

Summary of New H-2A regulation (2009):

Employers with questions related to the new H-2A temporary labor certification application process are encouraged to submit those questions to OFLC at H-2A.Regulation@dol.gov

On December 18, 2008, the Office of the Federal Register published the Department's Final Rule on H-2A Temporary Agricultural Employment. The Final Rule is Effective January 17, 2009, although certain aspects of the rule will be subject to transition provisions.

Part 655, Subpart B—Labor Certification Process for Temporary Agricultural Employment in the U.S. (H-2A workers):

- The application must be filed with the Administrator, OFLC at least 45 calendar days before the first date the employer requires the services of the H-2A workers. §655.100(a)(1)(i);
- No more than 75 days and no fewer than 60 calendar days before the first date the employer requires the services of the H-2A workers, and as a precursor to the filing of the labor certification application, the employer must initiate positive recruitment for eligible U.S. workers and cooperate with the local office of the SWA in the area of intended employment to place a job order. §655.100(a)(1)(ii);
- Prior to commencing recruitment an employer must obtain the appropriate wage for the position directly from the ETA NPC. Employer must then place a job order with the SWA; place print advertisements meeting the requirements of this regulation; and when so designated, recruit in other designated States of traditional labor supply. SWA will post job order locally and in all states listed in the application as anticipated work sites. §655.100(a)(1)(ii);
- No more than 50 days prior to the first date the employer requires the services of the H-2A workers, the employer will prepare and sign an initial written recruitment report that it must submit with the application for employment certification. §655.100(a)(1)(ii);
- Employer's obligation to engage in positive recruitment will end on day H-2A workers depart for the place of work or 3 days prior to the first date employer requires services of H-2A workers (whichever comes first). §655.100(a)(1)(ii);
- Application must be filed by mail. §655.100(a)(1)(iii);
- Employers receiving a labor certification must continue to cooperate with the SWA by accepting referrals—and have the obligation to hire qualified and eligible U.S. workers who apply—until the end of the designated recruitment period. §655.100(a)(1)(iii);
- Deficient applications: The CO will review application and notify applicant in writing if there are deficiencies. Applicant will have 5 calendar days to resubmit a modified application or to appeal. §655.100(a)(2);

- Determinations: If employer has complied with the criteria for certification, including recruitment of eligible U.S. workers, the CO must make a determination on the application by 30 days before first date employer requires services of H-2A workers. §655.100(a)(4)(i);
- Certified applications: A temporary agricultural certification will be certified if the CO finds that the employer has not offered and does not intend to offer foreign workers higher wages, better working conditions, or fewer restrictions than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, qualified and eligible will not be available at the time and place needed to perform the work for which H-2A workers are being requested; and that the employment of such nonimmigrants will not adversely affect the wages and working conditions of similarly employed U.S. workers. §655.100(a)(4)(ii);
- Timeliness of fee payment: The certification fee must be received by CO no later than 30 calendar days after the granting of each temporary labor certification.

Transition of Filing Procedures from Current Regulations (§655.100(b)(1)):

- Employers with a date of need for H-2A workers on or after July 1, 2009, must comply with all of the new H-2A obligations and assurances. §655.100(b)(1);
- Transition Period: Employers with a date of need for H-2A workers prior to July 1, 2009, will file applications in the following manner:
 - An employer will not obtain an offered wage rate through the NPC prior to filing an application, but will complete and submit Form ETA-9142, no less than 45 days prior to their date of need. The employer will simultaneously file ETA 790, along with ETA 9142, directly to the NPC having jurisdiction over H-2A applications. §655.100(b)(2)(i);
 - Pre-filing activities: Activities required to be conducted prior to filings under the final rule will be conducted post-filing during the transition period. The employer will be expected to make attestations in its application applicable to its future activities concerning recruitment, payment of the offered wage, etc. Employers will not be required to complete an initial recruitment report for submission with the application, but will be required to complete a recruitment report for submission prior to certification, and will also be required to complete a final recruitment report covering the entire recruitment period. §655.100(b)(2)(ii)
 - Upon receipt, the NPC will provide the employer with the wage rate to be offered, at a minimum, by the employer, and will process the application in a manner consistent with the new §655.107, issuing a notification of deficiencies for any curable deficiencies within 7 calendar days. §655.100(b)(2)(iii);
 - Processing of application: Once the application and job order have been accepted, the NPC will transmit a copy of the job order to the SWA serving the area of intended employment to initiate intra and interstate clearance, request that the SWA schedule an inspection of the housing, and provide instructions to the employer to commence positive recruitment. §655.100(b)(2)(iv);

