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Labor Certification Process for the Temporary Employment of Nonimmigrant Aliens in Agriculture in the United States; Administrative Measures To Improve Program Performance; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

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Labor Certification Process for the Temporary Employment of Nonimmigrant Aliens in Agriculture in the United States; Administrative Measures To Improve Program Performance

RIN 1205–AB19

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL or Department) is publishing a final rule amending its regulations relating to the temporary employment of nonimmigrant agricultural workers (H–2A workers) in the United States. The final rule makes three substantive changes to the current regulations. One change reduces the time that an application for temporary agricultural labor certification must be filed from 60 days to 45 days before the date the employer needs agricultural workers. Another change provides employers with the option of having the housing inspected as late as 20 days before the date of need. The third substantive change modifies the requirement that employers notify the local State Employment Security Office, in writing, of the exact date on which the H–2A workers depart for the employers place of business.

The proposal to provide a limited exception from the requirement to use certain Farm Labor Contractors as a source of workers has been narrowed so that it can be implemented in a manner that does not require a change to the current regulations. A fifth proposed change to transfer visa petition adjudication authority for workers outside of the United States from the Immigration and Naturalization Service (INS) to DOL remains open as it is the subject of parallel notice-and-comment rulemaking by INS.

DATES: This final rule is effective July 29, 1999. Affected parties do not have to comply with the information collection and recordkeeping requirements in § 655.106(e)(1) until the Department publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Denis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210. Telephone: (202) 219–5263 (this is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

I. Introduction

On October 2, 1998, ETA published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) which proposed five amendments to ETA's regulations at 20 CFR part 655, subpart B, relating to the temporary employment of nonimmigrant agricultural (H–2A) workers in the United States. 63 FR 53244 (Oct. 2, 1998). The NPRM proposed five regulatory changes pertaining to: (1) The time limits for housing inspections; (2) time limits for filing labor certification applications; (3) a possible exception from using certain Farm Labor Contractors (FLC's); (4) elimination of the requirement that employers notify the local job service office in writing of the date the H–2A workers depart for the employer's place of business; and (5) transfer of the responsibility for approving H–2A visa petitions for workers coming from outside of the United States (U.S.) to DOL from the INS Commissioner. This document adopts final regulations involving the time limits for housing inspection and filing applications, and the requirement that employers notify the local employment service office of the date the H–2A workers depart for the employer's place of business. Another proposed change relating to an exception from using certain FLC's is being adopted, in part, in a manner that can be implemented under current regulations. The Department will take appropriate action to finalize the transfer of petition authority if INS concludes such transfer is appropriate at the completion of its rulemaking.

II. Statutory Standard and Implementing Regulations

The decision whether to grant or deny an employer's petition to import nonimmigrant farm workers to the United States for the purpose of temporary employment is the responsibility of the Attorney General's designee, the INS Commissioner. The Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*) provides that the Attorney General may not approve a petition from an employer for employment of nonimmigrant farm workers (H–2A visa holders) for temporary or seasonal services or labor in agriculture unless the petitioner has applied to the Secretary of Labor for a labor certification showing 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. [8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.]

The Department of Labor has published regulations at 20 CFR part 655, subpart B, and 29 CFR part 501 to implement its responsibilities under the H–2A program. Regulations affecting employer-provided agricultural worker housing are in 20 CFR part 654, subpart E, and 29 CFR 1910.42.

It was noted in the NPRM that some recent H–2A program changes were made to enhance effectiveness and efficiency while maintaining worker protections by administrative directives in the form of Field Memoranda (FM) issued by the ETA national office to its 10 Regional Administrators (RA's). (The RA's make determinations on H–2A labor certification applications and provide functional guidance to the State Employment Security Agencies (SESA), which administer the H–2A program under 20 CFR part 655, subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States.) These administrative changes are summarized herein for the convenience of interested parties.

Administrative changes made by FM 17–9, issued January 6, 1997, Subject: *Improvements in H–2A processing,* included:

- Clarifying under what conditions U.S. workers are considered to be ''available'' and thus may be counted to fully or partially deny H–2A positions requested on employers' labor certification applications. Only those U.S. workers who are identified by name, address, and social security number can be counted to reduce the number of H–2A workers requested by an employer;
- Emphasizing that regional offices should use discretion in reducing the number of certified positions requested as a result of ''last minute'' replacements of recruited U.S. workers where historical records of similar last minute referrals, or other information,

indicate the likelihood that a proportion of the referred workers would not make themselves available for work;

- Clarifying positive recruitment requirements of U.S. farm workers in areas where there are credible reports of ''a significant number of qualified U.S. workers, who, if recruited, would likely be willing to make themselves available for work at the time and place needed,'' thereby targeting recruitment efforts by employers and SESA's to those areas most likely to produce qualified and available U.S. workers;
- Encouraging routine posting of approved agricultural job orders on America's Job Bank in view of the increased use of this resource on the part of employers and U.S. workers.

FM Number 22–98, issued April 14, 1998, Subject: *Clarification of Transportation Requirements Home,* reaffirmed and clarified the regulatory provisions which allow H–2A workers to move from one certified employer to another and the requirement placed on the final H–2A employer to pay for (or provide) the worker's transportation home.

