

Summary of Major Provisions of the Final Rule

The Department carefully considered the public comments received. This final rule largely adopts, with appropriate changes, the regulatory text proposed in the notice of proposed rulemaking (NPRM or proposed rule) published in the Federal Register on July 26, 2019.⁸ As discussed in detail elsewhere in this preamble, this final rule adopts the following major changes to the Department's H-2A program regulations:

Streamlining the H-2A Application Process

- Establishes a single point of entry by requiring that employers, except in limited circumstances, electronically file Applications for Temporary Employment Certification, job orders, and all supporting documentation through a centralized electronic system maintained by the Department, and permits the use of electronic signatures meeting valid signatures standards. These provisions are intended to reduce costs and burdens for most employers, improve the quality of applications, and reduce the frequency of delays associated with deficient applications.
- Codifies the use of electronic methods for the OFLC Certifying Officer (CO) to send notices and requests to employers, circulate approved job orders to appropriate State Workforce Agencies (SWAs) for interstate clearance and recruitment of U.S. workers, and issue temporary labor certification decisions directly to the Department of Homeland Security (DHS). These provisions are intended to modernize OFLC's processing of applications to minimize delays, reduce unnecessary administrative costs for the employer and the Department, and expedite the delivery of labor certifications to DHS, while maintaining program integrity.
- Permits SWAs, or other appropriate inspecting authorities, to inspect and certify employer-provided housing for a period of up to 24 months under certain circumstances; clarifies that other appropriate local, State, or Federal authorities may conduct inspections of employer-provided housing on behalf of the SWAs; and allows an employer to self-certify that the employer-provided housing remains in compliance during the validity period of the official housing certification provided by the SWA or other appropriate authorities. These provisions are intended to better leverage the longstanding expertise of

the SWAs in conducting housing inspections and reduce the frequency of delays in the labor certification process, while ensuring that sufficient and safe housing is available to workers.

Expanding Employer Access and Flexibilities to use the H-2A Program

- Revises the term “first date of need” as the first date on which employers anticipate the actual start date of work under the certified Application for Temporary Employment Certification and job order. Provided all regulatory obligations to workers are met, the actual start date of work may occur within 14 calendar days after the anticipated first date of need. This provision is intended to provide employers with a limited degree of flexibility for the actual start date of work for some or all of the temporary workers hired, which may vary due to such factors as travel delays or crop conditions at the time work is expected to begin.
- Establishes new standards that permit individual employers possessing the same need for agricultural services or labor to file a single Application for Temporary Employment Certification and job order to jointly employ workers in full-time employment, consistent with the statute and the Department’s longstanding practice. This provision is intended to provide small employers who cannot offer full-time work for their H-2A employees with an opportunity to participate in the H-2A program and ensure each employer will be held jointly liable for compliance with all program requirements.
- Codifies a unique set of standards and procedures, with some revisions, for employers that employ workers engaged in animal shearing, commercial beekeeping, and custom combining according to a planned itinerary across multiple areas of intended employment (AIE) in one or more contiguous States. These provisions are intended to provide appropriate flexibilities for employers engaged in these unique agricultural activities that are substantially similar to the processes formerly set out in administrative guidance letters, and greater certainty in the handling of these applications by the Department under 20 CFR part 655, subpart B.
- Permits employers granted temporary labor certifications to stagger the entry of H-2A workers into the United States over an extended period of time, which may be up

to 120 days, after the first date of certified need without filing another approved H-2A Petition. To do so, the employer must notify the Department of its plan to stagger the entry of H-2A workers before certification and must apprise and hire qualified and eligible U.S. workers until 30 days after the latest staggered entry date has elapsed. These provisions are intended to provide employers with greater flexibility to accommodate changing weather and production conditions and improve administrative efficiencies for employers and the Department, while ensuring U.S. workers have adequate access to agricultural job opportunities.

- Establishes new standards and procedures that permit employers to request minor amendments to the places of employment listed in the certified Application for Temporary Employment Certification under certain limited conditions and assurances submitted by employers to the Department. This provision provides employers with a limited degree of flexibility to respond to unforeseen circumstances arising after certification is granted, while maintaining program integrity and the material terms and conditions of employment certified by the Department.

Modernizing Prevailing Wage Surveys and Recruitment of U.S. Workers

- Replaces outdated prevailing wage survey guidelines from the Department's ETA Handbook 3859 (Handbook 385 or the Handbook) with modernized standards that are more effective in producing prevailing wages for distinct crop or agricultural activities, and expands the universe of State entities that may conduct prevailing wage surveys, including SWAs, other State agencies, State colleges, or State universities. These provisions are intended to improve the reliability and accuracy of prevailing wage surveys and allow SWAs to leverage other State survey resources to expand the number and scope of surveys conducted. In addition, while the minimum standards may not ensure statistically valid estimates for larger categories of workers, they are designed to provide more options for SWAs to make decisions about whether to prioritize precision, accuracy, granularity, or other quality factors in the data they use to inform prevailing wages.

- Adds a new provision providing employers with the option to initiate positive

recruitment of U.S. workers after the SWA has accepted the job order for intrastate clearance and before filing the Application for Temporary Employment Certification, consistent with statutory requirements. This provision is intended to benefit employers who consistently file job orders in compliance with program requirements by increasing the likelihood of receiving a certification as a first action from the CO, while concurrently broadening the dissemination of approved job opportunities to recruit qualified U.S. workers.

- Revises the period of recruiting U.S. workers by requiring employers to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days from the employer's first date of need on the certified Application for Temporary Employment Certification, including any modifications thereof, and a longer recruitment period for those employers who choose to stagger the entry of H-2A workers into the United States under § 655.130(f).

Strengthening Worker Protections and Program Integrity

- Revises the standards and procedures by which employers qualifying as H-2A Labor Contractors (H-2ALCs) obtain temporary labor certification by permitting the electronic submission of surety bonds, adjusting the required surety bond amounts based on changes to adverse effect wage rates (AEWR), adopting a common bond form that includes standardized bond language, and permitting debarment of H-2ALCs that fail to provide adequate surety bonds. These provisions are intended to streamline the process for accepting surety bonds, strengthen the Department's authority to address noncompliant bonds, and better ensure H-2ALCs are able to meet their payroll and other program obligations to workers, thereby reducing the likelihood of program abuse.

- Clarifies the definitions of "employer" and "joint employment," clarifies the use of these terms in the filing of Applications for Temporary Employment Certification. Employers that file as joint employers are treated as such, and the common law of agency determines joint employer status for those entities that do not file applications under the statute. These provisions are intended to improve program compliance consistent with the statute and the Department's current policy and practice.

- Provides that rental and/or public accommodations secured to house workers must meet applicable local, State, or Federal standards addressing certain health or safety concerns (e.g., minimum square footage per occupant, sanitary food preparation and storage areas, laundry and washing facilities), and requires employers to submit written documentation that such housing meets applicable standards and contains a sufficient number of bed(s) and room(s) to accommodate all workers requested. These provisions are intended to better protect the health and safety of workers without imposing an undue burden on employers.

- Enhances the Department's debarment authority by holding agents and attorneys, and their successors in interest, accountable for their own misconduct independent of the employer's violation(s), and clarifying that entities filing Applications for Temporary Employment Certification during the period of debarment will be denied without review. These provisions are intended to improve program integrity and promote greater compliance with program requirements.