Definitions of (some) Terms used in this Subpart (§655.100(c)):

- **Date of need** means the first date the employer requires the services of H-2A worker as indicated in the employer's Application for Temporary Employment Certification
- **Employee** means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party.
- **H-2A Labor Contractor (ie., H-2ALC)** means any person who meets the definition of an employer under paragraph (c) of this section and is not a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses or transports any worker subject to section 218 of the INA or these regulations;
- **Employer** means a person, firm, corporation or other association that: (1) has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment; (2) has an employer relationship with respect to H-2A employees or related U.S. workers under this subpart; and (3) possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN);
- **Positive recruitment** means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers;
- **Work contract** means all the material work terms and conditions of employment relating to wages, hours, working conditions, and other benefits, required by the applicable regulations in Subpart B of 20 CFR part 655, or these regulations, including those terms and conditions attested to by the H-2A employer, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum shall be the terms of the job order, as provided in 20 CFR part 653, Subpart F, and covered provisions of the work contract shall be enforced in accordance with these regulations.

Applications for Temporary Employment Certification in Agriculture:

- Application filing requirements: An employer that desires to apply for temporary employment certification of one or more nonimmigrant foreign workers must file a completed DOL Application for Temporary Employment Certification form, and unless a specific exemption applies, the initial recruitment report. §655.101(a)(1);
- If an H-2ALC intends to file an application, the H-2ALC must meet all of the requirements of employer in § 655.100(b), and comply with all the assurances, guarantees, and other requirements contained in this part and in part 653, subpart F, of this chapter. The H-2ALC must have a place of business (physical location) in the U.S. and a means by which it may be contacted for employment. H-2A workers employed by an H-2ALC may not perform services for a fixed site employer unless the H-2ALC is itself providing the housing and transportation required by §655.104(d) and (h), or has filed a statement confirming that the fixed site employer will provide compliant housing and/or transportation, as required by §655.106, with the OFLC, for each fixed-site employer listed on the application. The H-2ALC must retain a copy of the statement of compliance required by §655.106(b)(6). §655.101(a)(2);
- Filing: The employer may send the Application for Temporary Employment Certification and all supporting documentation by U.S. Mail or private mail courier to the NPC. The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent). §655.101(b);
- Timeliness: A completed Application for Temporary Employment Certification must be filed no less than 45 calendar days before the date of need. §655.101(c);
- Emergency Situations: The CO may waive the time period for filing and pre-filing wage and recruitment requirements set forth in § 655.102, along with their associated attestations, for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause. §655.101(d)

Required Pre-Filing Activity (§655.102):

- An employer may not file an Application for Temporary Employment Certification before all of the pre-filing recruitment steps set forth in this section have been fully satisfied, except where specifically exempted from some or all of those requirements by these regulations. Modifications to these requirements for H-2ALCs are set forth in § 655.106. §655.102(a);
- An employer must attest on the application that it will comply with all of the assurances and obligations of this subpart and to performing all necessary steps of the recruitment process as specified in this section. §655.102(b);
- An employer filing an application must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared to submit this documentation in response to a Notice of Deficiency from the CO prior to the CO rendering a Final Determination, or in the event of an audit. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of certification. §655.102(c);
- An employer filing an application must: 1) submit a job order to the SWA serving the area of intended employment; 2) run two print advertisements (one of which must be on a Sunday, except as provided in paragraph (h) of this section); and (3) recruit in all States currently designated by the Secretary. §655.102(d)(1-4);
- The employer must submit a job order to the SWA serving the area of intended employment no more than 75 calendar days and no fewer than 60 calendar days before the date of need for intrastate and interstate clearance, identifying it as a job order to be placed in connection with a

future application for H-2A workers. If the job is located in more than one State, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites. §655.102(e);

