

availability and make a determination as to adverse effect, the OFLC Administrator has the authority to establish special procedures for processing H-2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the OFLC Administrator has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates for those occupations, for a Statewide or other geographical area, other than the rates established pursuant to § 655.107 of this part, provided that the OFLC Administrator uses a methodology to establish such adverse effect wage rates which is consistent with the methodology in § 655.107(a). Prior to making determinations under this paragraph (b), the OFLC Administrator may consult with employer representatives and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the OFLC Administrator to continue and, where the OFLC Administrator deems appropriate, to revise the special procedures previously in effect for the handling of applications for shearers in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.

[52 FR 20507, June 1, 1987, as amended at 71 FR 35518, June 21, 2006]

§ 655.100 Overview of this subpart and definition of terms.

(a) *Overview—(1) Filing applications.* This subpart provides guidance to an employer who desires to apply for temporary alien agricultural labor certification for the employment of H-2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employer shall file an H-2A application, including a job offer, on forms prescribed by the Employment and Training Administration (ETA), which describes the material terms and conditions of employment to be offered and afforded to U.S. workers

and H-2A workers, with the OFLC Administrator. The entire application shall be filed with the OFLC Administrator no less than 45 calendar days before the first date of need for workers, and a copy of the job offer shall be submitted at the same time to the local office of the State employment service agency which serves the area of intended employment. Under the regulations, the OFLC Administrator will promptly review the application and notify the applicant in writing if there are deficiencies which render the application not acceptable for consideration, and afford the applicant a five-calendar-day period for resubmittal of an amended application or an appeal of the OFLC Administrator's refusal to approve the application as acceptable for consideration. Employers are encouraged to file their applications in advance of the 45-calendar-day period mentioned above in this paragraph (a)(1). Sufficient time should be allowed for delays that might arise due to the need for amendments in order to make the application acceptable for consideration.

(2) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the OFLC Administrator's certification determination, to increase the number of workers requested in the initial application; without requiring, under certain circumstances, an additional recruitment period for U.S. workers.

(3) *Untimely applications.* If an H-2A application does not satisfy the specified time requirements, this subpart provides for the OFLC Administrator's advice to the employer in writing that the certification cannot be granted because there is not sufficient time to test the availability of U.S. workers; and provides for the employer's right to an administrative review or a *de novo* hearing before an administrative law judge. Emergency situations are provided for, wherein the OFLC Administrator may waive the specified time periods.

(4) *Recruitment of U.S. workers; determinations—(i) Recruitment.* This subpart provides that, where the application is accepted for consideration and meets the regulatory standards, the State

agency and the employer begin to recruit U.S. workers. If the employer has complied with the criteria for certification, including recruitment of U.S. workers, by 20 calendar days before the date of need specified in the application (except as provided in certain cases), the OFLC Administrator makes a determination to grant or deny, in whole or in part, the application for certification.

(ii) *Granted applications.* This subpart provides that the application for temporary alien agricultural labor certification is granted if the OFLC Administrator finds that the employer has not offered foreign workers higher wages or better working conditions (or has imposed less restrictions on foreign workers) than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, and qualified will not be available at the time and place needed to perform the work for which H-2A workers are being requested; and that the employment of such aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees—(A) Amount.* This subpart provides that each employer (except joint employer associations) of H-2A workers shall pay to the OFLC Administrator fees for each temporary alien agricultural labor certification received. 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 to 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, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee to 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.

(B) *Timeliness of payment.* The fee must be received by the OFLC Administrator no later than 30 calendar days

after the granting of each temporary alien agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial violation which may result in the denial of future temporary alien agricultural labor certifications.

(iv) *Denied applications.* This subpart provides that if the application for temporary alien agricultural labor certification is denied, in whole or in part, the employer may seek review of the denial, or a *de novo* hearing, by an administrative law judge as provided in this subpart.

(b) *Definitions of terms used in this subpart.* For the purposes of this subpart:

Accept for consideration means, with respect to an application for temporary alien agricultural labor certification, the action by the OFLC Administrator to notify the employer that a filed temporary alien agricultural labor certification application meets the adverse effect criteria necessary for processing. An application accepted for consideration ultimately will be approved or denied in a temporary alien agricultural labor certification determination.

Administrative law judge means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105; or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide appeals as set forth in §655.112 of this part. “Chief Administrative Law Judge” means the chief official of the Department of Labor Office of Administrative Law Judges or the Chief Administrative Law Judge’s designee.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification (OFLC Administrator), or the OFLC Administrator’s designee.

Adverse effect wage rate (AEWR) means the wage rate which the OFLC Administrator has determined must be offered and paid, as a minimum, to every H-2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs

or seeks to employ an H-2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

Agent means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, which (1) is authorized to act on behalf of the employer for temporary alien agricultural labor certification purposes, and (2) is not itself an employer, or a joint employer, as defined in this paragraph (b).

Department of Homeland Security (DHS) through the United States Citizenship and Immigration Services (USCIS) makes the determination under the INA on whether or not to grant visa petitions to employers seeking H-2A workers to perform temporary agricultural work in the United States.

DOL means the United States Department of Labor.

