

## § 655.105

## 20 CFR Ch. V (4-1-04 Edition)

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 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 laced 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 re-

cruiting 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 employers 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 § 655.103 of this part. If the RA concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the RA shall deny the temporary alien agricultural labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.104(d) of this part.

(e) *Appeal procedure.* With respect to determinations by the RA pursuant to this section, if the employer timely requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

**§ 655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.**

(a) *Referral of able, willing, and qualified eligible U.S. workers.* With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b) (1) *Determinations.* If the RA, in accordance with § 655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of § 655.102 of this part, by the date specified pursuant to § 655.101(c)(2) of this part for untimely modified applica-

tions or 20 calendar days before the date of need specified in the application, whichever is applicable, the RA shall grant the temporary alien agricultural labor certification request for enough H-2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the RA shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are likely to sign a work contract. The RA shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the RA. The RA shall not grant a temporary alien agricultural labor certification request for any H-2A workers if the RA determines that:

(i) Enough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer's job opportunities;

(ii) The employer, since the time the application was accepted for consideration under § 655.104 of this part, has adversely affected U.S. workers by offering to, or agreeing to provide to, H-2A workers better wages, working conditions or benefits (or by offering to, or agreeing to impose on alien workers less obligations and restrictions) than those offered to U.S. workers;

(iii) The employer during the previous two-year period employed H-2A workers and the RA has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H-2A workers;