- The job order submitted to the SWA must satisfy all the requirements for newspaper advertisements contained in 655.103 and comply with the requirements for agricultural clearance orders in 20 CFR part 653 Subpart F and the requirements set forth in § 655.104.
- Newspaper advertisements: During the period of time that the job order is being circulated by the SWA for interstate clearance under paragraph (f) of this section, the employer must place an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is accepted by SWA for intrastate/interstate clearance. §655.102(g);
- The newspaper advertisements must satisfy the requirements of section 655.103 and 655.104. The employer must maintain copies of the newspaper pages (with date of publication and full text of ad) or tear sheets. §655.102(g)(3);
- Contact with former U.S. employees: The employer must contact by mail or other effective means its former U.S. employees and solicit their return to the job. Employer must maintain copies of correspondence signed and dated by the employer or, if other means are used, maintain dated logs demonstrating that each worker was contacted, including the phone number, email address, or other means that were used to make contact. The employer must list in the recruitment report any workers who did not return to the employ of the employer because they were either unable or unwilling to return to the job or did not respond to the employer's request, and must retain documentation, if provided by the worker, showing evidence of their inability, unwillingness, or non-responsiveness. §655.102(h);
- Each employer must engage in additional positive recruitment in those States designated in accordance with paragraph (i)(1) with respect to the State in which the employer's work is to be performed. Such recruitment will consist of one newspaper advertisement in each State in one of the newspapers designated by the Secretary, published within the same period of time as the newspaper advertisements required under paragraph (g). §655.102(h)(i)(2)
- Recruitment report. No more than 50 days before the date of need the employer must prepare, sign and date a written recruitment report. The recruitment report must be submitted with the Application for Temporary Employment Certification. The recruitment report must: i) list the original number of openings for which the employer recruited; ii) identify each recruitment source by name; iii) state the name and contact info of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker; iv) confirm that former employees were contacted and by what means; and v) if applicable, explain the lawful job-related reasons for now hiring any U.S. workers who applied for the new position. §655.102(k)(i-v).
- The employer must update the recruitment report within 48 hours of the date that is the end of the recruitment period as specified in § 655.102(f)(3). The supplement must meet the requirements of paragraph (k)(1) of this section. The employer must sign and date this report and retain it for a period of no less than 3 years. §655.102(k)(2);
- The employer must retain résumés of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such résumés and evidence of contact must be retained along with the recruitment report and the supplemental recruitment report for a period of no less than 3 years.

Advertising Requirements (§655.103):

- All advertising conducted before the filing of the Application must meet the requirements of this section and §655.104 and must contain terms of employment not less favorable than those that will be offered to H-2A workers. All advertising must contain the following:
- Employer's name, location of work, geographic areas of employment, description of the job opportunity and anticipated period of employment, the wage offer or range of applicable wage offers, the 3/4ths guarantee, statement that tools will be provided at no cost, statement that housing will be available at no cost, statement that transportation will be provided to the worksite, a statement of temporary nature of position and total number of positions available, statement directing applications to send résumés to SWA, and contact information for applicable SWA and job order number.

Contents of Job Offers (§655.104):

- The employer's job offer must offer to U.S. workers no less than the same benefits, wages and working conditions that the employer is offering to H-2A workers. §655.104(a);
- Each job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. §655.104(b);
- Employer provided housing must meet the full set of DOL OSHA standards set forth at 29 CFR 1910.142 or the set of standards at § 654.404-654.417. §655.104(d)(i);
- Rental or public accommodations or other substantially similar class of habitation that meets applicable standards for such housing will be subjected to state standards, or in the absence of state standards, DOL OSHA standards at 29 CFR 1910.142 will apply. §655.104(d)(ii);
- The employer must make a request to SWA for a housing inspection no less than 60 days before the date of need, except where otherwise provided. §655.104(d)(6)(ii);
- Workers' compensation: The employer must provide workers' compensation insurance in compliance with State law covering injury and disease arising out of an in the course of the worker's employment. §655.104(e);
- Employer provided items: The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. §655.104(f);
- Meals: The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by §655.114. §655.104(g);
- Transportation to place of employment. 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% of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has departed to the employer's place of employment. §655.104(h)(1);
- Transportation from last place of employment to home country. If the worker completes the work contract period, and the worker has no immediately subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker originally departed to work for the employer. §655.104(h)(2);