III. Comments on Proposed Rule and the Department's Response

A. Comments on Proposed Rule

Thirty-six comments were received on the proposed rule. The largest number of comments—15—were received from State agencies. After the State agencies, the largest number of comments were received from worker advocates and employer organizations, which submitted 8 and 5 comments, respectively. The Farmworker Justice Fund (FJF) indicated that its comments were supported by 32 listed organizations. Comments were received from the American Immigration Lawyers Association (AILA) and two private attorneys. Comments were also received from Congressman Howard Berman of California, ETA's Regional Office in Chicago, one monitor advocate, and one member of the general public.

Many commenters, in addition to commenting on the specific regulatory proposals contained in the NPRM, offered a number of additional suggestions for modifying the H–2A program. These suggestions included, but were not limited to:

- Repealing the adverse effect wage rate (AEWR);
- Increasing the AEWR by 20 percent;
- Eliminating the current definition of ''prevailing practice'' which is based on the practices of a majority of employers and employees, and replacing it with one based on either a majority of employers, or a majority of the employees in the local area and occupation;
- Imposing user fees that recover the true cost of the H–2A program;
- Eliminating the 50 percent rule, which requires employers to hire any qualified U.S. worker who applies until 50 percent of the work contract, under which the foreign worker was hired, has elapsed.
- Requiring withholding and placing in escrow sufficient funds from H–2A workers' wages so that they can pay for their return transportation home if they do not fulfill their contracts.

The above suggestions are outside the scope of the proposed rule. Consequently, they are not addressed in this document but may be considered by the Department in a future rulemaking regarding the H–2A nonimmigrant program. Similarly, comments concerning administrative (i.e., non-regulatory) changes in the H–2A program are not addressed in this document, but will be considered by the Department in making administrative changes that can be implemented without amending the H–2A regulations at 20 CFR part 656, subpart B.

The FJF strongly opposed the proposed rule and urged that it be withdrawn. According to the FJF, the proposal is arbitrary and capricious because it allegedly ignores numerous studies concluding that the Department has not adequately implemented worker protections under the H–2A program, and it ignores recommendations that have been made by such studies to improve worker protections. The FJF enumerated a variety of recommendations made and issues identified by the studies cited in its comments. Moreover, addressing the recommendations and issues cited by the FJF, as well as the many other recommendations made by other commenters would require a much more comprehensive assessment of the H–2A program and extensive consultation with all stakeholders, which—while such a process has been taking place in other fora—is outside the scope of this rulemaking.

As indicated in the preamble to the NPRM, the primary purpose of the proposed regulatory amendments was to implement certain changes growing out of a dialogue among the Departments of State (DOS), Justice (INS), Agriculture, and Labor to streamline the H–2A program and address complaints raised by some users of the program without weakening worker protections. Such an effort is particularly important in an environment characterized by program growth and stable or declining resources. The Department believes, as discussed in greater detail below, that the amendments adopted are balanced. The amendments serve to streamline the H–2A program and can help improve operations without weakening worker protections. Further, as stated in the preamble, this rulemaking represents one step towards implementing changes to improve H–2A program operations. The Department will consider the issues raised by various studies of the H–2A program, as well as the recommendations made by the commenters on the NPRM, in a future rulemaking effort to improve the operation of the H–2A program.

B. Comments About the Proposed Regulatory Changes

The comments received on the specific regulatory proposals in the NPRM and the Department's response to the comments are discussed below.

1. Time Limits for Employer Provided Housing To Be Available for Inspection (§ 654.403)

Several comments were received on the proposal to reduce the time by which housing that will be provided to a worker must be available for inspection, from 30 to 15 days prior to occupancy. Inspections are performed by State agencies in most cases. See 20 CFR 653.501(d)(2)(xv) and 20 CFR 654.400 *et seq.*

Congressman Howard Berman and several worker advocates objected to the proposal on several grounds. The major issues raised by those comments include:

- State agencies do not always make timely inspections and shortening the lead time to conduct housing inspections will inevitably lead to some needed repairs not being made.
- The Office of Inspector General's (OIG) report concluded, in relevant part, that DOL has certified employers to receive H–2A workers despite lacking documentary proof that housing inspection had occurred. The OIG finding is consistent with reports that some H–2A housing is not inspected in a timely fashion and that H–2A housing does not comply with basic housing standards.
- The untimely inspection and repair of farmworker housing will worsen as the H–2A program continues to grow, since funding for inspections will not keep pace with the increased need. The H–2A program has been expanding to new States and crop areas during the last three years and is expected to continue its growth.

Employer organizations favored the proposal to reduce the lead time worker

housing must be available for inspection prior to occupancy, and assumed that the proposed shortened deadline for housing inspections would allow certifications to be issued even if housing inspection was still pending. The National Council of Agricultural Employers (NCAE) stated that if certification is delayed while housing inspections are still pending, the proposed amendment would have little ''real impact on H–2A users.'' NCAE recommended that the regulations be amended to clarify that housing inspection is not required prior to certification.

Two large employer organizations—NCAE and the American Farm Bureau Federation (AFBF)—expressed considerable concern about the increasing difficulty employers face in obtaining timely housing inspections. The NCAE indicated that this problem has grown worse in recent years with growth in the H–2A program and its expansion into States where H–2A certification has not been sought in recent years. The NCAE further stated that it appears that many states have an extremely limited number of personnel who are capable of performing housing inspections. Although the NCAE supported reducing the application time, it strongly urged that DOL inventory the housing inspection resources available in the State agencies to assure that there are qualified inspectors available to make inspections in a timely manner.

