

[Code of Federal Regulations]

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TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 651--GENERAL PROVISIONS GOVERNING THE FEDERAL-STATE EMPLOYMENT SERVICE SYSTEM--Table of Contents

Sec. 651.10 Definitions of terms used in parts 651-658.

Administrator, United States Employment Service (Administrator) means the chief official of the United States Employment Service (USES) or the Administrator's designee.

Affirmative action means positive, result-oriented action imposed on or assumed by an employer pursuant to legislation, court order, consent decree, directive of a fair employment practice authority, government contract, grant or loan, or voluntary affirmative action plan adopted pursuant to the Affirmative Action Guidelines of the Equal Employment Opportunity Commission to provide equal employment opportunities for members of a specified group which for reasons of past custom, historical practice, or other nonoccupationally valid purposes has been discouraged from entering certain occupational fields.

Agricultural worker means a worker, whose primary work experience has been in farmwork in industries with a Standard Industrial Classification (SIC) of 01-07, except 027, 074, 0752, and 078, whether alien or citizen, who is legally allowed to work in the United States.

Applicant means a person who files an application for services with a local office of a State agency, with outstationed staff or with an

outreach worker.

Application card means the basic local office record for an applicant.

A Bona Fide Occupational Qualification (BFOQ) means that an employment decision or request based on age, sex, national origin or religion is based on a finding that such characteristic is necessary to the individual's ability to perform the job in question. Since a BFOQ is an exception to the general prohibition against discrimination on the basis of age, sex, national origin or religion, it must be interpreted narrowly in accordance with the Equal Employment Opportunity Commission regulations set forth at 29 CFR parts 1604, 1605 and 1627.

Clearance means activities in the placement process involving joint action of local offices in different labor market areas and/or States in the location, selection and the job referral of an applicant.

Complaint means a representation made or referred to a State or local JS office of a violation of the JS regulations and/or other federal, State or local employment related law.

Complainant means the individual, employer, organization, association, or other entity filing a complaint.

Day-haul means the assembly of workers at a pick-up point waiting to be employed, transportation of them to farm employment, and the return of the workers to the pick-up point on the same day. For the purposes of this definition "day-haul" shall exclude transportation and return of workers employed under regularly scheduled job orders such as corn detasseling jobs for youth.

Decertification means the rescission by the Secretary of the year end certification made under Section 7 of the Wagner-Peyser Act to the Secretary of the Treasury that the State agency may receive funds authorized by the Wagner-Peyser Act.

Dictionary of Occupational Titles (DOT) means the Dictionary of Occupational Titles, the reference work published by the USES which contains brief, non-technical definitions of U.S. job titles, distinguishing number codes, and worker trait data.

DOL means the Department of Labor.

D.O.T. means the Dictionary of Occupational Titles, the reference work published by the USES which contains brief, non-technical definitions of U.S. job titles, distinguishing number codes, and worker

trait data.

Employment and Training Administration (ETA) means the component of the Department of Labor containing the United States Employment Service (USES).

Employer means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the

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United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employee. An association of employers shall be considered an employer if it has all of the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if either shares in exercising one or more of the definitional indicia.

Establishment means a public or private economic employing unit generally at a single physical location which produces and/or sells goods or services, for example, a mine, factory, store, farm orchard or ranch. It is usually engaged in one, or predominantly one, type of commercial or governmental activity. Each branch or subsidiary unit of a large employer in a geographical area or community should be considered an individual establishment, except that all such units in the same physical location shall be considered a single establishment. A component of an establishment which may not be located in the same physical structure (such as the warehouse of a department store) should also be considered as part of the parent establishment. For the purpose of the "seasonal farmworker" definition, farm labor contractors and crew leaders are not considered establishments; it is the organizations to which they supply the workers that are the establishments.

Farmwork means work performed for wages in agricultural production or agricultural services in establishments included in industries 01--Agricultural Production-Crops; 02--Agricultural Production-Livestock excluding 027--Animal Specialties; 07--Agricultural Services excluding

074--Veterinary Services, 0752--Animal Speciality Services, and 078--Landscape and Horticultural Services, as defined in the most recent edition of the Standard Industrial Classification (SIC) Code definitions.

Farmworker, see Agricultural worker.

Full application means an application for an applicant who has participated in an application interview and which includes the applicant's personal characteristics, work history and an occupational classification and DOT code.

Hearing Officer means a Department of Labor Administrative Law Judge, designated to preside at DOL administrative hearings.

Identification card (applicant identification card) means a card given to the applicant on which are recorded identifying information and the dates of the applicant's visits to the local employment office.

Intrastate job order means a job order describing one or more hard-to-fill job openings, which a local office uses to request recruitment assistance from other local offices within the State.

JS regulations means the Federal regulations at 20 CFR parts 601-604, 620, 621, and 651-658, and at 29 CFR parts 8, 26, and 75.

Job bank means a computer assisted system which provides listings of current job openings in the area, on a regular basis, for distribution to JS and WIN offices and to cooperating agencies.

Job development means the process of securing a job interview with a public or private employer for a specific applicant for whom the local office has no suitable opening on file.

Job information means information derived from data compiled in the normal course of employment service activities from reports, job orders, applications and the like.

Job opening means a single job opportunity for which the local office has on file a request to select and refer on applicant or applicants.

Job Information Service (JIS) means a unit or an area within a JS local office where applicants primarily, on a self-service basis or with minimum professional help, can obtain specific and general information on where and how to get a job.

Job referral means (1) the act of bringing to the attention of an employer an applicant or group of applicants who are available for

specific job openings and (2) the record of such referral. ``Job referral" means the same as ``referral to a job."

Job Service (JS) means the nationwide system of public employment offices, funded through the United States Employment Service (USES) as grantee

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State agencies, and the various offices of the State agencies.

Labor market area means a geographic area consisting of a central city (or cities) and the surrounding territory within a reasonable commuting distance.

Labor Market Information (LMI) means that body of knowledge pertaining to the socio-economic forces influencing the employment process in specific labor market areas. These forces, which affect labor demand-supply relationships and define the content of the LMI program, include population and growth characteristics, trends in industrial and occupational structure, technological developments, shifts in consumer demands, unionization, trade disputes, retirement practices, wage levels, conditions of employment, training opportunities, job vacancies, and job search information.

Local office manager means the JS official in charge of all JS activities in a local office of a State agency.

LMI means labor market information.

Migrant farmworker is a seasonal farmworker who had to travel to do the farmwork so that he/she was unable to return to his/her permanent residence within the same day. Full-time students traveling in organized groups rather than with their families are excluded.

Migrant food processing worker means a person who during the preceding 12 months has worked at least an aggregate of 25 or more days or parts of days in which some work was performed in food processing (as classified in the 1972 Standard Industrial Classification (SIC) definitions 201, 2033, 2035, and 2037 for food processing establishments), earned at least half of his/her earned income from processing work and was not employed in food processing year round by the same employer, provided that the food processing required travel such that the worker was unable to return to his/her permanent residence

in the same day. Migrant food processing workers who are full-time students but who travel in organized groups rather than with their families are excluded.

MSFW means a migrant farmworker, a migrant food processing worker, or a seasonal farmworker.

Partial application means the application of an applicant who has not participated in an application interview and which does not include an occupational classification of DOT code. Partial applications prepared for Migrants and Seasonal Farmworkers must include a signed waiver for full services at that time in accordance with 20 CFR 653.103.

Placement means the hiring by a public or private employer of an individual referred by the employment office for a job or an interview, provided that the employment office completed all of the following steps:

- (a) Prepared a job order form prior to referral, except in the case of a job development contact on behalf of a specific applicant;
- (b) Made prior arrangements with the employer for the referral of an individual or individuals;
- (c) Referred an individual who had not been specifically designated by the employer, except for referrals on agricultural job orders for a specific crew leader or worker;
- (d) Verified from a reliable source, preferably the employer, that the individual had entered on a job; and
- (e) Appropriately recorded the placement.

Program Budget Plan (PBP) means the annual planning document for the SESA required by Sec. 8 of the Wagner-Peyser Act containing the SESA's detailed planning, programming and budget for carrying out employment security activities. For the purpose of JS regulations, this definition shall be restricted to the employment service portion of the PBP.

Public housing means housing operated by or on behalf of any public agency.

RA; see Regional Administrator.

Regional Administrator, Employment and Training Administration (RA) means the chief DOL Employment and Training Administration (ETA) official in each DOL regional office.

Respondent means the employer or State agency (including a State agency

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official) who is alleged to have committed the violation described in a complaint.

Rural area means an area which is not included in the urban area of a Standard Metropolitan Statistical Area and which has a population of less than **10,000**.

Seasonal farmworker means a person who during the preceding 12 months worked at least an aggregate of 25 or more days or parts of days in which some work was performed in farmwork, earned at least half of his/her earned income from farmwork, and was not employed in farmwork year round by the same employer. For the purposes of this definition only, a farm labor contractor is not considered an employer. Non-migrant individuals who are full-time students are excluded.

Secretary means the Secretary of the U.S. Department of Labor or the Secretary's designee.

SESA; see State Employment Service Agency.

Significant MSFW States shall be those States designated annually by ETA and shall include the twenty (20) States with the highest number of MSFW applicants.

Significant MSFW local offices shall be those designated annually by ETA and include those local offices where MSFWs account for **10%** or more of annual applicants and those local offices which the Administrator determines should be included due to special circumstances such as an estimated large number of MSFWs in the local office service area. In no event shall the number of significant MSFW local offices be less than 100 offices on a nationwide basis.

Significant bilingual MSFW local offices shall be those designated annually by ETA and include those significant MSFW offices where **10%** or more of MSFW applicants are estimated to require service provisions in Spanish unless the Administrator determines other local offices also should be included due to special circumstances.

Solicitor means the chief legal officer of the U.S. Department of Labor or the Solicitor's designee.

Standard Metropolitan Statistical Area (SMSA) means a metropolitan area designated by the Bureau of Census which contains (1) at least one

city of 50,000 inhabitants or more, or (2) twin cities with a combined population of at least 50,000.

State shall include the fifty States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

State Administrator means the chief official of the State Employment Security Agency (SESA).

State agency means the State job service agency designated under section 4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the job service system.

State Employment Security Agency (SESA) means the State agency which, under the State Administrator, contains both the State Employment service agency (State agency) and the State unemployment compensation agency.

State hearing official means a State official designated to preside at State administrative hearings convened to resolve JS-related complaints pursuant to subpart E of part 658 of this chapter.

Supportive services means services other than employment or training that are needed to enable individuals to obtain or retain employment, or to participate in employment and training programs.

Tests means a standardized method of measuring an individual's possession of, interest in, or ability to acquire, job skills and knowledge. Use of tests by employment service staff must be in accordance with the provisions of:

(1) 41 CFR part 60-3, Uniform Guidelines on Employee Selection Procedures;

(2) 29 CFR part 1627, Records To Be Made or Kept Relating to Age; Notices To Be Posted; Administrative Exemptions; and

(3) The Department of Labor's regulations on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, which have been published as 29 CFR part 32 at 45 FR 66706 (Oct. 7, 1980).

Training means a planned, systematic sequence of instruction or other learning experience on an individual or group basis under competent supervision, which is designed to impart skills, knowledge, or abilities to prepare individuals for employment.

Transaction means a single ES activity performed on behalf of an individual seeking assistance and/or the result of such an activity, e.g., applicant registration referral to a job, referral to a supportive service, counseling interview, testing, job development, job placement, enrollment in training, and inactivation of an applicant registration.

United States Employment Service (USES) means the component of the Employment and Training Administration of DOL which was established under the Wagner-Peyser Act of 1933 to promote and develop a national system of public job service offices.

Vocational Plan means a plan developed jointly by a counselor or counselor trainee and the applicant which describes: (1) The applicant's short-range and long-range occupational goals and (2) the actions to be taken to place the plan into effect.

Work Incentive Program (WIN) means the employment and training program under part C of title IV of the Social Security Act, administered by a State agency (such as the State employment service) or another public or nonprofit private agency.

(Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq.; 5 U.S.C. 301; and 38 U.S.C. chapters 41 and 42)

[45 FR 39457, June 10, 1980. Redesignated and amended at 7767 and 7768, Jan. 23, 1981]

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TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 652--ESTABLISHMENT AND FUNCTIONING OF STATE EMPLOYMENT SERVICES--Table of Contents

Subpart A--Employment Service Operations

Source: 48 FR 50665, Nov. 2, 1983, unless otherwise noted.

Sec. 652.1 Introduction and definitions.

(a) These regulations implement the provisions of the Wagner-Peyser Act,

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known hereafter as the Act, as amended by the Workforce Investment Act of 1998 (WIA). Congress intended that the States exercise broad authority in implementing provisions of the Act.

(b) Except as otherwise provided the definitions contained in section 2 of the Act apply to these regulations.

Act means the Wagner-Peyser Act (29 U.S.C. 49 et seq.).

Department means the United States Department of Labor (DOL), including its agencies and organizational units.

Governor means the chief executive of any State.

JTPA means the Job Training Partnership Act of 1982 (29 U.S.C. 1501 et seq.).

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

State Agency means the State governmental unit designated under section 4 of the Act to cooperate with the Secretary in the operation of the public employment service system.

State Workforce Investment Board (State Board) means the entity within a State appointed by the Governor under section 111 of the Workforce Investment Act.

WIA means the Workforce Investment Act of 1998 (29 U.S.C. 2801 et seq.).

[48 FR 50665, Nov. 2, 1983, as amended at 64 FR 18761, Apr. 15, 1999; 65 FR 49462, Aug. 11, 2000]

Sec. 652.2 Scope and purpose of the employment service system.

The basic purpose of the employment service system is to improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers.

Sec. 652.3 Basic labor exchange system.

At a minimum, each State shall administer a labor exchange system which has the capacity:

- (a) To assist jobseekers in finding employment;
- (b) To assist employers in filling jobs;
- (c) To facilitate the match between jobseekers and employers;
- (d) To participate in a system for clearing labor between the States, including the use of standardized classification systems issued by the Secretary, under section 15 of the Act; and.
- (e) To meet the work test requirements of the State unemployment compensation system.

[48 FR 50665, Nov. 2, 1983, as amended at 64 FR 18762, Apr. 15, 1999]

Sec. 652.4 Allotment of funds and grant agreement.

(a) Allotments. The Secretary shall provide planning estimates in accordance with section 6(b)(5) of the Act. Within 30 days of receipt of planning estimates from the Secretary, the State shall make public the substate resource distributions, and describe the process and schedule under which these resources will be issued, planned and committed. This notification shall include a description of the procedures by which the public may review and comment on the substate distributions, including a process by which the State will resolve any complaints.

(b) Grant Agreement. To establish a continuing relationship under

the Act, the Governor and the Secretary shall sign a Governor/Secretary Agreement, including a statement assuring that the State shall comply with the Act and all applicable rules and regulations. Consistent with this Agreement and section 6 of the Act, State allotments will be obligated through a Notification of Obligation.

(Approved by the Office of Management and Budget under control number 1205-0209)

Sec. 652.5 Services authorized.

The sums allotted to each State under section 6 of the Act must be expended consistent with an approved plan under 20 CFR 661.220 through 661.240 and Secs. 652.211 through 652.214. At a minimum, each State shall provide the basic labor exchange elements at Sec. 652.3.

[65 FR 49462, Aug. 11, 2000]

Sec. 652.6-652.7 [Reserved]

Sec. 652.8 Administrative provisions.

(a) Administrative Requirements. The Employment Security Manual shall not be applicable to funds appropriated under the Wagner-Peyser Act. Except as provided for in paragraph (f) of this

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section, administrative requirements and cost principles applicable to grants under this part 652 are as specified in 29 CFR part 97, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, and OMB Circular A-87 (Revised).

(b) Management systems, reporting and recordkeeping. (1) The State shall ensure that financial systems provide fiscal control and accounting procedures sufficient to permit preparation of required reports, and the tracing of funds to a level of expenditure adequate to establish that funds have not been expended in violation of the

restrictions on the use of such funds (section 10(a)).

(2) The financial management system and the program information system shall provide federally required records and reports that are uniform in definition, accessible to authorized Federal and State staff, and verifiable for monitoring, reporting, audit and evaluation purposes (section 10(c)).

(c) Reports Required. (1) Each State shall make reports pursuant to instructions issued by the Secretary and in such format as the Secretary shall prescribe.

(2) The Secretary is authorized to monitor and investigate pursuant to section 10 of the Act.

(d) Special Administrative and Cost Provisions. (1) Neither the Department nor the State is a guarantor of the accuracy or truthfulness of information obtained from employers or applicants in the process of operating a labor exchange activity.

(2) Prior approval authority, as described in various sections of 29 CFR part 97, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, and OMB Circular A-87 (Revised), is delegated to the State except that the Secretary reserves the right to require transfer of title on nonexpendable Automated Data Processing Equipment (ADPE), in accordance with provisions contained in 29 CFR 97.32(g). The Secretary reserves the right to exercise prior approval authority in other areas, after providing advance notice to the State.

(3) Application for financial assistance and modification requirements shall be as specified under this part.

(4) Cost of promotional and informational activities consistent with the provisions of the Act, describing services offered by employment security agencies, job openings, labor market information, and similar items are allowable.

(5) Each State shall retain basic documents for the minimum period specified below:

(i) Work Application: One year.

(ii) Job Order: One Year.

(6) Costs of employer contributions and expenses incurred for State agency fringe benefit plans that do not meet the requirements in OMB Circular A-87 (Revised) are allowable, provided that:

(i) For retirement plans, on behalf of individuals employed before the effective date of this part, the plan is authorized by State law and previously approved by the Secretary; the plan is insured by a private insurance carrier which is licensed to operate this type of plan; and any dividends or similar credits due to participation in the plan are credited against the next premium falling due under the contract;

(ii) For retirement plans on behalf of individuals employed after the effective date of this part, and for fringe benefit plans other than retirement, the Secretary grants a time extension to cover an interim period if State legislative action is required for such employees to be covered by plans which meet the requirements of OMB Circular A-87 (Revised). During this interim period, State agency employees may be enrolled in plans open to State agency employees only. No such extension may continue beyond the 60th day following the completion of the next full session of the State legislature which begins after the effective date of this part;

(iii) For fringe benefit plans other than retirement, the Secretary grants a time extension which may continue until such time as they are comparable in cost to those fringe benefit plans available to other similarly employed employees of the State on the condition that there are no benefit improvements. The Secretary may grant this time extension if the State agency can

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demonstrate that the extension is necessary to prevent loss of benefits to current States agency employees, retirees and/or their fringe benefit plan beneficiaries, or that it is necessary to avoid unreasonable expenditures on behalf of the employee or employer to maintain such fringe benefits for current employees and retirees. At such time as the cost of these fringe benefit plans becomes equitable with those available to other similarly employed State employees, the time extension will cease and the requirements of OMB Circular A-87 (Revised) will apply;

(iv) Requests for time extensions under this section will include an opinion of the State Attorney General, that either legislative action is required to accomplish compliance with OMB Circular A-87 (Revised) or,

for (d)(6)(iii) of this section that such compliance would result in either loss of current benefits to State agency employees and retirees or unreasonable expenditures to maintain these benefits. Such requests will be filed with the Secretary no later than 30 days after the effective date of this part; and

(v) Time extensions granted relative to (d)(6)(iii) of this section require a signed statement by the State agency Administrator, that no improvements have been made to fringe benefits under the extension and that the plan(s) is (are) not consistent with those available to other similarly employed State employees, for each year of the extension. Documentation supporting the affidavit shall be maintained for audit purposes.

(7) Payments from the State's Wagner-Peyser allotment made into a State's account in the Unemployment Trust Fund for the purpose of reducing charges against Reed Act funds (section 903(c) of the Social Security Act, as amended (42 U.S.C. 1103(c)) are allowable costs, provided that:

(i) The charges against Reed Act funds were for amounts appropriated, obligated, and expended for the acquisition of automatic data processing installations or for the acquisition or major renovation of State owned office building; and

(ii) With respect to each acquisition of improvement of property pursuant to paragraph (d)(7)(i) of this section, the payments are accounted for in the State's records as credits against equivalent amounts of Reed Act Funds used for administrative expenditures.

(e) Disclosure of Information. (1) The State shall assure the proper disclosure of information pursuant to section 3(b) of the Act.

(2) The information specified in section 3(b) and other sections of the Act, shall also be provided to officers or any employee of the Federal Government of a State government lawfully charged with administration of unemployment compensation laws, employment service activities under the Act or other related legislation, but only for purposes reasonably necessary for the proper administration of such laws.