Eligible worker means a *U.S. worker*, as defined in this section.

Employer means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. An association of employers shall be considered the sole employer if it has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

Employment Service (ES), in this subpart, refers to the system of federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of non-immigrant foreign workers. This includes the State Workforce Agencies (SWAs), the National Processing Centers (NPCs) and the Office of Foreign Labor Certification (OFLC).

Employment Standards Administration means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with the carrying out of certain functions of the Secretary under the INA.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the Office of Foreign Labor (OFLC).

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

H-2A worker means any non-immigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

INA means the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*).

Job offer means the offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

Office of Foreign Labor Certification (OFLC) means the organizational component within the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning alien workers seeking admission to the United States in order to work under the Immigration and Nationality Act, as amended.

Positive recruitment means the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

Prevailing means, with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that:

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(i) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(ii) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H-2A and non-H-2A employers for purposes of determinations concerning the provision of family housing, frequency of wage payments, and workers supplying their own bedding, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of farm labor contractors).

Secretary means the Secretary of Labor or the Secretary's designee.

Solicitor of Labor means the Solicitor, United States Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

State Workforce Agency (SWA) means the State employment service agency designated under §4 of the Wagner-Peyser Act to cooperate with OFLC in the operation of the ES System.

Temporary alien agricultural labor certification means the certification made by the Secretary of Labor with respect to an employer seeking to file with DHS a visa petition to import an alien as an H-2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 216 of the INA that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and (2) the employment of the alien in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1186).

Temporary alien agricultural labor certification determination means the written determination made by the OFLC Administrator to approve or deny, in whole or in part, an application for temporary alien agricultural labor certification.

United States (U.S.) worker means any worker who, whether a U.S. national, a

U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at §101(a)(38) of the INA (8 U.S.C. 1101(a)(38))).

Wages means all forms of cash remuneration to a worker by an employer in payment for personal services.

(c) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this subpart, "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) "*Agricultural labor or services*". Pursuant to section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), "agricultural labor or services" is defined for the purposes of this subpart as either "agricultural labor" as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be "agricultural labor or services", notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below:

(i) "*Agricultural labor*". Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), quoted as follows, defines the term "agricultural labor" to include all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals,

reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4)(A) In the employ of the operator of a farm in 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; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(ii) "Agriculture" Section 203(f) of title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938, as codified), quoted as follows, defines "agriculture" to include:

(f) * * * farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage

or to market or to carriers for transportation to market.

(iii) "Agricultural commodity". Section 1141j(g) of title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended), quoted as follows, defines "agricultural commodity" to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) "Gum rosin". Section 92 of title 7, United States Code, quoted as follows, defines "gum spirits of turpentine" and "gum rosin" as—

(c) "Gum spirits of turpentine" means spirits of turpentine made from gum (oleoresin) from a living tree.

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(h) "Gum rosin" means rosin remaining after the distillation of gum spirits of turpentine.

(2) "Of a temporary or seasonal nature"—(i) "On a seasonal or other temporary basis". For the purposes of this subpart, "of a temporary or seasonal nature" means "on a seasonal or other temporary basis", as defined in the Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition*. For informational purposes, the definition of "on a seasonal or other temporary basis", as set forth at 29 CFR 500.20, is provided below:

"On a seasonal or other temporary basis" means:

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Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he

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may continue to be employed during a major portion of the year.

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A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

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"On a seasonal or other temporary basis" does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

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"On a seasonal or other temporary basis" does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) "Temporary". For the purposes of this subpart, the definition of "temporary" in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part.

[52 FR 20507, June 1, 1987, as amended at 57 FR 43123, Sept. 17, 1992; 64 FR 34966, June 29, 1999; 71 FR 35518, 35521, 35522, June 21, 2006]

§ 655.101 Temporary alien agricultural labor certification applications.

(a) *General*—(1) *Filing of application.* An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the OFLC Administrator, for a temporary alien agricultural labor certification for temporary foreign workers

(H-2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the OFLC Administrator. At the same time, a duplicate application shall be submitted to the SWA serving the area of intended employment.

(2) *Applications filed by agents.* If the temporary alien agricultural labor certification application is filed by an agent on behalf of an employer, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer's behalf. The employer may authorize the agent to accept for interview workers being referred to the job and to make hiring commitments on behalf of the employer. The statement shall specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for compliance with all regulatory and other legal requirements.

(3) *Applications filed by associations.* If an association of agricultural producers which uses agricultural labor or services files the application, the association shall identify whether it is: (i) The sole employer; (ii) a joint employer with its employer-member employers; or (iii) the agent of its employer-members. The association shall submit documentation sufficient to enable the OFLC Administrator to verify the employer or agency status of the association; and shall identify by name and address each member which will be an employer of H-2A workers.

(b) *Application form.* Each H-2A application shall be on a form or forms prescribed by ETA. The application shall state the total number of workers the employer anticipates employing in the agricultural labor or service activity during the covered period of employment. The application shall include:

(1) A copy of the job offer which will be used by each employer for the recruitment of U.S. and H-2A workers. The job offer shall state the number of workers needed by the employer, based upon the employer's anticipation of a