Both the NCAE and AFBF recommended conforming the H–2A housing inspection requirement to that for all other migrant and seasonal agricultural workers in the regulations implementing the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) at 29 CFR 500.135. They contend such a change would address the problem faced by employers in obtaining timely housing inspections. The MSPA regulations require that housing be approved prior to occupancy. They also provide that if the employer has made a timely request for an inspection, and the inspection has not been made, the employer may house workers without inspection, provided that the housing is in full compliance with applicable regulations.

Nine State agencies objected to the proposal to shorten the lead time for housing inspections. The major points they made include:

- Several States objected to the proposal because it would allow certification to be issued before the employer's housing was inspected and approved.
- Other states objected to the proposal based on resource considerations. With the limited resources available, a shorter time frame would make it more difficult for States to inspect and approve housing prior to occupancy. Two States pointed out that they only had one person available to conduct housing inspections; another indicated that normally only one person is available to conduct 150 housing inspections.
- One State pointed out that inclement weather conditions during the winter months requires rescheduling of housing inspections in remote areas. The proposed 15-day time frame would make it difficult for inspections to be completed in a timely fashion.
- Many employers do not request housing inspections in a timely manner.
- Inspection 15-days before occupancy may not provide adequate time for employers to correct deficiencies in their housing.

Four States were in favor of the proposal to shorten the lead time for conducting housing inspections. One State maintained that the shorter time frame would allow more flexibility for its field staff to work with employers and that the ''relaxing'' of the regulation ''still provides the same level of protection for U.S. workers.''

The ETA Chicago Regional Office expressed great concern about reducing the time limit for inspection prior to occupancy, because there would be no way to guarantee that housing will be in full compliance with requirements before certification is granted.

The Department indicated in the NPRM that one reason for reducing the lead time for conducting housing inspections was the commonly expressed concern among employers in Northern States that a 1-month lead time was unrealistic for employers that need workers in March or April. It was also stated in the NPRM that local employment security agency staff have had difficulty inspecting employer-provided housing in Northern States. 63 FR at 53245. Only two comments directly addressed these issues. Massachusetts indicated that it does not have a problem in inspecting housing in late winter or early spring. The State's records show that employers with employment needs during late winter or early spring normally maintain their housing facilities in conformity with the required standards and have always been inspected in a timely manner. As noted above, another state, pointed out that inclement weather frequently causes housing inspections to be rescheduled and opined that reducing the lead time the employer has to assure that housing will be in full compliance before it is occupied will make it more difficult for State agencies to perform timely housing inspections.

Lastly, one commenter questioned what would happen if—with a shortened lead time—the employer's housing is found deficient after certification, and called upon the Department to spell out what happens in such circumstances. The commenter urged that the employer simply be given an opportunity to correct and cure any deficiency before the date of need.

After carefully reviewing all the comments, the Department continues to be of the view that employers should have the option of having the housing inspected at a date considerably later than under the current regulations. At the same time, however, the Department has given careful consideration to the interrelationship between housing inspection and the certification process, and has concluded that housing must pass inspection before certification can be granted. See 8 U.S.C. 1188(c)(4). Therefore the Department has concluded that the latest date by which employers must assure that the housing will be in full compliance with applicable standards pursuant to § 655.403(a)(3) can be no later than 20 days before the date of need—i.e., the date on which certification must ordinarily be granted. An employer whose housing fails to pass an inspection conducted on or before the 20th day prior to the date of need will have the 5 days provided for in § 655.403 (e) to correct the deficiency and the certification will be delayed for that period, if necessary. If, on the other hand, the state agency did not timely inspect the housing (i.e., by 20 days before the date of need), at no fault of the employer, the Department will delay certification until the housing has been inspected and the employer has had an opportunity to remediate any deficiencies discovered.

The Department notes that the employer must notify the SESA ordering office at least 10 working days before the date of need, pursuant to 20 CFR 653.501(d)(2)(v)(D), if workers are no longer needed or if the date of need has changed or else face liability to U.S. workers for housing and the first week's pay. U.S. workers in turn are required pursuant to 20 CFR 653.510(d)(2)(v)(B) to contact a local job service office 5 to 9 working days before the date of need to determine if the employer's needs have changed. This allows workers to commence travel to the jobsite, or to find alternative employment if the work is no longer available. It therefore is important that the housing be timely

inspected so that the local office is able to advise workers if it becomes necessary to deny the certification because the housing is not in compliance with the applicable standards.

The Department is of the view that rather than allow State agencies less time in which to schedule inspections, this modification actually provides a longer window. The Department anticipates that in areas where housing inspections take longer to schedule, employers will continue to provide early notice to State agencies to ensure that inspections are conducted timely.

Accordingly, the Department has modified § 654.403 to require that employers assure housing will be in full compliance no later than 20 calendar days before the date of need. The Department intends to issue administrative guidance concerning the operation of this modification.

2. Reduction in Lead Time To File Labor Certification Applications (§ 655.101(c))

The proposal in the NPRM to reduce the deadline for filing applications from 60 to 45 days before the date of need was strongly opposed by the FJF, other worker advocates, and Congressman Howard Berman. Their major reasons for objecting to the proposal include:

- There has been no showing that a change in the lead time to file applications is justified. Agricultural growers know well in advance their planting and harvesting schedules. Indeed, for decades, growers throughout the eastern United States were able to estimate these needs a full 80 days in advance.
- The time available for interstate and positive recruitment of U.S. workers would be unreasonably shortened if the proposal is implemented. Interstate recruitment does not begin until the application is accepted for consideration by DOL. It can take 7 days for the DOL's regional office to review the employer's application, and the employer has another 5 days to correct deficiencies. With a shortened lead time, this would place the beginning of the interstate recruitment at the 33rd day prior to the date of need and just 13 days before the date for labor certification. If DOL does not review applications in a timely manner, as is often the case, there could be 10 days or less of interstate recruitment of migrant workers prior to the date of certification.
- Congress insisted that H–2A labor certification be based on proof that there is an actual labor shortage, following a meaningful test of the labor market. Accordingly, it is not sufficient to rebut that the regulations provide that recruitment must continue until the date the foreign (H–2A) workers depart for the employer's place of work.
- Employers do not always hire workers referred to them pursuant to the 50-percent rule.
- The proposal is inconsistent with the recommendations of the General Accounting Office (GAO). Although the GAO report suggested that the Department could reduce from 60 to 45 days the time applications have to be submitted prior to the date of need, it also stated that such a reduction should only be made if the statutory requirement that certifications be issued 20 days before the date of need is reduced to 7 days.
- The proposal is inconsistent with the regulatory requirement at § 655.105 (a)(2), which requires that H–2A employers engage, at a minimum, in the kind and degree of recruitment efforts to secure U.S. workers that they made to obtain H–2A workers.

Employer organizations supported the reduction in the required lead time to file applications. However, they recommended that the lead time to file applications be reduced by more than suggested by DOL.

The NCAE, for example, maintained that it is the experience of H–2A users that most U.S. workers make themselves available shortly before, or after, the certification date. Furthermore, since under current regulations all qualified U.S. workers who apply to the employer must be hired until 50 percent of the anticipated period of work (the contract period) has elapsed, no qualified U.S. worker would be denied a job even if the deadline for applications were reduced to 40 or even 30 days before the date of need. The New England Apple Council (NEAC) maintained that the ''lag time'' between recruitment and start of work produces more ''no shows'' of workers than any other reason.

The Florida Fruit and Vegetable Association (FFVA) stated that for several vegetable crops which are greatly influenced by weather and other production uncertainties, a 45-day lead time may still be too far out to determine a crop's maturity rate.

Comments submitted by State agencies regarding the proposal to shorten the lead time for filing applications were mixed. Four States supported the proposal, indicating that the proposed change would not have an adverse impact on U.S. workers. Two of these States indicated that the deadline for filing applications should be reduced to less than 45 days. The California State agency recommended that the deadline for filing applications be reduced to 30 days prior to the date of need. According to the California State Agency, the shorter lead time would increase the possibility of locating U.S. workers who can commit to the job and it also would be beneficial to employers ''who may not know their exact staffing needs or start date until closer to the time the work needs to be done.'' The Kentucky State agency commented that ''(s)uccessfully recruiting any U.S. workers can be achieved through the Agriculture Recruitment System in 30 days if supply states and demand states coordinate specific efforts towards identified populations.''

Two states were against reducing the lead time for filing and processing applications. The Idaho State agency noted that the full 60 days is needed because applications are not filled out properly when received. The Massachusetts State agency indicated that the shorter time frame will adversely impact on State agencies' ability to conduct effective recruitment, especially in regions where master orders are used.

Two other states also commented. The New Jersey State agency indicated that the reduction in time to process applications should not be a problem if there are adequate staff at DOL to respond to the applications when they are received. The Nevada State agency noted that the proposal provides employers with more flexibility in recruitment of agricultural labor, particularly with regard to crops that are more sensitive to weather conditions. At the same time, the proposal may allow employers to be less organized in the planning and execution of their application. The Nevada State agency concluded by stating that because of the way applications are prioritized and processed in Nevada, processing times would remain relatively constant regardless of filing deadlines.

A monitor advocate who commented opined that the lead time to file and process applications should be expanded. This time should not be less than 60 days to enable employers to access all local resources in attracting and identifying a ''sufficiently large labor force.''

The ETA Chicago Regional Office commented that reducing the time limit to file labor certifications did not leave enough time for the State agencies to recruit adequately in view of all the administrative steps that must be completed before States can conduct recruitment.

Some commenters also indicated that the employers should still be able to file labor certification applications more than 45-days prior to the date of need

for H–2A agricultural workers. One commenter assumed that first-time users of the program would be able to file less than 45-days prior to the date of need if necessary.

With respect to the time limit for filing applications, the Department has decided, after reviewing all of the diverse comments, to implement the proposal to reduce the lead time for filing H–2A labor certification applications from 60 to 45 days before the first date the employer estimates that H–2A workers are needed. The regulation will provide growers with increased ability to more precisely estimate the need for workers. The Department has concluded, for the reasons discussed below, that reducing the lead time for filing H–2A labor certification applications will not have a significant adverse impact on the recruitment of U.S. workers. The final rule, at § 655.101(c)(3), continues to encourage employers to file in advance of the required filing date, and no change is made in the regulation for emergency applications at § 655.101(f)(2), which refers to agricultural employers who have not made use of H–2A agricultural workers for the prior year's agricultural season.

As noted in the preamble to the NPRM, the overwhelming majority of qualified U.S. workers do not apply and make a commitment to temporary agricultural employment earlier than 45 days before their services are required. The Department does not believe that this is generally attributable to the fact, as some commenters indicated, that DOL regional offices may spend 12 days, or more, in processing applications before they are accepted for consideration and placed into interstate clearance. Furthermore, the majority of applications filed on behalf of H–2A agricultural workers are by repeat users of the H–2A program. Most such employers are well versed in program requirements, policies, and procedures; consequently, their applications can be accepted for consideration and placed into the Agricultural Recruitment System with minimal review.