(f) Audits, (1) At least once every 2 years, the State shall prepare or have prepared an independent financial and compliance audit covering each full program year not covered in the previous audit, except that

funds expended pursuant to section 7(b) of the Act shall be audited annually.

(2) The Comptroller General and the Inspector General of the Department shall have the authority to conduct audits, evaluations or investigations necessary to meet their responsibilities under sections 9(b)(1) and 9(b)(2), respectively, of the Act.

(3) The audit, conducted pursuant to paragraph (f)(1) or (f)(2) of this section, shall be submitted to the Secretary who shall make an initial determination. Such determinations shall be based on the requirements of the Act, regulations, and State plan.

(i) The initial determination shall identify the audit findings, state the Secretary's proposed determination of the allowability of questioned costs and activities, and provide for informal resolution of those matters in controversy contained in the initial determination.

(ii) The Secretary shall not impose sanctions and corrective actions without first providing the State with an opportunity to present documentation or arguments to resolve informally those matters in controversy contained in the Secretary's initial determination. The informal resolution period shall be at least 60 days from issuance

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of the initial determination and no more that 170 days from the receipt by the Secretary of the final approved audit report. If the matters are resolved informally, the Secretary shall issue a final determination pursuant to paragraph (f)(3)(iii) of this section which notifies the parties in writing of the nature of the resolution and may close the file.

(iii) If the matter is not resolved informally, the Secretary shall provide each party with a final written determination by certified mail, return receipt requested. In the case of audits, the final determination shall be issued not later than 180 days after the receipt by the Secretary of the final approved audit report. The final determination shall:

(A) Indicate that efforts to resolve informally matters contained in the initial determination have been unsuccessful;

(B) List those matters upon which the parties continue to disagree;

(C) List any modifications to the factual findings and conclusions set forth in the initial determination;

(D) Establish a debt if appropriate;

(E) Determine liability, method of restitution of funds and sanctions;

(F) Offer an opportunity for a hearing in accordance with 20 CFR 658.707 through 658.711 in the case of a final determination imposing a sanction or corrective action; and

(G) Constitute final agency action unless a hearing is requested.

(g) Sanctions for Violation of the Act. (1) The Secretary may impose appropriate sanctions and corrective actions for violation of the Act, regulations, or State plan, including the following:

(i) Requiring repayment, for debts owed the Government under the grant, from non-Federal funds;

(ii) Offsetting debts arising from the misexpenditure of grant funds, against amounts to which the State is or may be entitled under the Act, provided that debts arising from gross negligence or willful misuse of funds shall not be offset against future grants. When the Secretary reduces amounts allotted to the State by the amount of the misexpenditure, the debt shall be fully satisfied;

(iii) Determining the amount of Federal cash maintained by the State or a subrecipient in excess of reasonable grant needs, establishing a debt for the amount of such excessive cash, and charging interest on that debt;

(iv) Imposing other appropriate sanctions or corrective actions, except where specifically prohibited by the Act or regulations.

(2) To impose a sanction or corrective action, the Secretary shall utilize the initial and final determination procedures outlined in (f)(3) of this section.

(h) Other violations. Violations or alleged violations of the Act, regulations, or grant terms and conditions except those pertaining to audits or discrimination shall be determined and handled in accordance with 20 CFR part 658, **subpart H**.

(i) Fraud and abuse. Any persons having knowledge of fraud, criminal activity or other abuse shall report such information directly and immediately to the Secretary. Similarly, all complaints involving such matters should also be reported to the Secretary directly and

immediately.

(j) Nondiscrimination and Affirmative Action Requirements. States shall:

(1) Assure that no individual be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration or in connection with any services or activities authorized under the Act in violation of any applicable nondiscrimination law, including laws prohibiting discrimination on the basis of age, race, sex, color, religion, national origin, disability, political affiliation or belief. All complaints alleging discrimination shall be filed and processed according to the procedures in the applicable DOL nondiscrimination regulations.

(2) Assure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ). See, generally, 42 U.S.C. 2000(e)-2(e), 29 CFR parts 1604, 1606, 1625.

(3) Assure that employers' valid affirmative action requests will be accepted and a significant number of qualified applicants from the target group(s) will be included to enable the

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employer to meet its affirmative action obligations.

(4) Assure that employment testing programs will comply with 41 CFR part 60-3 and 29 CFR part 32 and 29 CFR 1627.3(b)(iv).

(5) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, will be governed by the applicable DOL nondiscrimination regulations.

[48 FR 50665, Nov. 2, 1983, as amended at 64 FR 18762, Apr. 15, 1999; 65 FR 49462, Aug. 11, 2000]

Sec. 652.9 Labor disputes.

(a) State agencies shall make no job referral on job orders which will aid directly or indirectly in the filling of a job opening which is vacant because the former occupant is on strike, or is being locked out

in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage.

(b) Written notification shall be provided to all applicants referred to jobs not at issue in the labor dispute that a labor dispute exists in the employing establishment and that the job to which the applicant is being referred is not at issue in the dispute.

(c) When a job order is received from an employer reportedly involved in a labor dispute involving a work stoppage, State agencies shall:

(1) Verify the existence of the labor dispute and determine its significance with respect to each vacancy involved in the job order; and

(2) Notify all potentially affected staff concerning the labor dispute.

(d) State agencies shall resume full referral services when they have been notified of, and verified with the employer and workers' representative(s), that the labor dispute has been terminated.

(e) State agencies shall notify the regional office in writing of the existence of labor disputes which:

(1) Result in a work stoppage at an establishment involving a significant number of workers; or

(2) Involve multi-establishment employers with other establishments outside the reporting State.

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TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 653--SERVICES OF THE EMPLOYMENT SERVICE SYSTEM--Table of Contents

Subpart B--Services for Migrant and Seasonal Farmworkers (MSFWs)

Source: 45 FR 39459, June 10, 1980, unless otherwise noted.

Sec. 653.100 Purpose and scope of **subpart**.

This **subpart** sets forth the principal regulations of the United States Employment Service (USES) for counseling, testing, and job and training referral services for migrant and seasonal farmworkers (MSFWs) on a basis which is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs. It also contains requirements that State agencies establish a system to monitor their own compliance with USES regulations governing services to MSFWs, including the regulations under this **subpart**. Special services to ensure that MSFWs receive the full range of employment related services are established under this **subpart**.

Sec. 653.101 Provision of services to migrant and seasonal farmworkers (MSFWs).

(a) Each State agency and each local office shall offer to migrant and seasonal farmworkers (MSFWs) the full range of employment services, benefits and protections, including the full range of counseling, testing, and job and training referral services as are provided to non-MSFWs. In providing such services, the State agency shall consider and be sensitive to the preferences, needs, and skills of individual MSFWs and the availability of job and training opportunities.

(b) Each State agency shall assure that, in a local area, the same local offices, including itinerant and satellite offices, but exclusive of day-haul operations, offer services to both non-MSFWs and MSFWs. Separate farm labor service local offices, which offer only farmwork to agricultural workers while another local office serving the same geographical area offers other JS services to other applicants, are prohibited so that all applicants receive employment services on the same basis.

Sec. 653.102 Job information.

All State agencies shall make job order information conspicuous and available to MSFWs in all local offices. This information shall include Job Bank information in local offices where it is available. Such information shall be made available either by computer terminal, microfiche, hard copy, or other equally effective means. Each significant MSFW local office shall provide adequate staff assistance to each MSFW to use the job order information effectively. In those offices designated as significant MSFW bilingual offices, such assistance shall be provided to MSFWs in Spanish and English, wherever requested or necessary, during any period of substantial MSFW activity.

Sec. 653.103 MSFW job applications.

(a) Every local office shall determine whether or not applicants are MSFWs as defined at Sec. 651.10 of this chapter.

(b) Except as provided in Sec. 653.105, when an MSFW applies for JS services at a local office or is contacted by an Outreach worker, the services available through the JS shall be explained to the MSFW. In local offices which have been designated as significant MSFW bilingual offices by ETA, this explanation shall be made in Spanish, if necessary or requested during any period of substantial MSFW activity. Other local offices shall provide bilingual explanations wherever feasible.

(c) The local office staff member shall provide the MSFW a list of those services. The list shall be written in English and Spanish and shall specify those services which are available after completion of a full application and those services which are available after completion of a partial application. The JS staff member shall explain to each MSFW the advantages of completing a full application.

Applications shall be reviewed periodically by the local office manager or a member of his/her staff to ensure their accuracy and quality. Applications and the application-taking process shall also be reviewed during State and Federal onsite reviews by the State and Regional MSFW Monitor Advocates and/or review staff, who shall check

overall accuracy and quality, and offer technical advice on corrections or improvements.

(d) If the MSFW wishes to complete a full application, the staff shall provide all assistance necessary to complete the application and shall ensure that the form includes complete information. It shall include, to the extent possible, the significant history of the MSFW's prior employment, training and educational background and a statement of any desired employment and any training needs in order to permit a thorough assessment of the applicant's skills, abilities and preferences. All applicable items shall be completed according to the ETA instructions for preparation of the application card (ES-511). Additional Dictionary of Occupational Titles codes or keywords shall be assigned, where appropriate, based on the MSFW's work history, training, and skills, knowledges, and abilities. Secondary cards shall be completed and separately filed when keywords are not used. In extremely small local offices where the limited applicant load and file size does not require completion of secondary cards, additional D.O.T. codes shall be noted on the primary application card.

(e) If an MSFW wishes any JS service, and does not wish or is unable to file a full application, the interviewer shall try to obtain as much information as possible for a partial application. The interviewer shall enter the information on the partial application. The interviewer shall offer to refer the applicant to any available jobs for which the MSFW may be qualified, and any JS services permitted by the limited information available. He/she shall advise the MSFW that he/she may file a full application at any time.

(f) Partial applications shall be completed according to ETA instructions.

(g) Partial applications for MSFWs shall be filed in accordance with local office procedures for filing other partial applications.

(h) To minimize the need for additional applications in other offices, States shall issue JS cards to MSFWs at the initial visit under the following conditions:

(1) When automated data retrieval systems are available in the

State. In this instance, JS staff shall advise the MSFW that the JS card may be presented at any other JS office in the State and that services will be provided without completion of an additional application unless the services requested require additional information for adequate service delivery.

(2) When an MSFW is referred on an interstate or intrastate order.

In this instance, when it is known to the order-holding local office (through the presentation of an JS card or otherwise) that the MSFW has completed a full application or partial application in the applicant holding office or elsewhere, an additional application shall not be taken by the order-holding office unless the MSFW requests JS services in addition to referral on the clearance order.

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[45 FR 39459, June 10, 1980, as amended at 46 FR 7772, Jan. 23, 1981; 47 FR 145, Jan. 5, 1982]

Sec. 653.104 Services to MSFW family members, farm labor contractors, and crew members.

(a) In addition to other requirements in this **subpart**, the following special requirements are established for services to MSFW family members, farm labor contractors and crew members. Except as provided at Secs. 653.103(e) and 653.105, no local office shall refer an MSFW family or crew unless each working member of the family or crew being referred, has filed either a full or partial application pursuant to Sec. 653.103(b) at a local office or has been issued a JS card in instances set forth in Sec. 653.103(h). Local offices may, upon request, provide general information, e.g., the types of crops in other areas, to farm labor contractors and family heads prior to the registration of all working members.

(b) No local office shall accept an application from an individual for employment as a farm labor contractor or fill an agricultural job

order submitted by a farm labor contractor ("FLC") or farm labor contractor employee ("FLCE") unless the FLC or FLCE shows or obtains a valid FLC certificate, or FLCE identification card

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where required by Federal law, and a valid State certification where required by State law. If a FLC or FLCE is temporarily without his or her valid FLC certificate or FLCE identification card the local office shall try to verify the existence of the valid certificate or identification card by telephoning the State central office and/or the Department of Labor's Employment Standards Administration regional office. The local office, however, shall not serve the FLC or FLCE until the existence of the valid certificate or identification card is verified.

(c) Local offices may refer workers to registered farm labor contractors who are employers provided that a valid job order has been placed with the local office which clearly specifies all the terms and conditions of employment with the farm labor contractor shown as employer of record. Before a local office may refer workers to a farm labor contractor offering employment in another area of the State or in another State, one of two requirements must be met: Either a valid interstate clearance order from another State agency is on file in the office, or an intrastate order has been received from an office in another area of the State which is not within commuting distance of the office where the farm labor contractor is recruiting workers. Unless one of these conditions exists, the local office may only refer workers to a registered farm labor contractor who is an employer placing a local job order. Whenever the job order includes the provision of transportation, a FLC certificate authorizing transportation must be shown before workers are referred on the order.

Sec. 653.105 Job applications at day-haul facilities.

If the State agency is operating a day-haul facility under the exceptional circumstances provisions described in Sec. 653.106(a), a list of JS services shall be distributed and a full application shall be

completed whenever an MSFW requests the opportunity to file a full application unless this is impractical at that time. In such cases, a full application shall be taken at the earliest practical time. In all other cases, a list of JS services shall be distributed.

Sec. 653.106 JS day-haul responsibilities.

(a) State agencies shall not establish, operate, or supervise any agricultural day-haul facilities unless exceptional circumstances warrant such action and prior approval of the Regional Administrator is obtained.

(b) No JS applicants shall be referred to non-JS operated day-haul facilities, unless the applicant is referred on a specific job order and is provided with a checklist summarizing wages, working conditions, and other material specifications on the job order. Such checklists, where necessary, shall be in English and Spanish. State agencies shall use a standard checklist format provided by ETA unless a variance has been approved by the Regional Administrator. However, general labor market information on the availability of jobs, the level of activity of agricultural and nonagricultural employment, and crop conditions shall be provided, upon request, to applicants where specific referrals to employment cannot be made.

(c) JS outreach workers shall visit all JS and non-JS operated day-haul facilities with substantial activity during their operation for purposes of providing MSFWs with information and assistance pursuant to Sec. 653.107(j). Monitoring of such activity shall be conducted pursuant to Sec. 653.108(p).

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[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 653.107 Outreach.

(a) Each State agency shall operate an outreach program in order to locate and to contact MSFWs who are not being reached by the normal intake activities conducted by the local offices. Upon receipt of planning instructions and resource guidance from ETA, each State agency shall develop an annual outreach plan, setting forth numerical goals, policies and objectives. This plan shall be subject to the approval of the Regional Administrator as part of the program budget plan (PBP) process. Wherever feasible, State agencies shall coordinate their outreach efforts with

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those of public and private community service agencies and MSFW groups.

(b) In determining the extent of their outreach program, States shall be guided by the following statement of ETA policy:

(1) State agencies should make sufficient penetration in the farmworker community so that a large number of MSFWs are aware of the full range of JS services.

(2) Significant MSFW Local offices should conduct especially vigorous outreach in their service areas.

(3) State agencies in supply States should conduct particularly thorough outreach efforts with extensive follow-up activities which capitalize on the relatively long duration of MSFW residence in the State.

(c) The plan shall be based on the actual conditions which exist in the particular State, taking into account the State agency's history of providing outreach services, the estimated number of MSFWs in the State, and the need for outreach services in that State. The approval of the Regional Administrator shall be based upon his/her consideration of the following features of the outreach plan:

(1) Assessment of need. This assessment of need shall include:

(i) A review of the previous year's agricultural activity in the State.

(ii) A review of the previous year's MSFW activity in the State.

(iii) A projected level of agricultural activity in the State for the coming year.

(iv) A projected number of MSFWs in the State for the coming year,

which shall take into account data supplied by CETA 303 grantees, other MSFW organizations, employer organizations and federal and/or State agency data sources such as the Department of Agriculture and the United States Employment Service.

(v) A statement of the consideration given to the State Monitor Advocate's recommendation as set forth in the annual summary developed under Sec. 653.108(t).

(2) Assessment of available resources. This assessment of the resources available for outreach shall include:

(i) The level of funds available from all sources, including the funds specifically made available to the State agency for outreach.

(ii) Resources made available through existing cooperative agreements with public and private community service agencies and MSFW groups.

(iii) Where fewer resources are available for outreach than in a prior year, a statement of why fewer resources are available.

(3) Proposed outreach activities. The proposed outreach activities shall be designed to meet the needs determined under paragraph (c)(1) of this section with the available resources determined under paragraph (c)(2) of this section. The plan for the proposed outreach activities shall include:

(i) Numerical goals for the number of MSFWs to be contacted during the fiscal year by JS staff. The number of MSFWs planned to be contacted by other agencies under cooperative arrangements during the fiscal year also should be included in the plan. These numerical goals shall be based on the number of MSFWs estimated to be in the State in the coming year, taking into account the varying concentration of MSFWs during the seasons in each geographic area, the range of services needed in each area and the number of JS and/or cooperating agency staff who will conduct outreach.

(ii) Numerical goals for the staff years to be utilized for outreach during the fiscal year.

(iii) The level of funding to be utilized for outreach during the fiscal year.

(iv) The tools which will be used to conduct outreach contacts, including personal contact, printed matter, videotapes, slides, and/or cassette recordings.

(v) The records to be maintained by the JS outreach staff--logs of daily contacts to include the number of MSFWs contacted and assistance provided. The name of the individual contacted should be recorded when:

- (A) An application for work is taken by an outreach worker,
- (B) A referral to a job is made by an outreach worker, and/or
- (C) A complaint is taken by an outreach worker.

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(d) In developing the outreach plan, the State agency shall solicit information and suggestions from CETA 303 grantees, other appropriate MSFW groups, public agencies, agricultural employer organizations, and other interested organizations. In addition, at least 45 days before submitting its final outreach plan to the Regional Administrator, the State agency shall provide a proposed plan to CETA 303 grantees, public agencies, agricultural employer organizations, and other organizations expressing an interest and allow at least 30 days for review and comment. The State agency shall:

- (1) Consider any comments received in formulating its final proposed plan.
- (2) Inform all commenting parties in writing whether their comments have been incorporated and, if not, the reasons therefore.
- (3) Transmit the comments and recommendations received and its responses to the Regional Administrator with the submission of the plan. (If the comments are received after the submission of the plan, they may be sent separately to the Regional Administrator.)

(e) The outreach plan shall be submitted as an essential part of the State's annual PBP. The resource requirement of the plan shall be reflected in the PBP budget request. The plan, including the resource requirement, shall be reviewed by the Regional Administrator during the annual PBP approval process. The State agency shall be required to implement the approved outreach plan as part of its compliance with the PBP.

(f) The Regional Administrator shall review and evaluate the outreach plan, including the assessments of needs and resources, in light of the history of the State's outreach efforts and the statements of policy set forth in Sec. 653.107(b). He/she shall approve the plan

only if it demonstrates that adequate outreach will be conducted. The approved outreach plan shall be available for review by interested parties.

(g) As part of the annual PBP process, funding of State agencies shall be contingent upon the substantial and timely compliance of the State agency with its prior year outreach plan. However, if the Regional Administrator makes a finding of good faith efforts, he/she may fund a State agency even though it did not achieve substantial and timely compliance.

(h) For purposes of hiring and assigning staff to outreach duties, State agencies shall seek, through merit system procedures, qualified candidates:

- (1) Who are from MSFW backgrounds, and/or
- (2) Who speak Spanish, and/or
- (3) Who are racially or ethnically representative of the MSFWs in the service area.

(i) The five States with the highest estimated year round MSFW activity shall assign, in accordance with State merit staff requirements, full-time, year round staff to outreach duties. The remainder of the significant MSFW states shall make maximum efforts to hire outreach staff with MSFW experience for year round positions and shall assign outreach staff to work full-time during the period of the highest MSFW activity. Such outreach staff shall be bilingual if warranted by the characteristics of the MSFW population in the State, and shall spend a majority of their time in the field. The Regional Administrator may grant approval for a deviation from the requirements of this section if the State agency provides adequate evidence that outreach activities and service delivery to MSFWs would be improved through other staffing arrangements.

(j) For purposes of this **subpart**, an outreach "contact" shall include either the presentation of information and offer of assistance specified in paragraphs (j)(1) and (j)(2) of this section, or the followup activity specified in paragraph (j)(3) of this section.

(1) Outreach workers shall explain to MSFWs at their working, living or gathering areas, including day-haul sites, by means of written and oral presentations either spontaneous or recorded, in a language readily understood by them, the following;

(i) The services available from the local office, including the availability of referrals to agricultural and nonagricultural employment, to training, to supportive services, as well as the availability of testing, counseling and other job development services;

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(ii) Types of specific employment opportunities which are currently available in the JS system;

(iii) Information on the JS complaint system and other organizations serving MSFWs;

(iv) A basic summary of farmworker rights with respect to the terms and conditions of employment;

(v) Provided, however, That outreach workers shall not enter work areas to perform outreach duties described in this section on an employer's property without permission of the employer, unless otherwise authorized to enter by law, shall not enter workers' living areas without the permission of the workers, and shall comply with appropriate State laws regarding access.

