

workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the OFLC Administrator 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) *State Workforce Agency activities.* The State Workforce Agency (SWA), 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 OFLC Administrator should notify the SWA by telephone no later than seven calendar days after the application was received by the OFLC Administrator if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the SWA, whichever is earlier, the SWA 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) *National Processing Center activities.* The OFLC Administrator, 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 OFLC Administrator determines that the application does not meet the requirements of §§ 655.101-655.103, the OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator with a copy to the SWA. 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 OFLC Administrator 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 OFLC Administrator; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the OFLC Administrator'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 OFLC Administrator, but the OFLC Administrator'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 OFLC Administrator'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 OFLC Administrator within five calendar days and in a manner specified by the OFLC Administrator 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; 71 FR 35519, June 21, 2006]

§ 655.105 Recruitment period.

(a) *Notice of acceptance of application for consideration; required recruitment.* If the OFLC Administrator determines that the H-2A application meets the requirements of §§655.101-655.103 of this part, the OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator 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 OFLC Administrator shall provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the OFLC Administrator may require modifications to a job offer when the OFLC Administrator determines that the job offer