H–2A labor certification applications are filed simultaneously with the local employment service office and the ETA regional office. The local office begins to conduct local recruitment when it receives the application from the employer whether or not it has been accepted for consideration by ETA's regional office. 20 CFR 655.101(c)(2).

As stated above, some commentators noted that it can take longer than the allotted 7 days for regional offices to review H–2A labor certification applications, and that employers may take longer than 5 days to resubmit an amended application in response to any deficiencies found in the application by the regional office, resulting in a reduction in the time allowed for interstate recruitment, since the application has to be certified 20 days before the day the employer first needs agricultural workers. With respect to meeting the 7-day deadline for reviewing applications, ETA intends to increase its monitoring of regional offices to improve its performance in meeting this statutory and regulatory requirement. See 20 CFR 655.101(c)(1); and 8 U.S.C. 1188(c)(2).

With respect to the 5 days allotted for employers to submit amended applications in response to deficiencies noted by the regional office, ETA intends to strictly enforce the regulatory requirement at § 655.101(c)(2). This provides, in relevant part, that when ETA has formally notified an applicant of any deficiencies, any time needed to obtain an application acceptable for consideration after the 5-calendar period allowed for an amended application will postpone the certification decision day-for-day beyond the 20 calendar days before the date of need. This will lessen considerably the possibility that the period of interstate recruitment prior to the date the application is certified will be unduly abbreviated.

Most importantly, notwithstanding comments to the contrary, it is important to recognize that recruitment continues considerably past the date a labor certification application is certified. Positive recruitment conducted by the employer must continue until the time the H–2A workers depart for the employer's place of employment, and recruitment through the interstate clearance system continues until 50 percent of the work contract under which the H–2A workers were hired has elapsed. Under the ''50-percent rule,'' which refers to half the time accounted for by the total period of the contract, the employer must continue to provide employment to any qualified, eligible U.S. worker who may apply. In addition, the employer must offer to provide the U.S. workers with housing and the other benefits, wages, and working conditions provided to H–2A workers. See 8 U.S.C. 1188(b)(4), and 20 CFR 655.102, 655.103(d), 655.105(a), and 655.106(e).

As noted above, some commenters indicated that employers do not always hire U.S. workers referred to them pursuant to the ''50-percent rule.'' See 20 CFR 655.103(e). However, no evidence to support these claims was submitted to the Department. Additionally, the Department is not aware of any evidence suggesting that such occurrences are numerous or widespread. Nevertheless, ETA intends to be vigilant of employers' compliance with the ''50-percent rule'', with violations addressed through the imposition of appropriate sanctions.

3. Exception From Using Farm Labor Contractors (§ 655.103(f))

The majority of comments opposed the proposal to provide a limited exception from the requirement to use farm labor contractors (FLC's) when it is the prevailing practice in an area and occupation for non-H–2A employers to use such contractors as a recruitment source for U.S. workers and to compensate them with an override. This exception would have applied if a particular FLC has a demonstrated history of using undocumented aliens or serious labor standard violations.

Congressman Berman and worker advocacy organizations were strongly opposed to the proposal. They indicated that such an exception would reduce the use of FLC's which are an important recruitment source for U.S. farmworkers. The FJF maintained that recent studies show that an increasing percentage of U.S. farmworkers and most guest workers are hired through labor contractors. Both Congressman Berman and the FJF maintained that in California it is estimated that between one-half and two-thirds of seasonal farmworkers are hired through crewleaders—many of whom also transport, house, pay, and supervise workers in the fields.

Objections to the proposal by worker advocates include:

- The provision that employers need not use an FLC on the Wage and Hour Division's (WHD's) list of contractors whose certificates have been revoked is redundant with current law under MSPA and unnecessary. Employers are prohibited by law from contracting with an FLC whose licenses has been revoked and not reinstated.
- The complaint provision proposed provides no due process rights permitting FLC's to challenge the evidence submitted by State agencies.
- The proposed rule could put some FLC's out of business and deny jobs to U.S. workers who are associated with contractors who have been ''sanctioned'' by the INS for hiring unauthorized immigrants or who have violated labor laws. The Department should not use this rulemaking process to impose additional ''punishment'' on businesses because affected U.S. workers would be unduly harmed.

• The proposal may lead to workers being ''doubly punished'' and discouraged from filing complaints. If a worker complains about abusive practices of an FLC, such as nonpayment of wages, the worker may see wages go unpaid and then lose future work because of the secondary consequences of the complaint.

• An H–2A grower which may have hired unauthorized workers and violated labor laws would still receive Government approval to hire H–2A workers; yet, an FLC could be barred, at the grower's initiation, from supplying lawful U.S. workers to that same U.S. employer.

• The proposal is particularly troubling in that it allows an FLC who is barred as a contractor supplying U.S. workers to apply for H–2A labor certifications.

• The proposal could be subject to manipulation and harmful to workers. An employer could bring a complaint against an FLC who has a large number of available U.S. workers to avoid hiring U.S. workers.

The employer organizations also objected to the proposal to provide an exception from using certain FLC's. The NCAE pointed out, as did the worker advocates, that the provision in the proposal permitting H–2A applicants to refuse to engage FLC's who are on WHD's list of contractors whose certificates have been revoked adds no new protections for H–2A employers. Under the MSPA regulations at 20 CFR 500.71, employers are already prohibited from engaging such contractors.