(2) After making the presentation, outreach workers shall urge the MSFWs to go to the local office to obtain the full range of JS services. If an MSFW cannot or does not wish to visit the local JS office, the outreach workers shall offer to provide on-site the following:

(i) Assistance in the preparation of applications;

(ii) If an unemployed MSFW, assistance in obtaining referral to specific employment opportunities currently available; if an employed MSFW, information regarding the types of employment opportunities which will become available upon the date on which the MSFW indicates that he/she will be available following his/her current employment.

(iii) Assistance in the preparation of either JS or non-JS related complaints;

(iv) Receipt and subsequent referral of complaints to the local office complaint specialist or local officer manager;

(v) Referral to supportive services for which the individual or a family member may be eligible;

(vi) As needed, assistance in making appointments and arranging transportation for individual MSFWs or members of their family to and

from local offices or other appropriate agencies.

(3) Outreach workers shall make follow-up contacts as are necessary and appropriate to provide to the maximum extent possible the assistance specified in paragraphs (j)(1) and (j)(2) of this section.

(4) In addition to the foregoing outreach contacts, the State agency shall publicize the availability of JS services through such means as newspaper and electronic media publicity. Contacts with public and private community agencies, employers and/or employer organizations, and MSFW groups also shall be utilized to facilitate the widest possible distribution of information concerning JS services.

(k) Outreach workers shall be alert to observe the working and living conditions of MSFWs and, upon observation, or upon receipt of information regarding a suspected violation of federal or State employment-related law, document and refer information to the local office manager for processing in accordance with Sec. 653.113.

(l) Outreach workers shall be trained in local office procedures and in the services, benefits, and protections afforded MSFWs by the JS. They shall also be trained in the procedure for informal resolution of complaints. The program for such training shall be formulated by the State Administrator, pursuant to uniform guidelines developed by ETA, and each State's program shall be reviewed and commented upon in advance by the State MSFW Monitor Advocate.

(m) During months when outreach activities are conducted, outreach workers shall maintain complete records of their contacts with MSFWs and the services they perform in accordance with a format developed by ETA. These records shall include a daily log, a copy of which shall be sent monthly to the local office manager and maintained on file for at least two years. These records shall include the number of contacts and names of contacts (where applicable), the services provided (e.g., whether a complaint was received, whether an application was taken, and whether a referral was made). Outreach workers also shall maintain records of each possible violation or complaint of which they have knowledge, and their actions in ascertaining the facts and referring the matters as provided herein. These records shall include a description of the circumstances and names of any

employers who have refused outreach workers access to MSFWs pursuant to Sec. 653.107(l).

(n) During months when outreach activities are conducted, each local office manager shall file with the State MSFW Monitor Advocate a monthly summary report of outreach efforts. These reports shall summarize information collected, pursuant to paragraph (m) of this section. The local office manager and/or other appropriate State office staff members shall assess the performance of outreach workers by examining the overall quality and productivity of their work, including the services provided and the methods and tools used to offer services. Performance shall not be judged solely by the number of contacts made by the worker. The monthly reports and daily outreach logs shall be made available to the State MSFW Monitor Advocate and federal On-Site Review Teams. In addition, the distribution of any special funds for outreach, should funds become available, shall be based on the effectiveness and need of the State's outreach program as monitored by ETA.

(o) Outreach workers shall not engage in political, unionization or antiunionization activities during the performance of their duties.

(p) Outreach workers shall be provided with, carry and display, upon request, identification cards or other material identifying them as employees of the State agency.

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[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 653.108 State agency self-monitoring.

(a) State Administrators shall assure that their State agencies monitor their own compliance with JS regulations in serving MSFWs on an ongoing basis. The State Administrator shall have overall responsibility for State agency self-monitoring.

(b) The State Administrator shall appoint a State MSFW Monitor

Advocate. The State Administrator shall inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply through the State merit system prior to appointing a State MSFW Monitor Advocate. Among qualified candidates determined through State merit system procedures, the State agencies shall seek persons (1) who are from MSFW backgrounds, or (2) who speak Spanish or other languages of a significant proportion of the State MSFW population, or (3) who are racially or ethnically similar to the MSFWs in the State, or (4) who have substantial work experience in farmworker activities.

(c) The State MSFW Monitor Advocate shall have direct, personal access, whenever he/she finds it necessary, to the State Administrator and shall work in the State central office. The State MSFW Monitor Advocate shall have status and compensation as approved by the civil service classification system and be comparable to other State positions assigned similar levels of tasks, complexity and responsibility.

(d) The State MSFW Monitor Advocates shall be assigned staff necessary to fulfill effectively all of his/her duties as set forth in this **subpart**. The number of staff positions shall be determined by reference to:

(1) The number of MSFWs in the State, as measured at the time of the peak MSFW population (MSFW activity), and (2) the need for monitoring activity in the State. The MSFW Monitor Advocates shall devote full time to Monitor Advocate functions, except that the USES Administrator may reallocate positions from States of low MSFW activity to States of higher MSFW activity and may approve a plan for less than full-time work in States of low MSFW activity. Any such plan must demonstrate that the State MSFW Monitor Advocate function can be effectively performed with part-time staffing.

(e) All State MSFW Monitor Advocates and Assistant MSFW Monitor Advocates shall attend within the first three months of their tenure a training session conducted by the Regional MSFW Monitor Advocate. They shall

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also attend whatever additional training sessions are required by the

Regional or National MSFW Monitor Advocate.

(f) The State MSFW Monitor Advocate shall provide any relevant documentation requested from the State agency by the Regional MSFW Monitor Advocate.

(g) The State MSFW Monitor Advocate shall:

(1) Conduct an ongoing review of the delivery of services and protections afforded by JS regulations to MSFWs by the State agency and local offices. The State MSFW Monitor Advocate, without delay, shall advise the State agency and local offices of (i) problems, deficiencies, or improper practices in the delivery of services and protections afforded by these regulations (including progress made in achieving affirmative action goals and timetables), and (ii) means to improve such delivery.

(2) Participate in onsite local office MSFW formal monitoring reviews on a regular basis.

(3) Assure that all significant MSFW local offices not reviewed onsite by Federal staff, are reviewed at least once a year by State staff, and that, if necessary, those local offices in which significant problems are revealed by required reports, management information, the JS complaint system or otherwise are reviewed as soon as possible.

(4) Assure that the monitoring review format, developed by ETA, is used as a guideline in the conduct of local office MSFW onsite formal monitoring reviews. This format will ensure that applications and the application-taking process are reviewed during State onsite reviews by State MSFW Monitor Advocates and/or review staff, who shall check overall accuracy and quality, and offer technical advice on corrections or improvements.

(5) Review the State agency's outreach plan, and on a random basis, the outreach workers' daily logs and other reports including those showing or reflecting the workers' activities, to ensure that they comply with the outreach plan.

(h) Formal onsite MSFW monitoring reviews of local offices shall be conducted using the following procedures:

(1) Before beginning such a review, the State MSFW Monitor Advocate and/or review staff shall study:

- (i) Program performance data,
- (ii) Reports of previous reviews,

(iii) Corrective action plans developed as a result of previous reviews,

(iv) Complaint logs, and

(v) Complaints elevated from the office or concerning the office.

(2) Upon completion of a local office onsite formal monitoring review, the State MSFW Monitor Advocate shall hold one or more wrap-up sessions with the local office manager and staff to discuss any obvious findings and offer initial recommendations and appropriate technical assistance.

(3) After each review the State MSFW Monitor Advocate shall conduct an indepth analysis of the review data. The conclusions and recommendations of the State MSFW Monitor Advocate shall be put in writing, shall be sent to the State Administrator, to the official of the State agency with line authority over the local office, and other appropriate State agency officials.

(4) The state MSFW Monitor Advocate may recommend that the review responsibility set forth in this subsection be delegated to a responsible professional member of the administrative staff of the State agency, if and when the State Administrator finds such delegation necessary. In such event, the State MSFW Monitor Advocate shall be responsible for and shall approve the written report of the review.

(5) The local office manager shall develop and propose a written corrective action plan. The plan shall be approved, or appropriately revised, by appropriate superior officials and the State MSFW Monitor Advocate. The plan shall include actions required to correct or to take major steps to correct any problems within 30 days or if the plan allows for more than 30 days for full compliance, the length of, and the reasons for, the extended period shall be specifically stated.

(6) State agencies, through line supervisory staff, shall be responsible for assuring and documenting that the local office is in compliance within the time period designated in the plan.

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State agencies shall submit to the appropriate ETA regional offices copies of the onsite local office formal monitoring review reports and corrective action plans for significant local offices.

(i) The State MSFW Monitor Advocate shall participate in federal reviews conducted pursuant to **subpart G**.

(j) At the discretion of the State Administrator, the State MSFW Monitor Advocate may be assigned the responsibility as the complaint specialist. The State MSFW Monitor Advocate shall participate in and monitor the performance of the complaint system, as set forth at 20 CFR 658.400 et seq. The State MSFW Monitor Advocate shall review the local office managers' informal resolution of complaints relating to MSFWs and shall ensure that the State agency transmits copies of the logs of MSFW complaints to the regional office quarterly.

(k) The State MSFW Monitor Advocate also shall serve as an advocate to improve services for MSFWs within JS. The State MSFW Monitor Advocate shall establish ongoing liaison with CETA 303 and other organizations serving farmworkers, and employers and/or employer organizations, in the State. The State MSFW Monitor Advocate shall meet frequently with representatives of these organizations to receive complaints, assist in referrals of alleged violations to enforcement agencies, receive input on improving coordination with JS or improving JS services to MSFWs.

(l) The State MSFW Monitor Advocate shall conduct frequent field visits to the working and living areas of MSFWs, and shall discuss JS services and other employment-related programs with MSFWs, crew leaders, and employers. Records shall be kept of each such visit.

(m) The State MSFW Monitor Advocate shall participate in the appropriate regional public meeting(s) held by the Department of Labor Regional Farm Labor Coordinated Enforcement Committee.

(n) The State MSFW Monitor Advocate shall ensure that outreach efforts in all significant MSFW local offices are reviewed at least yearly to ensure that there is continuing compliance with 20 CFR 653.107. This review will include accompanying at least one outreach worker from each significant MSFW local office on his/her visits to MSFWs' working and living areas. The State MSFW Monitor Advocate shall review findings from these reviews.

(o) The State MSFW Monitor Advocate shall review and assess the adequacy of the annual State affirmative action plan for MSFWs, and shall report such findings to the State Administrator.

(p) The State MSFW Monitor Advocate shall ensure that JS outreach activities are reviewed periodically at day-haul sites at which these

activities are conducted. Complete records of such visits shall be kept. The State MSFW Monitor Advocate shall ensure that local offices and the State Administrator are advised of any deficiencies.

(q) The State MSFW Monitor Advocate shall review on at least a quarterly basis all statistical and other MSFW-related data reported by significant MSFW local offices in order (1) to determine the extent to which the State agency has complied with regulations at Sec. 653.100 et seq., and (2) to identify the areas of inadequate compliance.

(r) The State MSFW Monitor Advocate shall have full access to all statistical and other MSFW-related information gathered by State agencies and local offices and may interview State and local office staffs with respect to reporting methods. Subsequent to each review, the State MSFW Monitor Advocate shall consult, as necessary, with State and local offices and provide technical assistance to ensure accurate reporting.

(s) The State MSFW Monitor Advocate shall review and comment on proposed State JS directives, manuals, and operating instructions relating to MSFWs and shall ensure (1) that they accurately reflect the requirements of the regulations, and (2) that they are clear and workable. The State MSFW Monitor Advocate also shall explain and make available at the requestor's cost, pertinent directives and procedures to employers, employer organizations, farmworkers, farmworker organizations and other parties expressing

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an interest in a readily identifiable directive or procedure issued and receive suggestions on how these documents can be improved.

(t) The State MSFW Monitor Advocate shall prepare for the State Administrator an annual summary of JS services to MSFWs within his/her State based on statistical data and his/her reviews and activities set forth in these regulations. The summary shall include an assessment of the State agency's activities related to MSFWs such as those covered in the State agency's PBP, outreach plan, and affirmative action plan, and the other matters with respect to which the State MSFW Monitor Advocate has responsibilities under these regulations. A copy of this summary shall be forwarded to the Regional Administrator by the State

Administrator.

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[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 653.109 Data collection.

State agencies shall: (a) Collect data on MSFWs, including data on the number (1) contacted through outreach activities, (2) registering for service, (3) referred to agricultural jobs, (4) referred to non-agricultural jobs, (5) placed in agricultural jobs, (6) placed in non-agricultural jobs, (7) referred to training, (8) receiving counseling, (9) receiving job development, (10) receiving testing, (11) referred to supportive service, (12) receiving some service, (13) placed according to wage rates, and (14) placed according to duration. The State agencies also shall collect data on agricultural clearance orders (including field checks), MSFW complaints, and monitoring activities, as directed by ETA. These data shall be collected in accordance with the ESARS Handbook and applicable ETA Reports and Analysis Letters.

(b) Collect data on the number of MSFWs who were served as to whether they were male, female, black, Hispanic, American Indian, Asian, or Pacific Islander.

(c) Provide necessary training to State agency, including local office personnel, to assure accurate reporting of data;

(d) Collect and submit to ETA as directed by ETA, data on MSFWs required by the PBP, and

(e) Periodically collect and verify data required under this subsection, take necessary steps to ensure its validity, and collect and submit data for verification to ETA, as directed by ETA; and

(f) Submit additional reports to the ETA at such times and containing such items as ETA directs.

(Approved by the Office of Management and Budget under control number

1205-0039)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 653.110 Disclosure of data.

(a) State agencies shall disclose to the public, on written request, in conformance with applicable State and Federal law, the data collected by State and local offices pursuant to Sec. 653.109, if possible within 10 working days after receipt of the request.

(b) If a request for data held by a State agency is made to the ETA national or regional office, the ETA shall forward the request to the State agency for response.

(c) If the requested data cannot be supplied within 10 working days of receipt by the State agency of the request, the State agency shall respond to the requestor in writing, giving the reason for the delay and specifying the date by which it expects to be able to comply.

(d) State agency intra-agency memoranda and reports (or parts thereof) and memoranda and reports (or parts thereof) between the State agency and the ETA, however, to the extent that they contain statements of opinion rather than facts, may be withheld from public disclosure provided this reason for withholding is given to the requestor in writing. Similarly, documents or parts thereof, which, if disclosed, would constitute an unwarranted invasion of personal or employer privacy, may also be withheld

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provided the reason is given to the requestor in writing.

Sec. 653.111 State agency staffing requirements.

(a) On a statewide basis, staff representative of the racial and ethnic characteristics in the work force shall be distributed in substantially the same proportion among (1) all "job groups" (as that

term is defined by the Office of Federal Contract Compliance Programs), and (2) all offices in the plan(s).

(b)(1) As part of the PBP, each State agency shall develop and submit to the Regional Administrator affirmative action plans for all significant local offices within its jurisdiction (which, for the purposes of this provision, means those local offices representing the top 20 per cent of MSFW activity nationally). These affirmative action plans shall include goals and timetables and shall ensure that sufficient numbers of qualified, permanent minority staff are hired. Where qualified minority applicants are not available to be hired as permanent staff, qualified minority part-time, provisional, or temporary staff shall be hired in accordance with State merit system procedures, where applicable. These affirmative action plans shall be prepared on an individual office basis.

(2) The affirmative action plans shall include an analysis of the racial and ethnic characteristics of the work force in the local office service area. To determine the "work force" for the purpose of this paragraph, the State agency shall include the racial and ethnic characteristics of any MSFW population which is not a part of the permanent work force by computing an estimate of the total work years MSFWs collectively spend in the area and including a number of workers equivalent to this estimate as part of the permanent work force. This computation shall be made by calculating the average length of time, as a fractional part of a year, MSFWs stay in the area and then multiplying this figure by the total estimated MSFW population in the area during the previous year.

(3) The affirmative action plan also shall include an analysis of the local office staffing characteristics. The plan shall provide a comparison between the characteristics of the staff and the work force and determine if the composition of the local office staff(s) is representative of the racial and ethnic characteristics of the work force in the local office service area(s).

(4) If the staff under-represents any of these characteristics, the State agency shall establish a staffing goal at a level equivalent to the percentage of the characteristics in the work force in the local office service areas. The State agency also shall establish a reasonable timetable for achieving the staffing goal by hiring or promoting

available, qualified staff in the under-represented categories. In establishing timetables, the State agency shall consider the vacancies anticipated through expansion, contraction, and turnover in the office(s) and available funds, and all affirmative action plans shall establish timetables that are designed to achieve the staffing goal no later than December 31, 1983.

(c) In addition, each State agency which has significant local offices, shall undertake special efforts to recruit MSFWs and persons from MSFW back-grounds for its staff, shall document achievements, and shall include in the affirmative action plan(s) a complete description of specific actions which the agency will take and time frames within which these actions will be taken.

(d) In developing the affirmative action plan for significant local offices, the State agency shall solicit from CETA 303 and other appropriate MSFW groups, employer organizations and other interested organizations, estimates of the total MSFW population in each local office service area, and the average length of time the MSFWs stay in the area. In addition, State agencies shall solicit, consider, incorporate as appropriate, respond to and include copies of comments from CETA 303, other appropriate MSFW groups, employer organizations, and other interested organizations, following procedures set forth for the annual outreach plan at Sec. 653.107(d).

(e) As part of the annual Program and Budget Plan (PBP) process, the

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funding of State agencies which are required to develop and implement affirmative action plans for significant local offices shall be contingent upon the timely submittal of adequate affirmative action plans and the substantial and timely attainment of the goals and timetables contained in those plans. However, if the Regional Administrator makes a finding of good faith efforts, he/she may fund a State agency even though it did not achieve substantial and timely compliance.

(f) All State Employment Security Agencies (SESAs) required to develop affirmative action plans for significant local offices shall keep accurate records of their employment practices for those offices,

including information on all applications. These records shall be maintained in accordance with the recordkeeping requirements concerning affirmative action which are established by ETA and distributed to the SESAs. All records shall be made available to the State MSFW Monitor Advocate, EEO staff and Federal On-Site Review Teams.

(g) Affirmative action plans shall contain a description of specific steps to be taken for the adequate recruitment of MSFWs for all vacant positions in significant local offices and the central office. These steps shall include advertisements in newspapers, radio or other media, in a manner calculated to best reach the MSFW population, and contacts by outreach workers and the State MSFW Monitor Advocate with groups serving the MSFW population.

(h) State EEO staff shall have the responsibility for developing affirmative action plans. The State MSFW Monitor Advocate(s) shall comment on the plan to the State Administrator. Upon submission of the affirmative action plan as part of the State agency's PBP submittal, the Regional MSFW Monitor Advocate shall review the affirmative action plan(s) as it pertains to MSFWs and comment to the Regional Administrator. As part of his/her regular reviews of State agency compliance, the Regional MSFW Monitor Advocate shall monitor the extent to which the State has complied with its affirmative action plan(s) as it pertains to MSFWs. The Regional MSFW Monitor Advocate's finding as to the adequacy of the plan(s) and as to the State's compliance with the plan(s) shall be considered in PBP decisions involving future funding of the State agency.

(Approved by the Office of Management and Budget under control number 1205-0039)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 653.112 State agency program budget plans.

(a) Each State agency, in its annual program budget plan, shall describe its plan to carry out the requirements of this **subpart** in the

following year. The plan shall include, where applicable, the outreach and affirmative action plans required by Secs. 653.107 and 653.111, respectively. For significant MSFW States, ETA shall establish program performance indicators reflecting equity indicators and indicators measuring minimum levels of service to MSFWs which the significant MSFW State agencies will be required to meet. These program performance indicator requirements shall be contained in the PBP Guidelines which ETA promulgates on an annual basis.

(b) Equity indicators shall address JS controllable services and shall include, at a minimum, individuals referred to a job; receiving counselling; receiving job development; receiving some service; and referred to supportive service.

(c) Minimum level of service indicators shall address other services to MSFWs and shall include, at a minimum, individuals placed in a job; placed in a job with a wage exceeding the Federal minimum wage by at least 50 cents/hour; placed long-term (150 days or more) in a non-agricultural job; review of significant MSFW local offices; field checks on agricultural clearance orders; outreach contacts per staff day; and processing of complaints. The determination of the minimum service levels required of significant MSFW States for each year shall be based on the following:

(1) Past State agency performance in serving MSFWs, as reflected in on-site reviews and data collected under Sec. 653.109;

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(2) The need for services to MSFWs in the following year, comparing prior and projected levels of MSFW activity;

(3) The ETA program priorities for the following year; and

(4) Special circumstances and external factors existing in the particular State.

