the RA's written notification to the applicant is not timely as required by § 655.101 of this part, the certification determination will not be extended beyond 20 calendar days before the date of need. The notice will specify that the RA's temporary alien agricultural labor certification determination will be made no later than 20 calendar days before the date of need, provided that the applicant submits the modifications to the application which are required by the RA within five calendar days and in a manner specified by the RA which will enable the test of U.S. worker availability to be made as required by § 655.101 of this

§ 655.105

20 CFR Ch. V (4-1-03 Edition)

part within the time available for such purposes.

[42 FR 45899, Sept. 13, 1977, as amended at 59 FR 41875, Aug. 15, 1994]

§ 655.105 Recruitment period.

(a) *Notice of acceptance of application for consideration; required recruitment.* If the RA determines that the H-2A application meets the requirements of §§ 655.101-655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the RA finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the RA shall take into account other recent recruiting efforts in those areas and will 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. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H-2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H-2A agricultural em-

ployers in the area and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H-2A employer, during the period after filing the application and before the date the H-2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers.

(b) *Recruitment of U.S. workers.* After an application for temporary alien agricultural labor certification is accepted for processing pursuant to paragraph (a) of this section, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the RA, with the Director's concurrence, may require modifications to a job offer when the RA determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by § 655.102(b) of this part. If any such modifications are required after an application has been accepted for consideration by the RA, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

(d) *Final determination.* By 20 calendar days before the date of need specified in the application, except as provided for under §§ 655.101(c)(2) and 655.104(e) of this part for untimely modified applications, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in