The NCAE also maintained that the provision that H–2A employers would not be required to employ farm labor contractors on a list of contractors sanctioned by INS is meaningless, because INS does not maintain such a list. NCAE contends that although INS district or regional offices may have such lists, all offices may not have such lists, and to the extent such lists exist, they would include all employers sanctioned by that INS district and would not be limited to FLC's. The lists are not aggregated in one spot and the lists that do exist are not routinely disseminated to the public as is the DOL FLC list. NCAE contended that the only apparent way an employer could avail itself of this regulatory provision is to contact each INS district office and request its list of employers which have been sanctioned for violations of immigration laws and search each list for the names of contractors.

According to the NCAE, the provision in the proposal to permit employers not to use FLC's not on the WHD or INS lists if the employer can document that the FLC ''has a history of employing or providing a substantial number of workers who do not have the authorization to work in the U.S. or a substantial history of labor violations'' is impractical on several grounds. These grounds include:

• It is unlikely that growers would be able to assemble the documentation on the FLC required to support a credible complaint;

• There is no protection for the employer from retaliation by the FLC; DOL would be creating a procedure in which the employer could incur legal liability by making the complaint; and

• The complaint procedure is flawed, convoluted and ignores the reality of the hiring procedure.

The NCAE recommended that, if the Department is truly concerned about helping employers avoid hiring persons not authorized to work in the United States, it should take appropriate measures to assure that the workers the State agencies refer are authorized to work before referring them. It is the experience of users of the H–2A program that a substantial and growing number of the persons referred as ''U.S. workers'' to H–2A applicant employers are, in fact, workers with fraudulent documents or, in some cases, no documents at all.

The comments submitted by State agencies on the proposal to provide an exception to permit employers not to use certain FLC's were mixed. The thrust of the comments submitted by three States appeared to be that the current regulation pertaining to FLC's as a recruitment source should be eliminated. On balance the State agencies of Arizona and Ohio appeared to be against the proposal. The Kentucky state agency stated that the proposal is a common-sense approach to a growing concern on the part of employer's and the State employment security staff and should be implemented.

The one monitor advocate who submitted comments supported the proposed amendment that provided an exception to using certain FLC's as a recruitment source.

After reviewing all the comments received on the proposed amendment to provide an exception to using certain FLC's, the Department has concluded that there are indeed serious due process concerns about potentially stigmatizing FLC's who have not had an opportunity to challenge allegations of wrongdoing in an adjudicatory proceeding. Further, the Department has legal authority to revoke the licence of an FLC who has violated immigrations laws or to refuse to register such an FLC (29 CFR 500.51(g)). The Department intends to obtain from the INS the list of those FLC's who have been found in violation of Section 274A(a) of the INA, either by hiring, recruiting, or referring an alien, knowing the alien was unauthorized to work; or by employing a person without first verifying the person's identity and employment authorization. Therefore, the final rule needs to make no change to the regulation at § 655.103(f). The Department is not implementing its proposal to provide a new means for employers to challenge the requirement to use an FLC the employer believes may have violated immigration or labor laws. Employers must attempt to secure workers through registered FLC's and to compensate them with an override for their services when it is the prevailing practice in the area for non-H–2A agricultural employers to use FLC's. However, no H–2A grower-applicant may or will be required to use any FLC included on WHD's list of contractors whose certificates have been revoked, including those certificates which are revoked because of violations of the immigration laws. The Wage and Hour Division publishes a list of ineligible FLC's, which is also available at its web site at: http://www.dol.gov/dol/esa/public/regs/statutes/whd/mspa__debar0399.html. Thus, the Department's proposal is being narrowed and can be implemented under existing regulatory authority.

4. Elimination of Requirement To Provide Notice of the H–2A Workers' Departure Date (§ 655.106(e)(1))

Diverse comments were received on the proposal to eliminate the requirement that employers notify the local employment service office, in writing, of the exact date the H–2A workers depart for the employer's place of employment, and substitute a provision deeming that the workers departed on the day immediately preceding the date of need. The Department stated in the preamble to the NPRM that program experience indicates that the H–2A workers usually depart for the employer's place of business the day before they are needed.

Worker advocates objected to eliminating the requirement that employers notify the local office of the H–2A workers departure dates because:

• There is no evidence that the current regulation imposes an excessive burden on growers utilizing the H–2A program;

• Such change should not occur until DOL addresses workers' needs; and

• Although the proposed change appears innocuous, it is likely to harm U.S. workers. For example, a nursery that was certified for H–2A workers to begin employment on October 15, 1998, did not start employing its H–2A workers until November 15, a full month later. The required notification enabled the local office to determine the appropriate dates for administering the 50-percent rule and advise job applicants accordingly.

The NCAE supported eliminating notice of the departure date, but disagreed that workers typically depart the day before the employer's date of need. The NCAE maintained that typically for workers to obtain their visas, travel to the employer's place of employment, and be settled and ready for work on the date of need, they must depart at least 3 days before the date of need. NCAE recommended that DOL deem 3 days before the date of need as the departure date. Furthermore, since workers' departure dates may be even earlier, depending on where they are coming from, it recommended that DOL continue to allow employers to notify the Department of the date on which their workers depart if it is more than 3 days before the date of need.

One attorney supported eliminating notice of the departure date because it is extremely burdensome to employers, especially when the employer has many H–2A workers who do not always depart for the employer's place of business at the same time.

Divergent comments were submitted by State agencies on this proposal. Three States commented that the requirement for notification of the departure date should not be eliminated. One of these States maintained that the change will harm U.S. workers, as on numerous occasions H–2A workers have departed up to 15 days after the date of need. Another State also pointed out that the contract period must also be determined for the purpose of determining whether the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker came to work for the employer. A third State indicated that notification of the departure date is helpful in scheduling field checks, which is important to ensure that information is collected timely and for each employer, each crop and for each activity of those crops.