(d) The Regional Administrator shall review this portion of the PBP, and approve it upon making a written determination that it is acceptable in light of the requirements of this **subpart**. The Regional Administrator's written determination shall be available to the public upon request.

(Approved by the Office of Management and Budget under control number 1205-0039)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39459, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 653.113 Processing apparent violations.

(a) If a State agency employee observes, has reason to believe, or is in receipt of information regarding a suspected violation of employment related laws or JS regulations by an employer, except as provided at Sec. 653.503 (field checks) or Sec. 658.400 of this chapter (complaints), the employee shall document the suspected violation and refer this information to the local office manager.

(b) If the employer has filed a job order with the JS office within the past 12 months, the local office shall attempt informal resolution. If the employer does not remedy the suspected violation within 5 working days, procedures at part 658, **subpart F** of this chapter shall be initiated and, if a violation of an employment related law is involved, the violation shall be referred to the appropriate enforcement agency in writing.

(c) If the employer has not filed a job order with the local office during the past 12 months, the suspected violation of an employment related law shall be referred to the appropriate enforcement agency in writing.

Subpart C--Services for Veterans [Reserved]

Subpart D--Services to the Handicapped [Reserved]

Subpart E--Support Services [Reserved]

[Code of Federal Regulations]

[Title 20, Volume 3]

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[Page 442-447]

TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 653--SERVICES OF THE EMPLOYMENT SERVICE SYSTEM--Table of Contents

Subpart F--Agricultural Clearance Order Activity

Source: 45 FR 39466, June 10, 1980, unless otherwise noted.

Sec. 653.500 Purpose and scope of **subpart**.

This section contains the requirements for acceptance and handling of intrastate and interstate job clearance orders seeking workers to perform agricultural or food processing work on a less than year round basis. Orders seeking workers to perform agricultural or food processing work on a year round basis which involves permanent relocation are not subject to the requirements of this **subpart**. This section, therefore, contains requirements which affect not only applicants who are categorized as MSFWs based on their past employment, but all workers who are recruited through the JS intrastate and interstate clearance systems for less than year round agricultural or food processing work.

Sec. 653.501 Requirements for accepting and processing clearance orders.

(a) In view of the statutorily established basic function of the job service as a no-fee labor exchange, that is, as a forum for bringing together employers and job seekers, neither the ETA nor the State agencies are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. Nor does any job order

accepted or recruited upon by the JS constitute a contractual job offer to which the ETA or a State agency is in any way a party. Nevertheless, if the ETA or a State agency discovers that an employer's job order contains a material misrepresentation, the procedures of **subpart F** of part 658 of this chapter shall be followed.

(b) Intrastate and interstate job orders shall include the language of the first two sentences of paragraph (a) of this section.

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(c) No local office or State agency shall place into intrastate or interstate clearance any job order seeking workers to perform agricultural or food processing work before reviewing it pursuant to paragraphs (d) or (e) of this section, as applicable.

(d) No local office shall place a job order seeking workers to perform agricultural or food processing work into intrastate clearance unless:

(1) The job order does not contain an unlawful discriminatory specification by race, color, religion, national origin, age, sex, or mental or physical status unrelated to job performance (handicap);

(2) The employer has signed the job order and the job order states all the material terms and conditions of the employment, including:

(i) The crop;

(ii) The nature of the work;

(iii) The anticipated period and hours of employment;

(iv) The anticipated starting and ending date of employment and the anticipated number of days and hours per week for which work will be available;

(v) An assurance that:

(A) The employer will provide to workers referred through the clearance system the number of hours of work cited in paragraph (d)(2)(iv) of this section for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 working days prior to the original date of need (pursuant to paragraph (d)(2)(xiii) of this section) by so notifying the order-holding office. The State agency shall make a record of this notification and shall attempt to inform referred migrant workers of the

change in accordance with the following procedure:

(B) All workers referred through the clearance system, farm labor contractors on behalf of migrant workers or family heads on behalf of migrant family members referred through the clearance system shall be notified to contact a local job service office, preferably the order-holding office, to verify the date of need cited no sooner than 9 working days and no later than 5 working days prior to the original date of need cited on the job order; and that failure to do so will disqualify the referred migrant worker from the assurance provided in paragraphs (a) and (d) of this section.

(C) If the worker referred through the clearance system contacts a local office (in any State) other than the order holding office, that local office shall assist the referred worker in contacting the order holding office on a timely basis. Such assistance shall include, if necessary, contacting the order holding office by telephone or other timely means on behalf of the worker referred through the clearance system.

(D) If the employer fails to notify the order-holding office at least 10 working days prior to the original date of need the employer shall pay eligible (pursuant to paragraph (b) of this section) workers referred through the clearance system the specified hourly rate of pay, or in the absence of a specified hourly rate of pay, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need.

(E) Employers may require workers to perform alternative work if the guarantee in this section is invoked and if such alternative work is stated on the job order.

(F) For the purposes of this assurance, "working days" shall mean those days that the order-holding local office is open for public business.

(vi) The hourly wage rate or the piece rate estimated in hourly wage rate equivalents for each activity and unit size;

(vii) Any deductions to be made from wages;

(viii) A specification of any non-monetary benefits to be provided by the employer;

(ix) Any hours, days or weeks for which work is guaranteed, and, for each guaranteed week of work except as provided in paragraph (d)(2)(v)

of this section, the exclusive manner in which the guarantee may be abated due to weather conditions or other acts of God beyond the employer's control;

(x) Any bonus or work incentive payments or other expenses which will be paid by the employer in addition to the basic wage rate, including the anticipated time period(s) within which such

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payments will be made. No such payments, however, shall be made contingent upon the worker continuing employment beyond the period of employment specified in the job order or, in the case of any worker with children, beyond the time needed to return home for the beginning of the school year;

(xi) An assurance that no extension of employment beyond the period of employment specified in the job order shall relieve the employer from paying the wages already earned, or if specified in the job order as a term of employment, providing transportation or paying transportation expenses to the worker's home;

(xii) Assurances that the working conditions comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws;

(xiii) An assurance that the employer will expeditiously notify the order-holding local office or State agency by telephone immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment or other factors have changed the terms and conditions of employment. For orders submitted in conjunction with requests for foreign workers, an assurance that the employer will follow-up the telephone notification in writing.

(xiv) An assurance that the employer, if acting as a farm labor contractor ("FLC") or farm labor contractor employee ("FLCE") on the order, has a valid FLC certificate or FLCE identification card; and

(xv) An assurance of the availability of no cost or public housing which meets the Federal standards and which is sufficient to house the specified number of workers requested through the clearance system. This assurance shall cover the availability of housing for only those

workers, and, when applicable, family members who are unable to return to their residence in the same day.

(xvi) An assurance that outreach workers shall have reasonable access to the workers in the conduct of outreach activities pursuant to Sec. 653.107.

(3) The job order contains all the material terms and conditions of the job, and the employer assures that all items therein are actual conditions of the job by signing the following statement: "This job order describes the actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job";

(4) The wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. If the wages offered are expressed as piece rates or as base rates and bonuses, the employer shall make the method of calculating the wage and supporting materials available to JS staff who shall check if the employer's calculation of the estimated hourly wage rate is reasonably accurate and is not less than the prevailing wage rate or applicable Federal or State minimum wage, whichever is higher;

(5) The employer has agreed to provide or pay for the transportation of the workers and their families on at least the same terms as transportation is commonly provided by employers in the area of intended employment to agricultural workers and their families recruited from the same area of supply;

(6) JS staff have determined, through a preoccupancy housing inspection performed by JS staff or other appropriate public agencies, that the housing assured by the employer is in fact available, and meets the full set of standards set forth at 20 CFR part 654, **subpart E** which details applicable housing standards and contains provisions for conditional access to the clearance system; except that mobile range housing for shepherders shall meet existing Departmental guidelines; and

(7) The local office and employer have attempted and have not been able to obtain sufficient workers within the local labor market area, or the local office anticipates a shortage of local workers.

(e) No state agency shall place a job order seeking workers to perform agricultural or food processing work with interstate clearance unless:

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(1) The job order meets the requirements set forth at paragraphs (d)(1) through (d)(6) of this section;

(2) The State agency and the employer have attempted and have not been able to locate sufficient workers within the state, or the State agency anticipates a shortage of workers within the State; and

(3) The order has been reviewed and approved by the ETA regional office within 10 working days after receipt from the State agency, and the Regional Administrator has approved the areas of supply to which the order shall be extended. Any denial by the Regional Administrator shall be in writing and set forth the reasons for the denial.

(f) (1) The local office shall use the agricultural clearance form prescribed by ETA, and shall see that all necessary items on the form are completed, including items on attachments to the form prescribed by ETA.

(2) (i) The original of an interstate agricultural clearance form shall be retained for the order-holding local office files. If the clearance order is submitted in conjunction with a request for certification of temporary alien agricultural workers, the procedures at 20 CFR 655.204(a) shall be followed. For other clearance orders, the order-holding local office shall transmit a complete copy to the State office. The State office shall distribute additional copies of the form with all attachments except that the State agency may, at its discretion, delegate this distribution to the local office, as follows:

(A) At least one clear copy to each of the State agencies selected for recruitment (areas of supply);

(B) One copy to each applicant-holding ETA regional office;

(C) One copy to the order-holding ETA regional office; and

(D) One copy to the Regional Farm Labor Coordinated Enforcement Committee in the area of employment, Attn: ESA Regional Administrator.

(ii) Applicant-holding offices shall provide workers referred on clearance orders with a checklist summarizing wages, working conditions

and other material specifications on the job order. Such checklists, where necessary, shall be in English and Spanish. The checklist shall include language notifying the worker that a copy of the complete order is available for inspection. One copy of the form with all attachments shall be available for inspection in the applicant-holding office and the order-holding office. State agencies shall use a standard checklist format provided by ETA unless a variance has been approved by the Regional Administrator.

(iii) The applicant-holding office shall give each referred worker a copy of a description of worker's rights developed by the National Farm Labor Coordinated Enforcement Committee.

(g) The local office may place an intrastate or interstate order seeking workers to perform agricultural or food processing work for a specific farm labor contractor or worker preferred by the employer provided the order meets JS nondiscrimination criteria. The order would not meet such criteria, for example, if it requested a "white male crew leader" or "any white male crew leader."

(h) In local offices which have been designated significant MSFW bilingual offices by ETA, and in any other local office with bilingual staff, bilingual (English-Spanish) staff shall assist all agricultural workers, upon request, to understand the terms and conditions of employment set forth in intrastate and interstate job orders and shall provide such workers with checklists in Spanish showing wage payment schedules, working conditions and other material specifications of the job order.

(i) No agricultural or food processing order shall be included in job bank listings available outside the local office commuting area unless the order has been processed according to requirements for intrastate or interstate clearance contained in this **subpart**. If the job bank for the local office area incorporates offices beyond the local office commuting area, the order may be included in the listing but must be clearly designated as prohibiting referral from outside the community area, unless the requirements of this **subpart** are met.

(j) If the labor supply State agency accepts a clearance order, the State agency shall actively recruit workers for referral. In the event a potential

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labor supply State agency rejects a clearance order, the reasons for rejection shall be documented and submitted to the Regional Administrator having jurisdiction over the State agency. The Regional Administrator will examine the reasons for rejection, and, if the Regional Administrator agrees, will inform the Regional Administrator with jurisdiction over the order-holding State agency of the rejection and the justifiable reasons. If the Regional Administrator who receives the notification of rejection does not concur with the reasons for rejection, that Regional Administrator will so inform the USES Administrator, who will make a final determination on the acceptance or rejection of the order.

(Approved by the Office of Management and Budget under control number 1205-0039)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39466, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 653.502 Changes in crop and recruitment situations.

(a) If a labor demand State agency learns that a crop is maturing earlier than expected or that other material factors, including weather conditions and recruitment levels, have changed, the agency shall immediately contact the labor supply State agency, who shall in turn immediately inform crews and families scheduled through the JS clearance system of the changed circumstances and adjust arrangements on behalf of such crews or families.

(b) When there is a delay in the date of need, procedures required of employers and workers at Sec. 653.501(d)(2)(v) shall be followed. State agencies shall document notifications by employers and contacts by individual migrant workers or crew leaders on behalf of migrant workers or family heads on behalf of migrant family members to verify the date of need.

(c) In addition, if weather conditions, overrecruitment or other

conditions have eliminated the scheduled job opportunities, the State agencies involved shall make every effort to place the workers in alternate job opportunities as soon as possible, especially if the worker(s) is already enroute or at the job site. JS staff shall keep records of actions under this section.

Sec. 653.503 Field checks.

(a) The State agency, through its local offices or otherwise, shall conduct random, unannounced field checks at a significant number of agricultural worksites to which JS placements have been made through the intrastate or interstate clearance system. These field checks shall include visit(s) to the worksite at a time when workers are there. Both the employees and the employer shall be consulted, and JS shall determine and document whether wages, hours, working and housing conditions are as specified in job orders. JS staff shall keep records of all field checks. If State agency personnel observe or receive information, or otherwise have reason to believe that conditions are not as stated on the job order or that an employer is violating an employment related law, the State agency shall document the finding and attempt informal resolution. If the matter has not been resolved within 5 working days, the State agency shall follow the procedures set forth at **subpart F** of part 658 of this chapter. Violations of employment related laws shall be referred to appropriate enforcement agencies in writing.

(b) State agencies, to the maximum extent possible, shall make formal or informal arrangements with appropriate State and Federal enforcement agencies pursuant to which such agencies will agree to conduct compliance reviews in their areas of enforcement responsibility at agricultural worksites where the State agency has placed workers through the agricultural clearance system and to inform the State agency if violations are found. An enforcement agency compliance review shall satisfy the requirement for State agency field checks where all aspects of wages, hours, working and housing conditions have been reviewed by the enforcement agency reviews. The State agency shall supplement enforcement agency efforts with field checks focusing on areas not addressed by enforcement agencies. State agencies shall report

difficulties in making such formal or informal arrangements with State

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enforcement agencies as well as deficiencies in State enforcement agency activities to the Regional Farm Labor Coordinated Enforcement Committee.

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(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[46 FR 39466, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

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TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 654--SPECIAL RESPONSIBILITIES OF THE EMPLOYMENT SERVICE SYSTEM--Table of Contents

Subpart E--Housing for Agricultural Workers

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

Source: 45 FR 14182, Mar. 4, 1980, unless otherwise noted.

Purpose and Applicability

Sec. 654.400 Scope and purpose.

(a) This **subpart** sets forth the Employment and Training Administration standards for agricultural housing. Local Job Service offices, as part of the State employment service agencies and in cooperation with the United States Employment Service, assist employers in recruiting agricultural workers from places outside the area of intended employment. The experiences of the employment service indicate that employees so referred have on many occasions been provided with inadequate, unsafe, and unsanitary housing conditions. To discourage this practice, it is the policy of the Federal-State employment service system, as set forth in Sec. 653.108 of this chapter, to deny its intrastate and interstate recruitment services to employers until the State employment service agency has ascertained that the employer's housing meets certain standards.

(b) To implement this policy, Sec. 653.108 of this chapter provides that recruitment services shall be denied unless the employer has signed an assurance, a preoccupancy inspection has been conducted and the ES staff has ascertained that, with respect to intrastate clearance, if the workers are to be housed, the employer's housing meets or, with respect to interstate clearance, that the employer will provide housing for the workers which meets either the full set of standards set forth at 29 CFR 1910.142 or the full set of standards set forth in this **subpart**. Whichever is applicable under the criteria set forth in Sec. 654.401; except that for mobile range housing for sheepherders, the housing shall meet existing Departmental guidelines.

[45 FR 14182, Mar. 4, 1980; 45 FR 22901, Apr. 4, 1980]

Sec. 654.401 Applicability; transitional provisions.

(a) Employers whose housing was constructed in accordance with the ETA housing standards may continue to follow the full set of ETA standards set forth in this **subpart** only where prior to April 3, 1980

the housing was completed or under construction, or where prior to March 4, 1980 a contract for the construction of the specific housing was signed.

(b) To effectuate these transitional provisions, agricultural housing to which this **subpart** applies and which complies with the full set of standards set forth in this **subpart** shall be considered to be in compliance with the Occupational Safety and Health Administration temporary labor camp standards at 29 CFR 1910.142.

Sec. 654.402 Variances.

(a) An employer may apply for a permanent, structural variance from a specific standard(s) in this **subpart** by filing a written application for such a variance with the local Job Service office serving the area in which the housing is located. This application must be filed by June 2, 1980 and must:

(1) Clearly specify the standard(s) from which the variance is desired;

(2) Provide adequate justification that the variance is necessary to obtain a beneficial use of an existing facility, and to prevent a practical difficulty or unnecessary hardship; and

(3) Clearly set forth the specific alternative measures which the employer has taken to protect the health and safety of workers and adequately show that such alternative measures have achieved the same result as the standard(s) from which the employer desires the variance.

(b) Upon receipt of a written request for a variance under paragraph (a) of

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this section, the local Job Service office shall send the request to the State office which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration (RA). The RA shall review the matter and, after consultation with OSHA, shall either grant or deny the request for a variance.

(c) The variance granted by the RA shall be in writing, shall state the particular standard(s) involved, and shall state as conditions of

the variance the specific alternative measures which have been taken to protect the health and safety of the workers. The RA shall send the approved variance to the employer and shall send copies to the Regional Administrator of the Occupational Safety and Health Administration, the Regional Administrator of the Employment Standards Administration, and the appropriate State agency and the local Job Service office. The employer shall submit and the local Job Service office shall attach copies of the approved variance to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) If the RA denies the request for a variance, the RA shall provide written notice stating the reasons for the denial to the employer, the appropriate State agency and the local Job Service office. The notice shall also offer the employer an opportunity to request a hearing before a DOL Hearing Officer, provided the employer requests such a hearing from the RA within 30 calendar days of the date of the notice. The request for a hearing shall be handled in accordance with the employment service complaint procedures set forth at Secs. 658.421 (i) and (j), 658.422 and 658.423 of this chapter.

(e) The procedures of paragraphs (a) through (d) of this section shall only apply to an employer who has chosen, as evidenced by its written request for a variance, to comply with the ETA housing standards at Secs. 654.404--654.417 of this **subpart**.

Sec. 654.403 Conditional access to the intrastate or interstate clearance system.

(a) Filing requests for conditional access--(1) "Noncriteria" employers. Except as provided in paragraph (a)(2) of this section, an employer whose housing does not meet applicable standards may file with the local Job Service office serving the area in which its housing is located, a written request that its job orders be conditionally allowed into the intrastate or interstate clearance system, provided that the employer's request assures that its housing will be in full compliance with the requirements of the applicable housing standards at least 20 calendar days (giving the specific date) before the housing is to be occupied.

(2) "Criteria" employers. If the request for conditional access

described in paragraph (a)(1) of this section is from an employer filing a job order pursuant to an application for temporary alien agricultural labor certification for H-2A alien agricultural workers or H-2 alien workers under **subpart B** or **subpart C**, respectively, of part 655 of this chapter, the request shall be filed with the RA as an attachment to the application for temporary alien agricultural labor certification.

(3) Assurance. The employer's request pursuant to paragraphs (a)(1) or (a)(2) of this section shall contain an assurance that the housing will be in full compliance with the applicable housing standards at least 20 calendar days (stating the specific date) before the housing is to be occupied.

(b) Processing requests--(1) State agency processing. Upon receipt of a written request for conditional access to the intrastate or interstate clearance system under paragraph (a)(1) of this section, the local Job Service office shall send the request to the State office, which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration, (RA).

(2) Regional office processing and determination. Upon receipt of a request for conditional access pursuant to paragraph (a)(2) or paragraph (b)(1) of this section, the RA shall review the matter and, as appropriate, shall either grant or deny the request.

(c) Authorization. The authorization for conditional access to the intrastate or interstate clearance system shall be in writing, and shall state that although the housing does not comply with the applicable standards, the employer's job order may be placed into

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intrastate or interstate clearance until a specified date. The RA shall send the authorization to the employer and shall send copies to the appropriate State agency and local Job Service office. The employer shall submit and the local Job Service shall attach copies of the authorization to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) Notice of denial. If the RA denies the request for conditional access to the intrastate or interstate clearance system, the RA shall provide written notice to the employer, the appropriate State agency,

and the local Job Service office, stating the reasons for the denial.

(e) Inspection. (1) The local Job Service office serving the area containing the housing of any employer granted conditional access to the intrastate or interstate clearance system shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this **subpart**. An employer, however, may request an earlier preliminary inspection. If, on the date set forth in the authorization, the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office shall afford the employer five calendar days to bring the housing into full compliance. After the five-calendar-day period, if the housing is not in full compliance with the applicable housing standards as assured in the request for conditional access, the local Job Service office immediately:

(i) Shall notify the RA;

(ii) Shall remove the employer's job orders from intrastate and interstate clearance; and

(iii) Shall, if workers have been recruited against these orders, in cooperation with the employment service agencies in other States, make every reasonable attempt to locate and notify the appropriate crew leaders or workers, and to find alternative and comparable employment for the workers.

[52 FR 20506, June 1, 1987, as amended at 64 FR 34965, June 29, 1999]

Housing Standards

Sec. 654.404 Housing site.

(a) Housing sites shall be well drained and free from depressions in which water may stagnate. They shall be located where the disposal of sewage is provided in a manner which neither creates nor is likely to create a nuisance, or a hazard to health.

(b) Housing shall not be subject to, or in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards.

(c) Grounds within the housing site shall be free from debris, noxious plants (poison ivy, etc.) and uncontrolled weeds or brush.

(d) The housing site shall provide a space for recreation reasonably related to the size of the facility and the type of occupancy.

Sec. 654.405 Water supply.

(a) An adequate and convenient supply of water that meets the standards of the State health authority shall be provided.

(b) A cold water tap shall be available within 100 feet of each individual living unit when water is not provided in the unit. Adequate drainage facilities shall be provided for overflow and spillage.

(c) Common drinking cups shall not be permitted.

Sec. 654.406 Excreta and liquid waste disposal.

(a) Facilities shall be provided and maintained for effective disposal of excreta and liquid waste. Raw or treated liquid waste shall not be discharged or allowed to accumulate on the ground surface.

(b) Where public sewer systems are available, all facilities for disposal of excreta and liquid wastes shall be connected thereto.

(c) Where public sewers are not available, a subsurface septic tank-seepage system or other type of liquid waste treatment and disposal system, privies or portable toilets shall be provided. Any requirements of the State health authority shall be complied with.

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Sec. 654.407 Housing.

(a) Housing shall be structurally sound, in good repair, in a sanitary condition and shall provide protection to the occupants against the elements.

(b) Housing shall have flooring constructed of rigid materials, smooth finished, readily cleanable, and so located as to prevent the entrance of ground and surface water.

(c) The following space requirements shall be provided:

(1) For sleeping purposes only in family units and in dormitory accommodations using single beds, not less than 50 square feet of floor space per occupant;

(2) For sleeping purposes in dormitory accommodations using double bunk beds only, not less than 40 square feet per occupant;

(3) For combined cooking, eating, and sleeping purposes not less than 60 square feet of floor space per occupant.

(d) Housing used for families with one or more children over 6 years of age shall have a room or partitioned sleeping area for the husband and wife. The partition shall be of rigid materials and installed so as to provide reasonable privacy.

(e) Separate sleeping accommodations shall be provided for each sex or each family.

(f) Adequate and separate arrangements for hanging clothing and storing personal effects for each person or family shall be provided.

(g) At least one-half of the floor area in each living unit shall have a minimum ceiling height of 7 feet. No floor space shall be counted toward minimum requirements where the ceiling height is less than 5 feet.

(h) Each habitable room (not including partitioned areas) shall have at least one window or skylight opening directly to the out-of-doors. The minimum total window or skylight area, including windows in doors, shall equal at least 10 percent of the usable floor area. The total openable area shall equal at least 45 percent of the minimum window or skylight area required, except where comparably adequate ventilation is supplied by mechanical or some other method.

Sec. 654.408 Screening.

(a) All outside openings shall be protected with screening of not less than 16 mesh.

(b) All screen doors shall be tight fitting, in good repair, and equipped with self-closing devices.

Sec. 654.409 Heating.

(a) All living quarters and service rooms shall be provided with

properly installed, operable heating equipment capable of maintaining a temperature of at least 68[deg] F. if during the period of normal occupancy the temperature in such quarters falls below 68[deg].

(b) Any stoves or other sources of heat utilizing combustible fuel shall be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. No portable heaters other than those operated by electricity shall be provided. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there shall be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(c) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or a stovepipe shall be of fireproof material. A vented metal collar shall be installed around a stovepipe, or vent passing through a wall, ceiling, floor or roof.

(d) When a heating system has automatic controls, the controls shall be of the type which cut off the fuel supply upon the failure or interruption of the flame or ignition, or whenever a predetermined safe temperature or pressure is exceeded.

[45 FR 14182, Mar. 4, 1980; 45 FR 22901, Apr. 4, 1980]

Sec. 654.410 Electricity and lighting.

(a) All housing sites shall be provided with electric service.

(b) Each habitable room and all common use rooms, and areas such as: Laundry rooms, toilets, privies, hallways, stairways, etc., shall contain adequate ceiling or wall-type light fixtures. At least one wall-type electrical

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convenience outlet shall be provided in each individual living room.

(c) Adequate lighting shall be provided for the yard area, and pathways to common use facilities.

(d) All wiring and lighting fixtures shall be installed and maintained in a safe condition.

Sec. 654.411 Toilets.

(a) Toilets shall be constructed, located and maintained so as to prevent any nuisance or public health hazard.

(b) Water closets or privy seats for each sex shall be in the ratio of not less than one such unit for each 15 occupants, with a minimum of one unit for each sex in common use facilities.

(c) Urinals, constructed of nonabsorbent materials, may be substituted for men's toilet seats on the basis of one urinal or 24 inches of trough-type urinal for one toilet seat up to a maximum of one-third of the required toilet seats.

(d) Except in individual family units, separate toilet accommodations for men and women shall be provided. If toilet facilities for men and women are in the same building, they shall be separated by a solid wall from floor to roof or ceiling. Toilets shall be distinctly marked "men" and "women" in English and in the native language of the persons expected to occupy the housing.

(e) Where common use toilet facilities are provided, an adequate and accessible supply of toilet tissue, with holders, shall be furnished.

(f) Common use toilets and privies shall be well lighted and ventilated and shall be clean and sanitary.

(g) Toilet facilities shall be located within 200 feet of each living unit.

(h) Privies shall not be located closer than 50 feet from any living unit or any facility where food is prepared or served.

(i) Privy structures and pits shall be fly tight. Privy pits shall have adequate capacity for the required seats.

Sec. 654.412 Bathing, laundry, and handwashing.

(a) Bathing and handwashing facilities, supplied with hot and cold water under pressure, shall be provided for the use of all occupants. These facilities shall be clean and sanitary and located within 200 feet of each living unit.

(b) There shall be a minimum of 1 showerhead per 15 persons. Showerheads shall be spaced at least 3 feet apart, with a minimum of 9

square feet of floor space per unit. Adequate, dry dressing space shall be provided in common use facilities. Shower floors shall be constructed of nonabsorbent nonskid materials and sloped to properly constructed floor drains. Except in individual family units, separate shower facilities shall be provided each sex. When common use shower facilities for both sexes are in the same building they shall be separated by a solid nonabsorbent wall extending from the floor to ceiling, or roof, and shall be plainly designated "men" or "women" in English and in the native language of the persons expected to occupy the housing.

(c) Lavatories or equivalent units shall be provided in a ratio of 1 per 15 persons.

(d) Laundry facilities, supplied with hot and cold water under pressure, shall be provided for the use of all occupants. Laundry trays or tubs shall be provided in the ratio of 1 per 25 persons. Mechanical washers may be provided in the ratio of 1 per 50 persons in lieu of laundry trays, although a minimum of 1 laundry tray per 100 persons shall be provided in addition to the mechanical washers.

Sec. 654.413 Cooking and eating facilities.

(a) When workers or their families are permitted or required to cook in their individual unit, a space shall be provided and equipped for cooking and eating. Such space shall be provided with:

(1) A cookstove or hot plate with a minimum of two burners; and (2) adequate food storage shelves and a counter for food preparation; and (3) provisions for mechanical refrigeration of food at a temperature of not more than 45[deg] F.; and (4) a table and chairs or equivalent seating and eating arrangements, all commensurate with the capacity of the unit; and (5) adequate lighting and ventilation.

(b) When workers or their families are permitted or required to cook and

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eat in a common facility, a room or building separate from the sleeping facilities shall be provided for cooking and eating. Such room or building shall be provided with:

(1) Stoves or hot plates, with a minimum equivalent of two burners, in a ratio of 1 stove or hot plate to 10 persons, or 1 stove or hot plate to 2 families; and (2) adequate food storage shelves and a counter for food preparation; and (3) mechanical refrigeration for food at a temperature of not more than 45[deg] F.; and (4) tables and chairs or equivalent seating adequate for the intended use of the facility; and (5) adequate sinks with hot and cold water under pressure; and (6) adequate lighting and ventilation; and (7) floors shall be of nonabsorbent, easily cleaned materials.

(c) When central mess facilities are provided, the kitchen and mess hall shall be in proper proportion to the capacity of the housing and shall be separate from the sleeping quarters. The physical facilities, equipment and operation shall be in accordance with provisions of applicable State codes.

(d) Wall surface adjacent to all food preparation and cooking areas shall be of nonabsorbent, easily cleaned material. In addition, the wall surface adjacent to cooking areas shall be of fire-resistant material.

Sec. 654.414 Garbage and other refuse.

(a) Durable, fly-tight, clean containers in good condition of a minimum capacity of 20 gallons, shall be provided adjacent to each housing unit for the storage of garbage and other refuse. Such containers shall be provided in a minimum ratio of 1 per 15 persons.

(b) Provisions shall be made for collection of refuse at least twice a week, or more often if necessary. The disposal of refuse, which includes garbage, shall be in accordance with State and local law.

Sec. 654.415 Insect and rodent control.

Housing and facilities shall be free of insects, rodents, and other vermin.

Sec. 654.416 Sleeping facilities.

(a) Sleeping facilities shall be provided for each person. Such facilities shall consist of comfortable beds, cots, or bunks, provided

with clean mattresses.

(b) Any bedding provided by the housing operator shall be clean and sanitary.

(c) Triple deck bunks shall not be provided.

(d) The clear space above the top of the lower mattress of a double deck bunk and the bottom of the upper bunk shall be a minimum of 27 inches. The distance from the top of the upper mattress to the ceiling shall be a minimum of 36 inches.

(e) Beds used for double occupancy may be provided only in family accommodations.

Sec. 654.417 Fire, safety, and first aid.

(a) All buildings in which people sleep or eat shall be constructed and maintained in accordance with applicable State or local fire and safety laws.

(b) In family housing and housing units for less than 10 persons, of one story construction, two means of escape shall be provided. One of the two required means of escape may be a readily accessible window with an openable space of not less than 24x24 inches.

(c) All sleeping quarters intended for use by 10 or more persons, central dining facilities, and common assembly rooms shall have at least two doors remotely separated so as to provide alternate means of escape to the outside or to an interior hall.

(d) Sleeping quarters and common assembly rooms on the second story shall have a stairway, and a permanent, affixed exterior ladder or a second stairway.

(e) Sleeping and common assembly rooms located above the second story shall comply with the State and local fire and building codes relative to multiple story dwellings.

(f) Fire extinguishing equipment shall be provided in a readily accessible place located not more than 100 feet from each housing unit. Such equipment shall provide protection equal to a 2½ gallon stored pressure or 5-gallon pump-type water extinguisher.

(g) First aid facilities shall be provided and readily accessible for use at

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all time. Such facilities shall be equivalent to the 16 unit first aid kit recommended by the American Red Cross, and provided in a ratio of 1 per 50 persons.

(h) No flammable or volatile liquids or materials shall be stored in or adjacent to rooms used for living purposes, except for those needed for current household use.

(i) Agricultural pesticides and toxic chemicals shall not be stored in the housing area.

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TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 655--TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES--Table of Contents

Subpart B--Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)

Source: 52 FR 20507, June 1, 1987, unless otherwise noted.

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Sec. 655.90 Scope and purpose of **subpart B**.

(a) General. This **subpart** sets out the procedures established by the

Secretary of Labor to acquire information sufficient to make factual determinations of: (1) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and (2) whether the employment of H-2A workers will adversely effect the wages and working conditions of workers in the U.S. similarly employed. Under the authority of the INA, the Secretary of Labor has promulgated the regulations in this **subpart**. This **subpart** sets forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers in agriculture. This **subpart** provides the Secretary's methodology for the two-fold determination of availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers, for particular temporary and seasonal agricultural jobs in the United States.

(b) The statutory standard. (1) A petitioner for H-2A workers must apply to the Secretary of Labor for a certification that, as stated in the INA:

(A) 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 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.

(2) Section 216(b) of the INA further requires that the Secretary may not issue a certification if the conditions regarding U.S. worker availability and adverse effect are not met, and may not issue a certification if, as stated in the INA:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary has determined, after notice and opportunity for a hearing, that the employer at any time during that

period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment . . . shall terminate on the date the H-2A workers depart for the employer's place of employment.

(3) Regarding the labor certification determination itself, section 216(c)(3) of the INA, as quoted in the following, specifically directs the Secretary to make the certification if:

(i) The employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) The employer does not actually have, or has not been provided with referrals of, qualified individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.

(c) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S.

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workers would be adversely affected must be established. (The regulations in this **subpart** establish such minimum levels for wages, terms, benefits, and conditions of employment). Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976). Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this **subpart** set forth requirements for recruiting U.S. workers in accordance with this principle.

(d) Construction. This **subpart** shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974); *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed. *Williams v. Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), cert. denied, 429 U.S. 1000, and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

Sec. 655.92 Authority of the Regional Administrator.

Under this **subpart**, the accepting for consideration and the making of temporary alien agricultural labor certification determinations are ordinarily performed by the Regional Administrator (RA) of an Employment and Training Administration region, who, in turn, may delegate this responsibility to a designated staff member. The Director of the United States Employment Service, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by USES in Washington, DC. In those cases, the RA will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

Sec. 655.93 Special circumstances.

(a) Systematic process. The regulations under this **subpart** are designed to provide a systematic process for handling applications from the kinds of employers who have historically utilized nonimmigrant alien workers in agriculture, usually in relation to the production or harvesting of a particular agricultural crop for market, and which normally share such characteristics as:

- (1) A fixed-site farm, ranch, or similar establishment;
- (2) A need for workers to come to their establishment from other areas to perform services or labor in and around their establishment;
- (3) Labor needs which will normally be controlled by environmental conditions, particularly weather and sunshine; and
- (4) A reasonably regular workday or workweek.

(b) Establishment of special procedures. In order to provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Director has the authority to establish special procedures for processing H-2A applications when employers can demonstrate upon written application to and consultation with the Director 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 Director 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 Sec. 655.107 of this part, provided that the Director

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uses a methodology to establish such adverse effect wage rates which is consistent with the methodology in Sec. 655.107(a). Prior to making determinations under this paragraph (b), the Director may consult with employer representatives, appropriate RAs, and worker representatives.

(c) Construction. This **subpart** shall be construed to permit the Director to continue and, where the Director 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.

Sec. 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 Regional Administrator (RA) having jurisdiction over the geographical area in which the work will be performed. The entire application shall be filed with the RA 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 RA 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 RA'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 RA'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 RA'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 RA 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 RA 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 RA 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

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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 RA 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 RA no later than 30 calendar days after the granting a 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 RA 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 Sec. 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.

Adverse effect wage rate (AEWR) means the wage rate which the Director 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).

Director means the chief official of the United States Employment Service (USES) or the Director's designee.

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) and Employment Service (ES) System mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

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 United States Employment Service (USES).

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

H-2A worker means any nonimmigrant 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)).

Immigration and Naturalization Service (INS) means the component of the U.S. Department of Justice which 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.

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.

Local office means the State agency's office which serves a particular geographic area within a State.

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:

- (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).

Regional Administrator, Employment and Training Administration (RA) means the chief ETA official of a DOL regional office or the RA's designee.

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 agency means the State employment service agency designated under Sec. 4 of the Wagner-Peyser Act to cooperate with the USES 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 INS 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 RA to approve or deny, in whole or in part, an application for temporary alien agricultural labor certification.

United States Employment Service (USES) means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

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 Sec. 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,

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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.

* * * * *

(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:

* * * * *

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

* * * * *

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.

* * * * *

"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.

* * * * *

"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

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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 Sec. 655.106(c)(3) of this part.

[52 FR 20507, June 1, 1987, as amended at 57 FR 43123, Sept. 17, 1992;

Sec. 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 RA in whose region the area of intended employment is located, 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 RA. At the same time, a duplicate application shall be submitted to the local office 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 RA 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 shortage of U.S. workers needed to perform the agricultural labor or services, and the specific estimated date on which the workers are needed. The job offer shall comply with the requirements of Secs. 655.102 and 653.501 of this chapter, and shall be signed by the employer or the employer's agent on behalf of the employer; and

(2) An agreement to abide by the assurances required by Sec. 655.103 of this part.

(c) Timeliness. Applications for temporary alien agricultural labor certification are not required to be filed more than 45 calendar days before the first day of need. The employer shall be notified by the RA in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The RA's temporary alien agricultural labor certification determination on the approved application shall be made no later than 20 calendar days before the date of need if the employer has complied with the criteria for certification. To allow for the availability of U.S. workers to be tested, the following process applies:

(1) Application filing date. The entire H-2A application, including the job offer, shall be filed with the RA, in duplicate, no less than 45 calendar days before the first date on which the employer estimates that the workers are

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needed. Applications may be filed in person; may be mailed to the RA (Attention: H-2A Certifying Officer) by certified mail, return receipt requested; or delivered by guaranteed commercial delivery which will ensure delivery to the RA and provide the employer with a documented acknowledgment of receipt of the application by the RA. Any application received 45 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the RA as being acceptable for processing.

(2) Review of application; recruitment; certification determination period. Section 655.104 of this part requires the RA to promptly review the application, and to notify the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration and to afford an opportunity for resubmittal of an amended application. The employer shall have five calendar days in which to file an amended application. Section 655.106 of this part requires the RA to grant or deny the temporary alien agricultural labor certification application no later than 20 calendar days before the date on which the workers are needed, provided that the employer has complied with the criteria for certification, including recruitment of eligible individuals. Such recruitment, for the employer, the State agencies, and DOL to attempt to locate U.S. workers locally and through the circulation of intrastate and interstate agricultural clearance job orders acceptable under Sec. 653.501 of this chapter and under this **subpart**, shall begin on the date that an acceptable application is filed, except that the local office shall begin to recruit workers locally beginning on the date it first receives the application. The time needed to obtain an application acceptable for consideration (including the job offer) after the five-calendar-day period allowed for an amended application will postpone day-for-day the certification determination beyond the 20 calendar days before the date of need, provided that the RA notifies the applicant of any deficiencies within seven calendar days after receipt of the application. Delays in obtaining an application acceptable for consideration which are directly attributable to the RA will not postpone the certification determination beyond the 20 calendar days before the date of need. When an employer resubmits to the RA (with a copy to the local office) an application with modifications required by the RA, and the RA approves the modified application as meeting necessary adverse effect standards, the modified application will not be rejected solely because it now does not meet the 45-calendar-day filing requirement. If an application is approved as being acceptable for processing without need for any amendment within the seven-calendar-day review period after initial filing, recruitment of U.S. workers will be considered to have begun on the date the application was received by the RA; and the RA shall make the temporary alien agricultural labor certification determination required by

Sec. 655.106 of this part no later than 20 calendar days before the date of need provided that other regulatory conditions are met.

(3) Early filing. Employers are encouraged, but not required, to file their applications in advance of the 45-calendar-day minimum period specified in paragraph (c)(1) of this section, to afford more time for review and discussion of the applications and to consider amendments, should they be necessary. This is particularly true for employers submitting H-2A applications for the first time who may not be familiar with the Secretary's requirements for an acceptable application or U.S. worker recruitment. Such employers particularly are encouraged to consult with DOL and local office staff for guidance and assistance well in advance of the minimum 45-calendar-day filing period.

(4) Local recruitment; preparation of clearance orders. At the same time the employer files the H-2A application with the RA, a copy of the application shall be submitted to the local office which will use the job offer portion--of the application to prepare a local job order and begin to recruit U.S. workers in the area of intended employment. The local office also shall begin preparing an agricultural clearance order,

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but such order will not be used to recruit workers in other geographical areas until the employer's H-2A application is accepted for consideration and the clearance order is approved by the RA and the local office is so notified by the RA.