Four State agencies supported eliminating the requirement of notification of the H–2A workers' departure date. One State noted that the requirement is currently being ignored. Two States indicated that eliminating notice of the departure date would have no adverse impact on U.S. workers. A fourth State viewed the proposal as positive, since it does not affect the employer's requirement of notifying the order-holding office of changes in the date of need. This State also noted that it has had problems with H–2A employers notifying it of departure dates, but it can still meet with the H–2A workers after the date of need to review the job order and the employment service complaint system.

In light of the above comments regarding departure date notification, ETA has concluded that its original proposal to eliminate the requirement to notify of the departure date at § 655.106(e) should be modified to provide that ETA and the SESA shall deem the date of departure to be the third day before the first date of need. If the workers depart on or before the date of need, no notice to the SESA will be necessary. However, employers will have the option of advising the SESA if workers depart earlier. In all cases, an employer's obligation to positively recruit continues until the actual date of departure.

If the workers do not depart by the date of need, the employer must notify the SESA. Such notice shall be in writing, or orally, confirmed in writing, and must be made as soon as the employer knows that the workers will not depart by the first date of need, but in no event later than the date of need. At the same time the employer shall notify the SESA of the workers' expected departure date, if known. No additional notification will be necessary unless the employer either did not inform the local office of the expected departure date or the workers in fact did not depart by the expected date.

This modification should address the concerns of employers that workers more commonly depart three days before the date of need, while allowing flexibility if they do not depart on exactly that day or if employers wish to advise of an earlier departure date. In addition, this modification should address the concern expressed by worker advocates groups that on occasion workers depart long after the stated date of need, as well as the concern of States regarding their need to know the date of departure.

5. Transfer of Adjudication of Visa Petitions

Worker advocates indicated that there should be no transfer of adjudication of H–2A visa petitions from INS to DOL, absent a comprehensive approach to improving administration of the program.

AILA and two attorneys opposed the proposal to transfer the adjudication of visa petitions to the Department. They cited the lack of DOL's experience in adjudicating visa petitions, that training DOL personnel in visa petitioning issues and procedures would be duplicative of the training INS adjudicators already receive on these issues, that DOL does not have the resources or personnel to adjudicate visa petitions, and that they believe it is doubtful that DOL could be any more efficient than INS in processing H–2A visa petitions—in fact, because of the lack of personnel familiar with the issues, as well as the budgetary problems experienced by ETA in immigration-related processing, they contend it is likely to be worse.

Further, AILA and one attorney pointed out that it is impossible to know how delegation will work without seeing specifics of a rule implementing the proposed delegation. The AILA suggested that, if the proposed transfer of adjudication of visa petitions to DOL goes forward, it should be published in the **Federal Register** for comment.

The NCAE expressed ''grave'' concerns about any interim procedures that might be established to process H–2A visa petitions. It noted the interim procedures were not described in sufficient detail to permit an analysis of whether they, in fact, will be more streamlined and save time, or whether they might have the opposite effect. It also opined that the bottleneck in the current system is not the INS but the DOL. The only way to save time and increase the probability of timely arrival of workers is if the employer is permitted to include a completed visa petition in the same submission as the labor certification application, and if the issuance of the labor certification and approval of the visa petition are done in one action.

The NCAE concluded its comments by stating it strongly supported efforts to streamline the H–2A paperwork process. Combining the temporary labor certification application and visa petition into a single document, which is acted upon at the time of certification and immediately transmitted to the consulate or port of entry, could result in a significant improvement. Before undertaking this change, however, DOL should propose the precise regulations and procedures under which it intends to operate, and, at the same time, the INS should propose its regulations so both proposals can be evaluated together. Until this can be done, NCAE stated that it strongly objects to the proposed change and recommended that

the proposal to transfer adjudication of visa petitions be withdrawn from the rulemaking effort at this time.

The NEAC and the AFBF also expressed concerns similar to the NCAE regarding the transfer of the adjudication of the visa petition function to DOL; only the FFVA approved of this proposal.

Three State agencies supported transferring adjudication of H–2A visa petitions to DOL from the INS as it would result in reducing the time needed for employers to obtain foreign workers. Four States indicated that visa petitioning authority should not be transferred to DOL, unless additional funding is made available to the regional offices to adjudicate the visa petitions. The Ohio State agency ''guardedly'' agreed with the change based on a concern that work may be delegated to the States which are already underfunded to complete existing duties.

The Department believes that transferring the visa adjudication function to the Department would save substantial government resources and would eliminate one administrative step employers would have to complete under the program. Reducing the number of steps and paperwork involved in the process of obtaining H–2A workers—from the filing of an application with the Department of Labor to the issuance of a visa by the Department of State—should reduce both the paperwork burden and the number of instances that foreign workers do not arrive by the first date of the employer's need. The Department anticipates that the streamlined process would involve the development of a single consolidated labor certification application and visa petition form that will eliminate otherwise redundant information and support both labor certification and visa petitioning requirements. This would eliminate the necessity of employers filing visa petitions with INS for H–2A workers who are outside of the United States. The Department is committed to completing the necessary rulemaking and associated procedural changes as soon as possible, if INS delegates to DOL the authority to adjudicate H–2A visa petitions. INS has begun rulemaking to implement the transfer and the comment period on its proposed rule concluded on February 5, 1999.