(5) First-time employers of H-2A workers. With respect only to those applications filed on or before May 31, 1989, and notwithstanding the time requirements in paragraphs (c)(1) through (c)(4) of this section, under the following circumstances the RA shall make the certification determination required by Sec. 655.106 of this part no later than 10 calendar days before the date of need:

(i) The employer would be a first-time employer of H-2A workers (and, prior to June 1, 1987, did not use or apply for certification to use H-2 agricultural workers under the INA as then in effect) and has not previously applied for a temporary alien agricultural labor certification to use H-2A workers;

(ii) The RA, the employer, and the ES System have had a reasonable

opportunity to test the availability of U.S. workers under the conditions of a job offer which has been determined to be acceptable by the RA in accordance with the provisions of Secs. 655.102 and 655.103 of this part at least 30 calendar days before the date of need; and

(iii) The RA has determined that the employer has otherwise made good faith efforts to comply with the requirements of this **subpart**.

(d) Amendments to application to increase number of workers. Applications may be amended at any time, prior to an RA certification determination, to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than ten workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved only when the need for additional workers could not have been foreseen, and that crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(e) Minor amendments to applications. Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the RA determines they are justified and will have no significant effect upon the RA's ability to make the labor certification determination required by Sec. 655.106 of this part. Amendments described at paragraph (d) of this section are not "minor technical amendments".

(f) Untimely applications--(1) Notices of denial. If an H-2A application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the RA may then advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial shall inform the employer of its right to an administrative review or de novo hearing before an administrative law judge.

(2) Emergency situations. Notwithstanding paragraph (f)(1) of this section, in emergency situations the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien agricultural workers (H-2 or H-2A) for the prior year's agricultural season or for any employer which has other good and

substantial cause (which may include unforeseen changes in market conditions), provided that the RA has an opportunity to obtain sufficient labor market information on an expedited basis to make the labor certification determination required by Sec. 216 of the INA (8 U.S.C. 1186). In making this determination, the RA will accept information offered by and may consult with representatives of the U.S. Department of Agriculture.

(g) Length of job opportunity. The employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is "of a temporary or seasonal nature", as defined at Sec. 655.100(c)(2) of this part. Job opportunities of 12 months or more

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are presumed to be permanent in nature. Therefore, the RA shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H-2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, except in extraordinary circumstances.

[52 FR 20507, June 1, 1987, as amended at 64 FR 34966, June 29, 1999]

Sec. 655.102 Contents of job offers.

(a) Preferential treatment of aliens prohibited. The employer's job offer to U.S. workers shall offer the U.S. workers no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H-2A workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) Minimum benefits, wages, and working conditions. Except when higher benefits, wages or working conditions are required by the

provisions of paragraph (a) of this section, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H-2A application always shall include each of the following minimum benefit, wage, and working condition provisions:

(1) Housing. The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

(i) Standards for employer-provided housing. Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142, or the full set of standards at Secs. 654.404-654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii) of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at Sec. 654.403 of this chapter.

(ii) Standards for range housing. Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL Occupational Safety and Health Administration for such housing. In the absence of such standards, range housing for shepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.

(iii) Standards for other habitation. Rental, public accommodation, or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, Occupational Safety and Health Administration standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the RA that the housing complies with the local, State, or federal housing standards applicable under this paragraph (b)(1)(iii).

(iv) Charges for public housing. If public housing provided for migrant agricultural workers under the auspices of a local, county, or

State government is secured by an employer, and use of the public housing unit normally requires charges from migrant workers, such charges shall be paid by the employer directly to the appropriate individual or entity affiliated with the housing's management.

(v) Deposit charges. Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers by employers who provide housing for their workers. However, employers may require workers to reimburse them for damage caused to housing by the individual workers found to have

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been responsible for damage which is not the result of normal wear and tear related to habitation.

(vi) Family housing. When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing shall be provided to workers with families who request it.

(2) Workers' compensation. The employer shall provide, at no cost to the worker, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the RA prior to the issuance of a labor certification.

(3) Employer-provided items. Except as provided below, the employer shall provide, without charge including deposit charge, to the worker all tools, supplies, and equipment required to perform the duties assigned; the employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement is

permissible if approved in advance by the RA.

(4) Meals. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall provide each worker with three meals a day. When such facilities are not available, the employer either shall provide each worker with three meals a day or shall furnish free and convenient cooking and kitchen facilities to the workers which will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. Until a new amount is set pursuant to this paragraph (b)(4), the charge shall not be more than \$5.26 per day unless the RA has approved a higher charge pursuant to Sec. 655.111 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the Federal Register.

(5) Transportation; daily subsistence--(i) Transportation to place of employment. The employer shall advance transportation and subsistence costs (or otherwise provide them) to workers when it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H-2A workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment. The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment. If no charges will be made for meals and free and convenient cooking and kitchen facilities will be provided, the amount of the subsistence payment shall be no less than the amount permitted under

paragraph (b)(4) of this section.

(ii) Transportation from place of employment. If the worker completes the work contract period, the employer shall provide or pay for the worker's

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transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses; except that, if the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer is not required to provide or pay for such expenses.

(iii) Transportation between living quarters and worksite. The employer shall provide transportation between the worker's living quarters (i.e., housing provided by the employer pursuant to paragraph (b)(1) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations. This paragraph (b)(5)(iii) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (b)(1) of this section.

(6) Three-fourths guarantee--(i) Offer to worker. The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the expiration date specified in the work contract or in its extensions, if any. If the employer affords the U.S. or H-2A worker during the total work contract period less employment than that required under this paragraph (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the

guaranteed number of days. For purposes of this paragraph (b)(6), a workday shall mean the number of hours in a workday as stated in the job order and shall exclude the worker's Sabbath and federal holidays. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time specified in the job order. The work shall be offered for at least three-fourths of the workdays (that is, $3/4 \times (\text{number of days}) \times (\text{specified hours})$). Therefore, if, for example, the contract contains 20 eight-hour workdays, the worker shall be offered employment for 120 hours during the 20 workdays. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker shall not be required to work for more than the number hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays.

(ii) Guarantee for piece-rate-paid worker. If the worker will be paid on a piece rate basis, the employer shall use the worker's average hourly piece rate earnings or the AEW, whichever is higher, to calculate the amount due under the guarantee.

(iii) Failure to work. Any hours which the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(iv) Displaced H-2A worker. The employer shall not be liable for payment under this paragraph (b)(6) with respect to an H-2A worker whom the RA certifies is displaced because of the employer's compliance with Sec. 655.103(e) of this part.

(7) Records. (i) The employer shall keep accurate and adequate records with respect to the workers' earnings including field tally records, supporting summary payroll records and records showing the nature and amount of the work performed; the number of hours of work offered each

day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (b)(6) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the three-fourths guarantee at paragraph (b)(6) of this section, the records shall state the reason or reasons therefore.

(iii) Upon reasonable notice, the employer shall make available the records, including field tally records and supporting summary payroll records for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker; and

(iv) The employer shall retain the records for not less than three years after the completion of the work contract.

(8) Hours and earnings statements. The employer shall furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily.

(9) Rates of pay. (i) If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period;

or

(ii)(A) If the worker will be paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay shall be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate for each hour worked; and the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment; and

(B) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention,

(1) Such standards shall be specified in the job offer and be no more than those required by the employer in 1977, unless the RA approves a higher minimum; or

(2) If the employer first applied for H-2 agricultural or H-2A temporary alien agricultural labor certification after 1977, such standards shall be no more than those normally required (at the time of the first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

(10) Frequency of pay. The employer shall state the frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least twice monthly whichever is more frequent).

(11) Abandonment of employment; or termination for cause. If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the local office of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section, and that worker is not

entitled to the "three-fourths guarantee" (see paragraph (b)(6) of this section).

(12) Contract impossibility. If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, hurricane, or other Act of God which makes the fulfillment of the contract impossible the employer may terminate the work contract. In the event of such termination of a contract, the employer shall fulfill the three-fourths guarantee at paragraph (b)(6) of this section for the time that has elapsed from the start of the work contract to its termination. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the employer shall:

(i) Offer to return the worker, at the employer's expense, to the place from which the worker disregarding intervening employment came to work for the employer,

(ii) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment, and

(iii) Notwithstanding whether the employment has been terminated prior to completion of 50 percent of the work contract period originally offered by the employer, pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker, without intervening employment, has come to work for the employer to the place of employment. Daily subsistence shall be computed as set forth in paragraph (b)(5)(i) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved.

(13) Deductions. The employer shall make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's

completion of 50 percent of the worker's contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA as determined by the Secretary at 29 CFR part 531.

(14) Copy of work contract. The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract.

(c) Appropriateness of required qualifications. Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA for their appropriateness. The RA may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer; and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

(d) Positive recruitment plan. The employer shall submit in writing, as a part of the application, the employer's plan for conducting independent, positive recruitment of U.S. workers as required by Secs. 655.103 and 655.105(a) of this part. Such a plan shall include a description of recruitment efforts (if any) made prior to the actual submittal of the application. The plan shall describe

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how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate

farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H-2A agricultural employers and provide an override which is no less than that being provided by non-H-2A agricultural employers.

Sec. 655.103 Assurances.

As part of the temporary alien agricultural labor certification application, the employer shall include in the job offer a statement agreeing to abide by the conditions of this **subpart**. By so doing, the employer makes each of the following assurances:

(a) Labor disputes. The specific job opportunity for which the employer is requesting H-2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(b) Employment-related laws. During the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.

(c) Rejections and terminations of U.S. workers. No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office.

(d) Recruitment of U.S. workers. The employer shall independently engage in positive recruitment until the foreign workers have departed for the employer's place of employment and shall cooperate with the ES System in the active recruitment of U.S. workers by:

(1) Assisting the ES System to prepare local, intrastate, and interstate job orders using the information supplied on the employer's job offer;

(2) Placing advertisements (in a language other than English, where the RA determines appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the RA:

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the $\frac{3}{4}$ guarantee; state that work tools,

supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier, if appropriate; and

(ii) Each such advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the ES System and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone; and

(4) Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers.

(e) Fifty-percent rule. From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by Sec. 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other benefits, wages, and working conditions required by Sec. 655.102 of this part to any such U.S. worker and shall not treat less favorably than H-2A workers

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

(f) Other recruitment. The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by Sec. 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm

labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H-2A agricultural employers and shall provide an override which is no less than that being provided by non-H-2A agricultural employers. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an override. The employer shall not be required to provide for housing through an override.

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

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

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

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

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to Sec. 216 of the INA (8 U.S.C. 1186), or this **subpart** or any other DOL regulation promulgated pursuant to Sec. 216 of the INA; or

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

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

(1) Amount. The fee for each employer receiving a temporary alien agricultural labor certification is \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. In the case of a joint

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

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

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

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

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

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

(b) Regional office activities. The RA, upon receipt of the H-2A

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

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

- (1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;
- (2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in order for the RA to accept the application for consideration;
- (3) Offer the applicant an opportunity to request an expedited administrative review of or a de novo administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and
- (4) State that if the employer does not request an expedited administrative-judicial review or a de novo hearing before an

administrative law judge within the seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

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

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

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part within the time available for such purposes.

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

Sec. 655.105 Recruitment period.

(a) Notice of acceptance of application for consideration; required recruitment. If the RA determines that the H-2A application meets the requirements of Secs. 655.101-655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in Sec. 655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be laced into intrastate clearance and into interstate clearance to such States as the

RA shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the RA finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the RA shall take into account other recent recruiting efforts in those areas and will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H-2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H-2A employer, during the period after filing the application and before the date the H-2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers.

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

(c) Modifications. At any time during the recruitment effort, the RA, with the Director's concurrence, may require modifications to a job

offer when the RA determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by Sec. 655.102(b) of this part. If any such modifications are required after an application has been accepted for consideration by the RA, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

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

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

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

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

(a) Referral of able, willing, and qualified eligible U.S. workers. With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and

qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b) (1) Determinations. If the RA, in accordance with Sec. 655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of Sec. 655.102 of this part, by the date specified pursuant to Sec. 655.101(c)(2) of this part for untimely modified applications or 20 calendar days before the date of need specified in the application, whichever is applicable, the RA shall grant the temporary alien agricultural labor certification request for enough H-2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the RA shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are likely to sign a work contract. The RA shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the RA. The RA shall not grant a temporary alien agricultural labor certification request for any H-2A workers if the RA determines that:

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

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

(iii) The employer during the previous two-year period employed H-2A workers and the RA has determined, after notice and opportunity for a

hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H-2A workers;

(iv) The employer has not complied with the workers' compensation requirements at Sec. 655.102(b)(2) of this part; or

(v) The employer has not satisfactorily complied with the positive recruitment requirements specified by this **subpart**.

Further, the RA, in making the temporary alien agricultural labor certification determination, will subtract from any temporary alien agricultural labor certification the specific verified

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number of job opportunities involved which are vacant because of a strike or other labor dispute involving a work stoppage, or a lockout, in the occupation at the place of employment (and for which H-2A workers have been requested). Upon receipt by the RA of such labor dispute information from any source, the RA shall verify the existence of the strike, labor dispute, or lockout and the vacancies directly attributable through the receipt by the RA of a written report from the State agency written following an investigation by the State agency (made under the oversight of the RA) of the situation and after the RA has consulted with the Director prior to making such a determination.

(2) Fees. A temporary alien agricultural labor certification determination granting an application shall include a bill for the required fees. Each employer (except joint employer associations) of H-2A workers under the application for temporary alien agricultural labor certification shall pay in a timely manner a nonrefundable fee upon issuance of the temporary alien agricultural labor certification granting the application (in whole or in part), as follows:

(i) Amount. The fee for each employer receiving a temporary alien agricultural labor certification is \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee 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. The fees shall be paid by check or money order made payable to "Department of Labor". In the case of employers of H-2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H-2A workers under the application may be paid by one check or money order.

(ii) Timeliness. Fees received by the RA no more than 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

(c) Changes to temporary alien agricultural labor certifications; temporary alien agricultural labor certifications involving employer associations--(1) Changes. Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the RA after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from one employer to another, except as provided for by paragraph (c)(2) of this section.

(2) Associations--(i) Applications. If an association is requesting a temporary alien agricultural labor certification as a joint employer, the temporary alien agricultural labor certification granted under this section shall be made jointly to the association and to its employer members. Except as provided in paragraph (c)(2)(iii) of this section, such workers may be transferred among its producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such

workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members. If an association is requesting a temporary alien agricultural labor certification as a sole employer, the temporary alien agricultural labor certification granted pursuant to this section shall be made to the association only.

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(ii) Referrals and transfers. For the purposes of complying with the "fifty-percent rule" at Sec. 655.103(e) of this part, any association shall be allowed to refer or transfer workers among its members (except as provided in paragraph (c)(2)(iii) of this section), and an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(iii) Ineligible employer-members. Workers shall not be transferred or referred to an association's member, if that member is ineligible to obtain any or any additional workers, pursuant to Sec. 655.110 of this part.

(3) Extension of temporary alien agricultural labor certification--

(i) Short-term extension. An employer who seeks an extension of two weeks or less of the temporary alien agricultural labor certification shall apply for such extension to INS. If INS grants such an extension, the temporary alien agricultural labor certification shall be deemed extended for such period as is approved by INS. No extension granted under this paragraph (c)(3)(i) shall be for a period longer than the original work contract period of the temporary alien agricultural labor certification.

(ii) Long-term extension. For extensions beyond the period which may be granted by INS pursuant to paragraph (c)(3)(i) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the RA for an extension of the period of the temporary alien agricultural labor certification, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and

could not have been reasonably foreseen by the employer. The RA shall grant or deny the request for extension of the temporary alien agricultural labor certification based on available information, and shall notify the employer of the decision on the request in writing. The RA shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The RA shall not grant an extension where the temporary alien agricultural labor certification has already been extended by INS pursuant to paragraph (c)(3)(i) of this section.

(d) Denials of applications. If the RA does not grant the temporary alien agricultural labor certification (in whole or in part) the RA shall notify the employer by means reasonably calculated to assure next-day delivery. The notification shall contain all the statements required in Sec. 655.104(c) of this part. If a timely request is made for an administrative-judicial review or a de novo hearing by an administrative law judge, the procedures of Sec. 655.112 of this part shall be followed.

(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)

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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 Sec. 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.

(f) Exceptions. (1) "Fifty-percent rule" inapplicable to small employers. The assurance requirement at Sec. 655.103(e) of this part does not apply to any employer who:

(i) Did not, during any calendar quarter during the preceding calendar year, use more than 500 "man-days" of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the RA in the H-2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this **subpart** for its members; and

(iii) Has not otherwise "associated" with other employers who are applying for H-2A workers under this **subpart**, and so certifies to the RA.

(2) Displaced H-2A workers. An employer shall not be liable for payment under Sec. 655.102(b)(6) of this part with respect to an H-2A worker whom the RA certifies is displaced due to compliance with Sec. 655.103(e) of this part.

(g) Withholding of U.S. workers prohibited. (1) Complaints. Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H-2A workers in order to force the hiring of U.S. workers under Sec. 655.103(e) of this part may submit a written complaint to the local office. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the local office.

(2) Investigations. The local office shall inform the RA by telephone that a complaint under the provisions of paragraph (g) of this section has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the local office fails to conduct such interviews, the RA shall do so.

(3) Reports of findings. Within five working days after receipt of the complaint, the local office shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the RA.

(4) Written findings. The RA shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the RA deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the RA shall issue written findings to the local office and the employer. Where the RA determines that the employer's complaint is valid and justified, the RA shall immediately suspend the application of Sec. 655.103(e) of this part to the employer. Such suspension of Sec. 655.103(e) of this part under these circumstances shall not take place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The RA's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

(h) Requests for new temporary alien agricultural labor

certification determinations based on nonavailability of able, willing, and qualified U.S. workers--(1) Standards for requests. If a temporary alien agricultural labor certification

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application has been denied (in whole or in part) based on the RA's determination of the availability of able, willing, and qualified U.S. workers, and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able, willing, qualified, or available at the time and place needed, the employer may request a new temporary alien agricultural labor certification determination from the RA. The RA shall expeditiously, but in no case later than 72 hours after the time a request is received, make a determination on the request.

(2) Filing requests. The employer's request for a new determination shall be made directly to the RA. The request may be made to the RA by telephone, but shall be confirmed by the employer in writing as required by paragraphs (h)(2)(i) or (ii) of this section.

(i) Workers not able, willing, qualified, or eligible. If the employer asserts that any worker who has been referred by the ES System or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H-2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified, or eligible because of lawful job-related reasons. The employer's burden of proof shall be met by the employer's submission to the RA, within 72 hours of the RA's receipt of the request for a new determination, of a signed statement of the employer's assertions, which shall identify each rejected worker by name and shall state each lawful job-related reason for rejecting that worker.

(ii) U.S. workers not available. If the employer telephonically requests the new determination, asserting solely that U.S. workers are not available, the employer shall submit to the RA a signed statement confirming such assertion. If such signed statement is not received by the RA within 72 hours of the RA's receipt of the telephonic request for

a new determination, the RA may make the determination based solely on the information provided telephonically and the information (if any) from the local office.

(3) Regional office review--(i) Expeditious review. The RA expeditiously shall review the request for a new determination. The RA may request a signed statement from the local office in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) New determination. If the RA determines that the employer's assertion of nonavailability is accurate and that no able, willing, or qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons, the RA shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the RA promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) Notification of new determination. If the RA cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the RA shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The RA's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the RA's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H-2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not

being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

[52 FR 20507, June 1, 1987, as amended at 55 FR 29358, July 19, 1990; 64 FR 34966, June 29, 1999]

Sec. 655.107 Adverse effect wage rates (AEWRs).

(a) Computation and publication of AEWRs. Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of Sec. 655.93 of this part) for which temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The Director shall publish, at least once in each calendar year, on a date or dates to be determined by the Director, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the Federal Register.

(b) Higher prevailing wage rates. If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the Director) is found to be higher than the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) Federal minimum wage rate. In no event shall an AEWR computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

[52 FR 20507, June 1, 1987, as amended at 54 FR 28046, July 5, 1989]

Sec. 655.108 H-2A applications involving fraud or willful misrepresentation.

(a) Referral for investigation. If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS and DOL Office of the Inspector General for investigation. The RA shall continue to process the application and may issue a temporary alien agricultural labor certification.