Executive Order 12866

The Department has treated this rule as a ''significant regulatory action'' within the meaning of Executive Order 12866 because of the great interest in the H–2A program and the legal and policy issues raised by the rulemaking. However, this rule is not an ''economically significant regulatory action'' which requires an economic analysis because it will not have an economic effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

Regulatory Flexibility Act

When the proposed rule was published, the Department notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule would not have a significant impact on a small number of entities. The Chief Counsel did not submit a comment.

Paperwork Reduction Act

Section 655.106(e)(1), pertaining to departure-date notification, contains information collection recordkeeping requirements. As required by the Paperwork Reduction Act of 1995, the U.S. Department of Labor has submitted a copy of these sections to OMB for its review. (44 U.S.C. 3504(h)).

The public reporting burden for information collection requirements contained in these regulations is estimated to average as follows:

15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Comments from the public and substantive changes are discussed in the preamble section dealing with this regulatory provision.

As discussed in the preamble, the Department anticipates further rulemaking to transfer the adjudication of H–2A visa petitions from the INS to DOL. Although this requirement would create a new collection of information requirement for DOL, we expect a net reduction in requirements for employers. This rulemaking will be subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

Catalogue of Federal Domestic Assistance Number

This program is listed in the *Catalogue of Federal Domestic Assistance* as Number 17.202, ''Certification of Foreign Workers for Agricultural and Logging Employment.''

List of Subjects

20 CFR Part 654

Agriculture, Employment, Government procurement, Housing standards, Labor, Migrant labor, Unemployment.

20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Forest and forest products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and record keeping requirements, Specialty occupation, Students, Wages.

Final Rule

Accordingly, parts 654 and 655 of chapter V of title 20, Code of Federal Regulations, are amended as follows:

PART 654—SPECIAL RESPONSIBILITIES OF THE EMPLOYMENT SERVICE SYSTEM

Subpart E—Housing for Agricultural Workers

1. The authority citation for part 654, subpart E is revised to read as follows:

Authority: 29 U.S.C. 49k; 8 U.S.C. 1188(c)(4); 41 Op.A.G. 406 (1959).

§ 654.403 [Amended]

2. Section 654.403 is amended as follows:

a. In paragraph (a)(1) the phrase ''30 calendar days'' is removed and the phrase ''20 calendar days'' is added in lieu thereof.

b. In paragraph (a)(3) the phrase ''30 calendar days'' is removed and the phrase ''20 calendar days'' is added in lieu thereof.

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); P.L. 103–206, 107 Stat 2419; and 8 CFR 214.2(h)(4)(i).

Section 665.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15) (H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c) and (d); and 29 U.S.C. 49 *et seq.*; and P.L. 103–206, 107 Stat 2419.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

§ 655.100 [Amended]

2. In § 655.100, paragraph (a)(1) is amended by removing the phrases ''60 calendar days'' and ''60-calendar-day period'' and adding in lieu thereof the phrases ''45 calendar days'' and ''45-calendar-day period'', respectively.

§ 655.101 [Amended]

3. In § 655.101, paragraph (c) is amended as follows:

a. In the introductory text of paragraph (c), the phrase ''60 calendar days'' is removed and the phrase ''45 calendar days'' is added in lieu thereof.

b. In paragraph (c)(1), the phrase ''60 calendar days'' is removed in the two places it appears and the phrase ''45 calendar days'' is added in each place in lieu thereof.

c. In paragraph (c)(2), the phrase ''60-calendar-day filing requirement'' is removed and the phrase ''45-calendar-day filing requirement'' is added in lieu thereof.

d. In paragraph (c)(3), the term ''60-calendar-day'' is removed in the two places it appears and the term ''45-calendar-day'' is added in each place in lieu thereof.

§ 655.106 [Amended]

4. Section 655.106 is amended by revising paragraph (e) to read as follows:

§ 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.

* * * * *

(e) *Approvals of applications*—(1) *Continued recruitment of U.S. workers.* After a temporary agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers until the actual date the H–2A workers depart for the employer's place of employment.

(i) Unless the local employment office is informed in writing of a different date, the local office shall deem the third day immediately preceding the employer's first date of need to be the date the H–2A workers depart for the employer's place of employment. The employer may notify the local office in writing if the workers depart prior to that date.

(ii)(A) If the H–2A workers do not depart for the place of employment on or before the first date of need (or by the stated date of departure, if the local office has been advised of a different date), the employer shall notify the local employment office in writing (or orally, confirmed in writing) as soon as the employer knows that the workers will not depart by the first date of need, and in no event later than such date of need. At the same time, the employer shall notify the local office of the workers' expected departure date, if known. No further notice is necessary if the workers depart by the stated date of departure.

(B) If the employer did not notify the local office of the expected departure date pursuant to paragraph (e)(1)(ii)(A) of this section, or if the H–2A workers do not leave for the place of employment on or before the stated date of departure, the employer shall notify the local employment office in writing (or orally, confirmed in writing) as soon as the employer becomes aware of the expected departure date, or that the workers did not depart by the stated date and the new expected departure date, as appropriate.

(2) *Requirement for Active Job Order.* The employer shall keep an active job order on file until the ''50-percent rule'' assurance at § 655.103(e) of this part is met, except as provided by paragraph (f) of this section.

(3) *Referrals by ES System.* The ES system shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

* * * * *

Signed at Washington, DC, this 22nd day of June, 1999.

Raymond L. Bramucci,

Assistant Secretary for Employment and Training.

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