(b) Continued processing. If a court finds an employer or agent not guilty of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary alien agricultural labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this **subpart**.

(c) Terminated processing. If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary alien agricultural labor certification application, the application is thereafter invalid, consideration of the application shall be terminated and the RA shall return the application to the employer or agent with the reasons therefor stated in writing.

Sec. 655.110 Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications.

(a) Investigation of violations. If, during the period of two years after a temporary alien agricultural labor certification has been granted (in whole or in part), the RA has reason to believe that an employer violated a material term or condition of the temporary alien agricultural labor certification, the RA shall, except as provided in paragraph (b) of this section, investigate the matter. If, after the investigation, the RA determines that a substantial violation has occurred, the RA, after consultation with the Director, shall notify the employer that a temporary alien agricultural certification request will not be granted for the next period of time in a calendar

year during which the employer would normally be expected to request a temporary alien agricultural labor certification, and any application subsequently submitted by the employer for that time period will not be accepted by the RA. If multiple or repeated substantial violations are involved, the RA's notice to the employer shall specify that the prospective denial of the temporary alien agricultural labor certification will apply not only to the next anticipated period for which a temporary alien agricultural labor certification would normally be requested, but also to any periods within the coming two or three years; two years for two violations, or repetitions of the same violations, and three years for three or more violations, or repetitions thereof. The RA's notice shall be in writing, shall state the reasons for the determinations, and shall offer the employer an opportunity to request an expedited administrative review or a de novo hearing before an administrative law judge of the determination within seven calendar days of the date of the notice. If the employer requests an expedited administrative review or a de novo hearing before an administrative law judge, the procedures in Sec. 655.112 of this part shall be followed.

(b) Employment Standards Administration investigations. The RA may make the determination described in paragraph (a) of this section based on information and recommendations provided by the Employment Standards Administration, after an Employment Standards Administration investigation has been conducted in accordance with the Employment Standards Administration procedures, that an employer has not complied with the terms and conditions of employment prescribed as a condition for a temporary alien agricultural labor certification. In such instances, the RA need not conduct any investigation of his/her own, and the subsequent notification to the employer and other procedures contained in paragraph (a) of this section will apply. Penalties invoked by the Employment Standards Administration for violations of temporary alien agricultural labor certification terms and conditions shall be treated and handled separately from sanctions available to the RA, and an employer's obligations for compliance with the Employment Standards Administration's enforcement penalties shall not absolve an employer from sanctions applied by ETA under this section (except as noted in

paragraph (a) of this section).

(c) Less than substantial violations--(1) Requirement of special procedures. If, after investigation as provided for under paragraph (a) of this section, or an Employment Standards Administration notification as provided under paragraph (b) of this section, the RA determines that a less than substantial violation has occurred, but the RA has reason to believe that past actions on the part of the employer may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the RA may require the employer to conform to special procedures before and after the temporary alien labor certification determination (including special on-site positive recruitment and streamlined interviewing and referral techniques) designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary alien agricultural labor certification. Such requirements shall be reasonable, and shall not require the employer to offer better wages, working conditions and benefits than those specified in Sec. 655.102 of this part, and shall be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this **subpart**. The RA shall notify the employer in writing of the special procedures which will be required in the coming year. The notification shall state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary alien agricultural labor certification, and shall offer the employer an opportunity to request an administrative review or a de novo hearing before an administrative law judge. If an administrative review or de novo hearing is requested, the procedures prescribed in Sec. 655.112 of this part shall apply.

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(2) Failure to comply with special procedures. If the RA determines that the employer has failed to comply with special procedures required pursuant to paragraph (c)(1) of this section, the RA shall send a written notice to the employer, stating that the employer's otherwise affirmative temporary alien agricultural labor certification

determination will be reduced by twenty-five percent of the total number of H-2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year. Notice of such a reduction in the number of workers requested shall be conveyed to the employer by the RA in the RA's written temporary alien agricultural labor certification determination required by Sec. 655.101 of this part (with the concurrence of the Director). The notice shall offer the employer an opportunity to request an administrative review or a de novo hearing before an administrative law judge. If an administrative review or de novo hearing is requested, the procedures prescribed in Sec. 655.112 of this part shall apply, provided that if the administrative law judge affirms the RA's determination that the employer has failed to comply with special procedures required by paragraph (c)(1) of this section, the reduction in the number of workers requested shall be twenty-five percent of the total number of H-2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year.

(d) Penalties involving members of associations. If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) shall apply only to that member of the association unless the RA determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the penalty shall be invoked against the association or other association member as well.

(e) Penalties involving associations acting as joint employers. If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) of this section shall apply only to the

association, and shall not be applied to any individual producer member of the association unless the RA determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the penalty shall be invoked against the association member as well.

(f) Penalties involving associations acting as sole employers. If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, no individual producer member of the association shall be permitted to employ certified H-2A workers in the crop and occupation for which the H-2A workers had been previously certified for the sole employer association unless the producer member applies for temporary alien agricultural labor certification under the provisions of this **subpart** in the capacity of an individual employer/applicant or as a member of a joint employer association, and is granted temporary alien agricultural labor certification by the RA.

(g) Types of violations--(1) Substantial violation. For the purposes of this **subpart**, a substantial violation is one or more actions of commission or omission on the part of the employer or the employer's agent, with respect to which the RA determines:

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(i)(A) That the action(s) is/are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H-2A workforce; and that:

(1) With respect to the action(s), the employer has failed to comply with one or more penalties imposed by the Employment Standards Administration for violation(s) of contractual obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to Sec. 216 of the INA (8 U.S.C. 1186), this **subpart**, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations); or

(2) The employer has engaged in a pattern or practice of actions which are significantly injurious to the wages, benefits, or working

conditions of 10 percent or more of an employer's U.S. and/or H-2A workforce;

(B) That the action(s) involve(s) impeding an investigation of an employer pursuant to Sec. 216 of the INA (8 U.S.C. 1186), this **subpart**, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations);

(C) That the employer has not paid the necessary fee in a timely manner;

(D) That the employer is not currently eligible to apply for a temporary alien agricultural labor certification pursuant to Sec. 655.210 of this part (failure of an employer to comply with the terms of a temporary alien agricultural labor certification in which the application was filed under **subpart** C of this part prior to June 1, 1987); or

(E) That there was fraud involving the application for temporary alien agricultural labor certification of that the employer made a material misrepresentation of fact during the application process; and

(ii) That there are no extenuating circumstances involved with the action(s) described in paragraph (g)(1)(i) of this section (as determined by the RA).

(2) Less than substantial violation. For the purposes of this **subpart**, a less than substantial violation is an action of commission or omission on the part of the employer or the employer's agent which violates a requirement of this **subpart**, but is not a substantial violation.

Sec. 655.111 Petition for higher meal charges.

(a) Filing petitions. Until a new amount is set pursuant to this paragraph (a), the RA may permit an employer to charge workers up to \$6.58 for providing them with three meals per day, if the employer justifies the charge and submits to the RA the documentation required by paragraph (b) of this section. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal such denial. Such appeals shall be filed with the Chief Administrative Law Judge. Administrative law judges shall hear such appeals according to the procedures in 29 CFR part 18, except that the

appeal shall not be considered as a complaint to which an answer is required. The decision of the administrative law judge shall be the final decision of the Secretary. Each year the maximum charge allowed by this paragraph (a) will be changed by the same percentage as the twelve-month percent change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the Federal Register. However, an employer may not impose such a charge on a worker prior to the effective date contained in the RA's written confirmation of the amount to be charged.

(b) Required documentation. Documentation submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation.

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Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the RA for a period of one year.

Sec. 655.112 Administrative review and de novo hearing before an administrative law judge.

(a) Administrative review--(1) Consideration. Whenever an employer has requested an administrative review before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under

Sec. 655.110 of this part, the RA shall send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be 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 the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge shall not remand the case and shall not receive additional evidence.

(2) Decision. Within five working days after receipt of the case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions submitted from the parties involved or amici curiae, either affirm, reverse, or modify the RA's denial by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, the Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

(b) De novo hearing--(1) Request for hearing; conduct of hearing. Whenever an employer has requested a de novo hearing before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under Sec. 655.110 of this part, the RA shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be 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 the appeal as set forth in this section) to conduct the de novo hearing. The procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an

answer is required,

(ii) The administrative law judge shall ensure that, at the request of the employer, the hearing is scheduled to take place within five working days after the administrative law judge's receipt of the case file, and

(iii) The administrative law judge's decision shall be rendered within ten working days after the hearing.

(2) Decision. After a de novo hearing, the administrative law judge shall either affirm, reverse, or modify the RA's determination, and the administrative law judge's decision shall be provided immediately to the employer, RA, Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

[52 FR 20507, June 1, 1987, as amended at 59 FR 41876, Aug. 15, 1994]

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Sec. 655.113 Job Service Complaint System; enforcement of work contracts.

Complaints arising under this **subpart** may be filed through the Job Service Complaint System, as described in 20 CFR part 658, **subpart E**. Complaints which involve worker contracts shall be referred by the local office to the Employment Standards Administration for appropriate handling and resolution. See 29 CFR part 501. As part of this process, the Employment Standards Administration may report the results of its investigation to ETA for consideration of employer penalties under Sec. 655.110 of this part or such other action as may be appropriate.

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TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 658--ADMINISTRATIVE PROVISIONS GOVERNING THE JOB SERVICE SYSTEM--Table of Contents

Subpart E--Job Service Complaint System

Sec. 658.400 Purpose and scope of **subpart**.

This **subpart** sets forth the regulations governing the Job Service complaint system at both the State and Federal levels.

Sec. 658.401 Types of complaints handled by the JS complaint system.

(a) (1) The types of complaints (JS related complaints) which shall be handled to resolution by the JS complaint system are as follows: (i) Complaints against an employer about the specific job to which the applicant was referred by the JS involving violations of the terms and conditions of the job order or employment-related law (employer-related complaint) and (ii) complaints about Job Service actions or omissions under JS regulations (agency-related complaints). These complaint procedures are not applicable to UI, WIN or CETA complaints. Complaints alleging violations of UI, WIN or CETA regulations should be handled within the procedures set forth in the respective regulations.

(2) A complaint shall be handled to resolution by these regulations only if it is made within one year of the alleged occurrence.

(b) Complaints by veterans alleging employer violations of the mandatory listing requirements under 38 U.S.C. 2012 shall not be handled under this **subpart**. The State agency shall handle such complaints under

the Department's regulations at 41 CFR part 60-250.

(c) Complaints from MSFWs alleging violations of employment-related laws enforced by ESA or OSHA shall be taken in writing by the State agency and the ETA regional office and referred to ESA or OSHA pursuant to the procedures set forth in Secs. 658.414 and 658.422. All other complaints alleging violations of employment-related Federal, State or local laws other than JS regulations by employers, their agents, or DOL subagencies other than JS (non-JS related complaints) shall be logged by the State agency and the ETA regional office and the complainant shall be referred to the appropriate

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agency pursuant to procedures set forth in Secs. 658.414 and 658.422.

(d) Certain types of complaints, such as, but not limited to, complaints by MSFWs, and complaints alleging unlawful discrimination, shall, as set forth in this **subpart**, be handled by specified officials of the State agency or of ETA.

State Agency JS Complaint System

Sec. 658.410 Establishment of State agency JS complaint system.

(a) Each State agency shall establish and maintain a Job Service complaint system pursuant to this **subpart**.

(b) The State Administrator shall have overall responsibility for the operation of the State agency JS complaint system. At the local office level, the local office manager shall be responsible for the management of the JS complaint system.

(c) (1) State agencies shall ensure that centralized control procedures are established for the handling of complaints and files relating to the handling of complaints. The Manager or Administrator of the local or State office taking the complaint shall ensure that a central complaint log is maintained, listing all complaints received, and specifying for each complaint:

- (i) The name of the complainant,
- (ii) The name of the respondent (employer or State agency),

- (iii) The date the complaint is filed,
- (iv) Whether the complaint is by or on behalf of an MSFW,
- (v) Whether the complaint is JS-related,
- (vi) If the complaint is JS-related, whether it is employer-related or agency-related,
- (vii) If the complaint is non-JS-related, the information required by Sec. 658.414(c), and
- (viii) The action taken, including for JS-related complaints, whether the complaint has been resolved.

(2) Within one month after the end of the calendar quarter during which a local office receives an MSFW complaint (JS or non-JS related), the local office manager shall transmit a copy of that portion of the log containing the information on the MSFW complaint(s) or a separate listing of the relevant information from the log for each MSFW complaint to the State Administrator. Within two months after the end of each calendar quarter the State Administrator shall transmit copies of all local and State office complaint logs received for that quarter to the Regional Administrator.

(3) State agencies shall ensure that any action taken by the responsible official, including referral, on a JS-related or non-JS related complaint from an MSFW alleging a violation of employment related laws enforced by ESA or OSHA is fully documented in a file containing all relevant information, including a copy of the original complaint form, a copy of any JS reports, any related correspondence, a list of actions taken, and a record of related telephone calls.

(4) At the State office level, the State Administrator shall ensure that all JS-related complaints referred from local offices, and all correspondence relating thereto are logged with a notation of the nature of each item.

(d) State agencies shall ensure that information pertaining to the use of the JS complaint system is publicized. This shall include the prominent display of an ETA-approved JS complaint system poster in each local office, satellite or district office, and at each State agency operated day-haul facility.

(Approved by the Office of Management and Budget under control number 1205-0039)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39468, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 658.411 Filing and assignment of JS-related complaints.

(a) JS-related complaints may be filed in any office of the State job service agency.

(b) Assignment of complaints to local office personnel shall be as follows:

(1) All JS-related complaints filed with a local office, and alleging unlawful discrimination by race, color, religion, national origin, sex, age, or physical or mental status unrelated to job performance (handicap) shall be assigned to a local office Equal Opportunity (EO) representative if the local office has a trained and designated EO

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representative, or, if the local office does not have such a representative, shall be sent immediately to the State agency for logging and assignment to the EO representative or, where appropriate, handled in accordance with the procedures set forth at 29 CFR part 31. The EO representative shall refer complaints alleging discrimination by employers to the Equal Employment Opportunity Commission or other appropriate enforcement agency. Complaints retained by an EO representative shall be subject to the hearing and appeal rights as are normally provided in accordance with this **subpart**. The State agency complaint specialist shall follow-up with the EO representative or with other responsible enforcement agency monthly regarding MSFW complaints and quarterly regarding non-MSFW complaints, and shall inform the complainants of the status of the complaint periodically.

(2) All JS-related and non-JS related complaints other than those described in paragraph (b)(1) of this section shall be handled by the local office manager or assigned by the local office manager to a local office employee trained in JS complaint procedures.

(c) Assignment of complaints to State office personnel shall be as follows:

(1) The handling of all JS-related complaints received by the State office alleging unlawful discrimination by race, color, religion, national origin, sex, age, physical or mental status unrelated to job performance (handicap) status shall be assigned to a State EO representative and, where appropriate, handled in accordance with procedures set forth at 29 CFR part 31.

(2) The handling of all other JS-related complaints and all non-JS-related complaints received by the State office shall be assigned to a State agency official designated by the State Administrator, provided that the State agency official designated to handle MSFW complaints shall be the State MSFW Monitor Advocate.

Sec. 658.412 Complaint resolution.

(a) A JS-related complaint is resolved when:

(1) The complainant indicates satisfaction with the outcome, or

(2) The complainant chooses not to elevate the complaint to the next level of review, or

(3) The complainant or the complainant's authorized representative fails to respond within 20 working days or in cases where the complainant is an MSFW, 40 working days of a written request by the appropriate local or State office, or

(4) The complainant exhausts the final level of review, or

(5) A final determination has been made by the enforcement agency to which the complaint was referred.

Sec. 658.413 Initial handling of complaints by the State or local office.

(a) There shall be an appropriate official available during regular office hours to take complaints in each local office.

(b) Whenever an individual indicates an interest in making any complaint to a State agency office, the appropriate JS official shall offer to explain the operation of the JS complaint system. The appropriate JS official shall offer to take the complaint in writing if

it is JS related, or if non-JS related, it alleges violations of employment related laws enforced by ESA or OSHA and is filed by or on behalf of an MSFW. The official shall require that the complainant put the complaint on the JS Complaint/Referral Form prescribed or approved by the ETA. The JS Complaint/Referral Form shall be used for all complaints taken by a State agency, including complaints about unlawful discrimination, except as provided in paragraph (c) of this section. The State agency official shall offer to assist the complainant in filling out the form and shall do so if the complainant desires such assistance. If the complainant also represents several other complainants, all such complainants shall be named on the JS Complaint/Referral Form. The complainant shall sign the completed form. The identity of the complainant(s) and any persons who furnish information relating to, or assisting in, an investigation of a complaint shall be kept confidential to the maximum extent possible, consistent with applicable law and a fair determination of the complaint. A copy of the completed JS Complaint/Referral

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Form shall be given to the complainant(s), and the complaint form shall be given to the appropriate JS official.

(c) If a JS official receives a complaint in any form (e.g., a letter) which is signed by the complainant and includes sufficient information for the JS official to initiate an investigation, the document shall be treated as if it were a properly completed JS Complaint/Referral Form filed in person by the complainant. The JS official shall send a confirming letter to this effect to the complainant and shall give the document to the appropriate JS official. If the complainant has not provided sufficient information to investigate the matter expeditiously, the JS official shall request additional information from the complainant.

(d) If the appropriate JS official determines that the complaint is not JS-related, the official shall follow the procedures set forth in Sec. 658.414.

(e) If the appropriate JS official determines that the complaint is JS-related, the official shall ensure that the complaint is handled in

accordance with this **subpart E**.

(f) During the initial discussion with the complainant, the JS official receiving the complaint shall:

(1) Make every effort to obtain all the information he/she perceives to be necessary to investigate the complaint;

(2) Request that the complainant indicate all of the addresses through which he or she might be contacted during the investigation of the complaint;

(3) Request that the complainant contact the JS before leaving the area if possible, and explain the need to maintain contact during the complaint investigation.

(Approved by the Office of Management and Budget under control number 1205-0039)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[45 FR 39468, June 10, 1980, as amended at 47 FR 145, Jan. 5, 1982]

Sec. 658.414 Referral of non-JS-related complaints.

(a) To facilitate the operation of the coordinated enforcement procedures established at 29 CFR part 42, the State agency shall take from MSFWs in writing non-JS related complaints which allege violations of employment related laws enforced by ESA or OSHA. The official shall immediately refer the complaint to ESA or OSHA for prompt action. The JS official shall inform the MSFW of the enforcement agency (and the individual if known) to which the complaint will be referred and refer the complainant to other agencies, attorney, consumer advocate and/or other assistance where appropriate.

(b) Upon receipt of all other non-JS related complaints, the JS official shall refer the complainant to the appropriate enforcement agency, another public agency, an attorney, a consumer advocate and/or other appropriate assistance.

(c) For all non-JS-related complaints received pursuant to paragraphs (a) and (b) of this section, the appropriate JS official shall record the referral of the complainant and the complaint where

paragraph (a) is applicable, and the agency or agencies (and individual(s), if known) to which the complainant and the complaint where paragraph (a) is applicable, were referred on the complaint log specified in Sec. 658.410(c)(1). The JS official shall also prepare and keep the file specified in Sec. 658.410(c)(3) for the complaints filed pursuant to paragraph (a) of this section.

Sec. 658.415 Transferring complaints to proper JS office.

(a) Where a JS-related complaint deals with an employer, the proper office to handle the complaint initially is ordinarily the local office serving the area in which the employer is located. Where a JS-related complaint deals with an office of a State agency, the proper office to handle the complaint initially is the local office serving the area in which the alleged violation of the JS regulations occurred. Where an agency-related complaint deals with more than one office of a State agency, with an alleged agency-wide violation, or with the State office, the appropriate State agency official may direct that the State office of that agency handle the complaint initially.

(b) The State Administrator shall establish a system whereby the office in which an JS-related complaint is filed,

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alleging a violation in that same State, ensures that the JS Complaint/Referral Form is adequately completed and then sent to the proper State or local office of that agency. A copy of the referral letter shall be sent to the complainant.

(c) Whenever a JS-related complaint deals with an employer in another State or another State agency, the State JS agency shall send, after ensuring that the JS Complaint/Referral Form is adequately completed, a copy of the JS Complaint/Referral Form and copies of any relevant documents to the State agency in the other State. Copies of the referral letter shall be sent to the complainant, and copies of the complaint and referral letter shall be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies.

(d) The State agency receiving the complaint after an interstate transferral under paragraph (c) of this section shall handle the complaint as if it had been initially filed with that office.

(e) The ETA regional office with jurisdiction over the receiving State shall follow-up with the receiving State agency to ensure the complaint is handled in accordance with these regulations.

(f) If the JS complaint is against more than one State JS agency, the complaint shall so clearly state. The complaint shall be handled as separate complaints and shall be handled according to procedures at Sec. 658.416(c) and paragraph (c) of this section.

Sec. 658.416 Action on JS-related complaints.

(a) The appropriate State agency official handling an JS-related complaint shall offer to assist the complainant through the provision of appropriate JS services. For complaints against employers, this may include such services as referring a worker-complainant to another job.

(b) (1) If the JS-related complaint concerns violations of an employment-related law, the local or State office official shall refer the complaint to the appropriate enforcement agency and notify the complainant in writing of the referral. The agency shall follow-up with the enforcement agency monthly regarding MSFW complaints and quarterly regarding non-MSFW complaints, and shall inform the complainant of the status of the complaint periodically.

(2) If the enforcement agency makes a final determination that the employer violated an employment related law, the State JS agency shall initiate procedures for discontinuation of services immediately in accordance with **subpart F**. The State agency shall notify the complainant and the employer of this action.

(c) If the complaint is filed initially in a local office, and is not referred under paragraph (b), the appropriate local office official shall investigate and attempt to resolve the complaint immediately upon receipt. If resolution has not been achieved to the satisfaction of the complainant within 15 working days after receipt of the complaint, or 5 working days with respect to complaints filed by or on behalf of MSFWs, the local office official shall send the complaint to the State office for resolution or further action except that if the local office has

made a written request for information pursuant to Sec. 658.412(a)(3), these time periods shall not apply until the complainant's response is received in accordance with Sec. 658.412(a)(3). The local office shall notify the complainant and the respondent, in writing, of the results of its investigation pursuant to this paragraph, and of the referral to the State office.

(d) If the complaint is filed initially with the State office, and is not transferred to a local office under Sec. 658.415(a), or not referred to an enforcement agency under paragraph (b) of this section, the appropriate State office official shall investigate and attempt to resolve the complaint immediately upon receipt. If the State office receives the complaint on referral from a local office, the State official shall attempt to resolve the complaint immediately and may, if necessary, conduct a further investigation. If resolution at the State office level has not been accomplished within 30 working days (20 working days with respect to complaints by MSFWs) after the complaint was received by the State office (whether the complaint was received directly or from a local office pursuant

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to paragraph (c) of this section), the State office shall make a written determination regarding the complaint and shall send copies to the complainant and the respondent except that if the State office has made a written request for information pursuant to Sec. 658.412 (a)(3) these time periods shall not apply until the complainant's response is received in accordance with Sec. 658.412(a)(3). The determination must be sent by certified mail. The determination shall include all of the following:

- (1) The results of any State office investigation pursuant to this paragraph.
- (2) Conclusions reached on the allegations of the complaint.
- (3) An explanation of why the complaint was not resolved.
- (4) If the complaint is against an employer, and the State office has found that the employer has violated JS regulations, the determination shall state that the State will initiate procedures for discontinuation of services to the employer in accordance with **subpart**

F.

(5) If the complaint is against an employer and has not been referred to an enforcement agency pursuant to paragraph (b)(1) of this section, and the State office has found that the employer has not violated JS regulations, an offer to the complainant of the opportunity to request a hearing within 20 working days after the certified date of receipt of the notification.

(6) If the complaint is against the State agency, an offer to the complainant of the opportunity to request in writing a hearing within 20 working days after the certified date of receipt of the notification.

(e) If the State office, within 20 working days from the certified date of receipt of the notification provided for in paragraph (d) of this section, receives a written request for a hearing in response thereto, the State office shall refer the complaint to a State hearing official for hearing. The parties to whom the determination was sent (the State agency may also be a party) shall then be notified in writing by the State office that:

(1) The parties will be notified of the date, time and place of the hearing;

(2) The parties may be represented at the hearing by an attorney or other representative;

(3) The parties may bring witnesses and/or documentary evidence to the hearing;

(4) The parties may cross-examine opposing witnesses at the hearing;

(5) The decision on the complaint will be based on the evidence presented at the hearing;

(6) The State hearing official may reschedule the hearing at the request of a party or its representative; and

(7) With the consent of the State agency's representative and of the State hearing official, the party who requested the hearing may withdraw the request for hearing in writing before the hearing.

Sec. 658.417 Hearings.

(a) Hearings shall be held by State hearing officials. A State hearing official may be any State official authorized to hold hearings under State law. They may be, for example, the same referees who hold

hearings under the State unemployment compensation law and/or the Work Incentive Program or any official of the State agency, authorized by State law to preside at State administrative hearings.

(b) The State hearing official may decide to conduct hearings on more than one complaint concurrently if he/she determines that the issues are related or that the complaints will be handled more expeditiously in this fashion.

(c) The State hearing official, upon the referral of a case for a hearing, shall:

(1) Notify all involved parties of the date, time and place of the hearing; and

(2) Re-schedule the hearing, as appropriate.

(d) In conducting a hearing the State hearing official shall:

(1) Regulate the course of the hearing;

(2) Issue subpoenas, if empowered to do so under State law, if necessary;

(3) Assure that all relevant issues are considered;

(4) Rule on the introduction of evidence and testimony; and

(5) Take any other action which is necessary to insure an orderly hearing.

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(e) The testimony at the hearing shall be recorded and may be transcribed when appropriate.

(f) The parties shall be afforded the opportunity to present, examine, and cross-examine witnesses.

(g) The State hearing official may elicit testimony from witnesses, but shall not act as advocate for any party.

(h) The State hearing official shall receive and include in the record, documentary evidence offered by any party and accepted at the hearing. Copies thereof shall be made available by the party submitting the document to other parties to the hearing upon request.

(i) Technical rules of evidence shall not apply to hearings conducted pursuant to this section, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination, shall be applied where

reasonably necessary by the State hearing official. The State hearing official may exclude irrelevant, immaterial, or unduly repetitious evidence.

(j) The case record, or any portion thereof, shall be available for inspection and copying by any party at, prior to, or subsequent to the hearing upon request. Special procedures may be used for disclosure of medical and psychological records such as disclosure to a physician designated by the individual.

(k) The State hearing official shall, if feasible, resolve the dispute by conciliation at any time prior to the conclusion of the hearing.

(l) At the State hearing official's discretion, other appropriate individuals, organizations, or associations may be permitted to participate in the hearing as *amicus curiae* (friends of the court) with respect to specific legal or factual issues relevant to the complaint. Any documents submitted by the *amicus curiae* shall be included in the record.

(m) The following standards shall apply to the location of hearings involving parties in more than one State or in locations within a State but which are separated geographically so that access to the hearing location is extremely inconvenient for one or more parties as determined by the State hearing official.

(1) Whenever possible, the State hearing official shall hold a single hearing, at a location convenient to all parties or their representatives wishing to appear and present evidence, and with all such parties and/or their representatives present.

(2) If a hearing location cannot be established by the State hearing official pursuant to paragraph (m)(1) of this section, the State hearing official may conduct, with the consent of the parties, the hearing by a telephone conference call from a State agency office with all parties and their representatives not choosing to be present at that location permitted to participate in the hearing from their distant locations.

(3) Where the State agency does not have the facilities to conduct hearings by telephone pursuant to paragraph (m)(1) or (m)(2) of this section, the State agencies in the States where the parties are located shall take evidence and hold the hearing in the same manner as used for appealed interstate unemployment claims in those States, to the extent

that such procedures are consistent with Sec. 658.416.

Sec. 658.418 Decision of the State hearing official.

(a) The State hearing official may:

(1) Rule that the case is improperly before it, that is, that there is a lack of jurisdiction over the case;

(2) Rule that the complaint has been withdrawn properly and in writing;

(3) Rule that reasonable cause exists to believe that the request has been abandoned or that repeated requests for re-scheduling are arbitrary and for the purpose of unduly delaying or avoiding a hearing;

(4) Render such other rulings as are appropriate to the issues in question. However, the State hearing official shall not have jurisdiction to consider the validity or constitutionality of JS regulations or of the Federal statutes under which they are promulgated.

(b) Based on the entire record, including the investigations and determinations of the local and State offices

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and any evidence provided at the hearing, the State hearing official shall prepare a written decision. The State hearing official shall send a copy of the decision stating the findings and conclusions of law and fact and the reasons therefor to the complainant, the respondent, entities serving as amicus capacity (if any), the State office, the Regional Administrator, and the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, Department of Labor, room N2101, 200 Constitution Avenue, NW., Washington, DC, 20210. The notification to the complainant and respondent must be sent certified mail.

(c) All decisions of a State hearing official shall be accompanied by a written notice informing the parties (not including the Regional Administrator, the Solicitor of Labor, or entities serving in an amicus capacity) that, if they are not satisfied, they may, within 20 working days of the certified date of receipt of the decision, file an appeal in writing with the Regional Administrator. The notice shall give the

address of the Regional Administrator.

Federal JS Complaint System

Sec. 658.420 Establishment of JS complaint system at the ETA regional office.

(a) Each Regional Administrator shall establish and maintain a JS complaint system at the DOL regional office level.

(b) The Regional Administrator shall designate DOL officials to handle JS-related complaints as follows:

(1) The handling of all JS-related complaints alleging discrimination by race, color, religion, national origin, sex, age, or physical or mental status unrelated to job performance (handicap), shall be assigned to a Regional Director for Equal Opportunity and Special Review (RDEOSR) and, where appropriate, handled in accordance with procedures at 29 CFR part 31.

(2) The handling of all JS-related complaints other than those described in paragraphs (b)(1) of this section, shall be assigned to a regional office official designated by the Regional Administrator, provided that the regional office official designated to handle MSFW complaints shall be the Regional MSFW Monitor Advocate.

(c) The Regional Administrator shall designate DOL officials to handle non-JS-related complaints in accordance with Sec. 658.422: Provided, That the regional official designated to handle MSFW non-JS-related complaints shall be the Regional MSFW Monitor Advocate.

(d) The Regional Administrator shall assure that all JS-related complaints and all correspondence relating thereto are logged, with a notation of the nature of each item.

Sec. 658.421 Handling of JS-related complaints.

(a) No JS-related complaint shall be handled at the ETA regional office level until the complainant has exhausted the State agency administrative remedies set forth at Secs. 658.410 through 658.418. Therefore, if the Regional Administrator determines that any complainant, who has filed a JS-related complaint with the regional

office, has not yet exhausted the administrative remedies at the State agency level, the Regional Administrator shall inform the complainant within 10 working days in writing that the complainant must first exhaust those remedies before the complaint may be filed in the regional office. A copy of this letter shall be sent to the State Administrator. However, nothing in this provision shall prevent an ETA regional office from accepting and handling to resolution a JS-related complaint pursuant to Sec. 658.423 or Sec. 658.702(c).

(b) The ETA regional office shall be responsible for handling appeals of determinations made on complaints at the State level. An "appeal" shall include any letter or other writing requesting review if it is received by the regional office and signed by a party to the complaint. Upon receipt of an appeal by the Regional Administrator after the exhaustion of State agency administrative remedies, the Regional Administrator immediately shall send for the complete State agency file, including the original JS Complaint/Referral Form.

(c) The Regional Administrator shall review the file in the case and shall determine within ten (10) days whether

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any further investigation or action is appropriate, provided however that the Regional Administrator shall have twenty (20) working days to make this determination if legal advice is necessary.

(d) If the Regional Administrator determines that no further action is warranted, the Regional Administrator shall send this determination in writing by certified mail to the appellant within five (5) days of his/her determination and may, in the Regional Administrator's discretion, offer the appellant a hearing before a DOL Administrative Law Judge, provided the appellant requests such a hearing in writing from the Regional Administrator within 20 working days of the certified date of receipt of the Regional Administrator's offer of hearing.

(e) If the Regional Administrator determines that further investigation or other action is warranted, the Regional Administrator immediately shall undertake such an investigation, informal resolution or other action.

(f) If the Regional Administrator determines to reverse or modify

the decision of the State hearing official or the State Administrator, the Regional Administrator shall offer in writing by certified mail each party to the State hearing official's hearing or to whom the State office determination was sent, the opportunity for a hearing before a DOL Administrative Law Judge, provided the party requests such a hearing in writing within 20 working days of the certified date of the Regional Administrator's offer of hearing.

(g) If the Regional Administrator finds reason to believe that a State agency or one of its local offices has violated JS regulations, the Regional Administrator shall follow the procedures set forth at **subpart H** of this part.

(h) If the appeal is not resolved, pursuant to paragraph (e) of this section, to the appellant's satisfaction, the Regional Administrator may, in the Regional Administrator's discretion, offer the appellant in writing by certified mail a hearing before a DOL Administrative Law Judge provided the appellant requests such a hearing in writing from the Regional Administrator within 20 working days of the certified date of receipt of the Regional Administrator's offer of hearing.

Sec. 658.422 Handling of non-JS-related complaints by the Regional Administrator.

(a) Each non-JS-related complaint filed by an MSFW alleging violations of employment related laws enforced by ESA or OSHA shall be taken in writing, and referred to ESA or OSHA for prompt action pursuant to 29 CFR part 42.

(b) Upon referring the complaint in accordance with paragraph (a) of this section, the regional official shall inform the complainant of the enforcement agency (and individual, if known) to which the complaint was referred and shall also refer the complainant to the enforcement agency, another public agency, an attorney, a consumer advocate and/or other appropriate assistance.

(c) All other non-JS related complaints alleging violations of employment related laws shall be logged. The complainant shall be referred to the appropriate agency for assistance.

(d) For all non-JS-related complaints received and/or referred, the appropriate regional official shall record the referral of the

complainant (or complaint filed on behalf of an MSFW), and the agency or agencies (and individual(s) if known) to which the complainant (or complaint) was referred on a complaint log, similar to the one described in Sec. 658.410(c)(1). The appropriate regional official shall also prepare and keep the file specified in Sec. 658.410(c)(3).

Sec. 658.423 Handling of other complaints by the Regional Administrator.

Whenever the regional office receives a JS-related complaint and the appropriate official determines that the nature and scope of the complaint are such that the time required to exhaust the administrative procedures at the State level would adversely affect a significant number of applicants, he/she shall take the complaint and follow up on the complaint as follows: for a complaint against an employer, the regional office shall handle the complaint in a manner consistent with the

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requirements imposed upon State agencies by Secs. 658.413 and 658.416 of this part. A hearing shall be offered to the parties once the Regional Administrator makes a determination on the complaint. For a complaint against a State agency, the regional office shall follow procedures established at Sec. 658.702(c).

Sec. 658.424 Federal hearings.

(a) If a party requests a hearing pursuant to Sec. 658.421 (d), (f), or (h) or Sec. 658.423, the Regional Administrator shall:

(1) Send the party requesting the hearing and all other parties to the prior State agency hearing, a written notice containing the statements set forth at Sec. 658.416(e);

(2) Compile four hearing files containing copies of all documents relevant to the case, indexed and compiled chronologically;

(3) Send simultaneously one hearing file to the DOL Chief Administrative Law Judge, 800 K Street, NW., suite 400, Washington, DC

20001-8002, one hearing file to the Administrator, and one hearing file to the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, and retain one hearing file.

(b) Upon the receipt of a hearing file, the DOL Administrative Law Judge designated by the Chief Administrative Law Judge shall notify the party requesting the hearing, all parties to the prior State hearing official hearing (if any), the State agency, the Regional Administrator, the Administrator, and the Solicitor of the receipt of the case. The DOL Administrative Law Judge shall afford the non-Federal parties 20 working days to submit legal arguments and supporting documentation, if any, in the case. The DOL Administrative Law Judge shall afford the Solicitor 20 working days to submit legal arguments and supporting documentation, if any, in the case on behalf of the Federal parties. After the 20 working days elapse, the Hearing Officer shall decide whether to schedule a hearing, or make a determination on the record.

(c) The DOL Administrative Law Judge may decide to conduct hearings on more than one complaint concurrently if he/she determines that the issues are related or that the complaints will be handled more expeditiously in this fashion.

(d) At the DOL Administrative Law Judge's discretion, other appropriate individuals, organizations, or associations may be permitted to participate in the hearing as amicus curiae with respect to specific legal or factual issues relevant to the complaint. Any documents submitted by the amicus curiae shall be included in the record.

(e) The following standards shall apply to the location of hearings involving parties in more than one State or in locations which are within a State but which are separated geographically so that access to the hearing location is extremely inconvenient for one or more parties as determined by the Administrative Law Judge.

(1) Whenever possible, the Administrative Law Judge shall hold a single hearing, at a location convenient to all parties or their representatives wishing to appear and present evidence, and with all such parties and/or their representatives present.

(2) If a hearing location cannot be established by the Administrative Law Judge at a location pursuant to paragraph (e)(1) of this section, the Administrative Law Judge may conduct, with the consent of the parties, the hearing by a telephone conference call from an

office with all parties and their representatives not choosing to be present at that location permitted to participate in the hearing from their distant locations.

(3) Where the Administrative Law Judge is unable to locate facilities to conduct hearings by telephone pursuant to paragraph (e)(1) or (e)(2) of this section, the Administrative Law Judge shall take evidence in the States where the parties are located and hold the hearing in the same manner as used for appealed interstate unemployment claims in those States, to the extent that such procedures are consistent with Sec. 658.416.

(f) The DOL Administrative Law Judge shall:

(1) Notify all involved parties of the date, time and place of the hearing; and

(2) Re-schedule the hearing, as appropriate.

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(g) In conducting a hearing the DOL Administrative Law Judge shall:

(1) Regulate the course of the hearing;

(2) Issue subpoenas if necessary;

(3) Consider all relevant issues which are raised;

(4) Rule on the introduction of evidence and testimony;

(5) Take any other action which is necessary to insure an orderly hearing.

(h) The testimony at the hearing shall be recorded, and shall be transcribed if appropriate.

(i) The parties to the hearing shall be afforded the opportunity to present, examine, and cross-examine witnesses. The DOL Administrative Law Judge may elicit testimony from witnesses, but shall not act as advocate for any party.

(j) The DOL Administrative Law Judge shall receive, and make part of the record, documentary evidence offered by any party and accepted at the hearing. Copies thereof shall be made available by the party submitting the documentary evidence, to any part to the hearing upon request.

(k) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to

assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the Administrative Law Judge conducting the hearing. The Administrative Law Judge may exclude irrelevant, immaterial, or unduly repetitious evidence.

(l) The case record, or any portion thereof, shall be available for inspection and copying by any party to the hearing at, prior to, or subsequent to the hearing upon request. Special procedures may be used for disclosure of medical and psychological records such as disclosure to a physician designated by the individual concerned.

(m) The DOL Administrative Law Judge shall, if feasible, encourage resolution of the dispute by conciliation at any time prior to the conclusion of the hearing.

[45 FR 39468, June 10, 1980, as amended at 56 FR 54708, Oct. 22, 1991]

Sec. 658.425 Decision of DOL Administrative Law Judge.

(a) The DOL Administrative Law Judge may:

(1) Rule that there is a lack of jurisdiction over the case;

(2) Rule that the appeal has been withdrawn properly and in writing, with the written consent of all the parties;

(3) Rule that reasonable cause exists to believe that the appeal has been abandoned or that repeated requests for re-scheduling are arbitrary and for the purpose of unduly delaying or avoiding a hearing; or

(4) Render such other rulings as are appropriate to the issues in question. However, the DOL Administrative Law Judge shall not have jurisdiction to consider the validity or constitutionality of JS regulations or of the Federal statutes under which they are promulgated.

(b) Based on the entire record, including any legal briefs, the record before the State agency, the investigation (if any) and determination of the Regional Administrator, and evidence provided at the hearing, the DOL Administrative Law Judge shall prepare a written decision. The DOL Administrative Law Judge shall send a copy of the decision stating the findings and conclusions of law and fact and the reasons therefor to the parties to the hearing, including the State agency, the Regional Administrator, the Administrator, and the

Solicitor, and to entities filing amicus briefs (if any).

(c) The decision of the DOL Administrative Law Judge shall be the final decision of the Secretary.

Sec. 658.426 Complaints against USES.

Complaints alleging that an ETA regional office or the national office of USES has violated JS regulations should be mailed to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, DC 20210. Such complaints should include:

(a) The allegations of wrong-doing, (b) the date of the incident, (c) location of the incident, (d) who the complaint is against, and (e) any other relevant

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information available to the complainant. The Assistant Secretary or the Regional Administrator as designated shall make a determination and respond to the complainant after investigation of the complaint.