- Transportation between living quarters and worksite. The employer must provide transportation between the worker's living quarters and the employer's worksite at no cost to the worker. §655.104(h)(3);
- Three-fourths guarantee to worker. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual date of need, whichever is later, and ending on the expiration date specified in the work contract. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work contract can be shortened by agreement of the parties only with the approval of the CO. §655.104(i);
- Earnings records. The employer must keep accurate and adequate records with respect to workers' earnings, including but not limited to field tally 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 3/4ths guarantee at paragraph (i)(3) 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; the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages. §655.104(j)(2);
- To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reasons therefore. §655.104(j)(3);
- The employer must retain the records for not less than 3 years after the completion of the work contract. §655.104(j)(4);
- Hours and earnings statements: The employer must furnish to the worker on or before each payday in one or more written statements the following information: 1) the worker's total earnings for the pay period; 2) the worker's hourly rate and/or piece rate of pay; 3) the hours of employment offered to the worker (broken out by offers in accordance with, and over and above, the guarantee); 4) the hours actually worked by the worker; 5) an itemization of all deductions made from the worker's wages; and 6) if piece rates are used, the units produced daily. §655.104(k)(1-6);
- The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly. §655.104(m);
- 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, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination. §655.104(o);
- The employer must provide to the worker, no later than one the day the work commences, a copy of the work contract between the employer and the worker. §655.104(q)

Assurance and Obligations of H-2A Employers (§655.105):

- The job opportunity is a full-time temporary position, calculated to be at least 30 hours per work week, the qualifications for which do not substantially deviate from the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations;
- For the remainder of H-2A employer obligations, please see §655.105.

Assurances and Obligations of H-2A Labor Contractors (ie., H-2ALCs) (§655.106):

- The pre-filing activity requirements set forth in §655.102 are modified as follows for H-2ALCs:
- The job order for an H-2ALC may contain work locations in multiple areas of intended employment, and may be submitted to any one of the SWAs having jurisdiction over the anticipated work areas. The SWA receiving the job order shall promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites, as well as those States designed by the Secretary. §655.106(a)(1);
- The H-2ALC must conduct separate positive recruitment under §655.102(g-i) for each area of intended employment in which the H-2ALC intends to perform work, but need not conduct separate recruitment for each work location within a single area of intended employment. The positive recruitment for each area of intended employment must list the name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALCs will be providing workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site. Such positive recruitment must be conducted pre-filing for the first area of intended employment, but must be started no more than 75 and no fewer than 60 days before the listed arrival date for each subsequent area of intended employment. For each area of intended employment, the advertising that must be placed in any applicable States designated as traditional or expected labor supply States must be placed at the same time as the placement of other positive recruitment for the area of intended employment in accordance with §655.102(i)(2). §655.106(a)(2);
- An H-2ALC may amend its application subsequent to submission in accordance with §655.107(d)(3) to account for new or changed worksites or areas of intended employment during the course of the itinerary in the following manner:
- If the additional worksites are in the same areas of intended employment as represented on the Application, the H-2ALC is not required to recruit in those areas of intended employment if that recruitment has been completed and if the job duties at the new worksites are similar to those already covered by the application. §655.106(a)(5)(i);
- If the additional worksites are outside the areas of intended employment represented on the Application, H-2ALC must submit in writing the new areas of intended employment and explain the reasons for the amendment of the labor certification itinerary. The CO will order additional recruitment in accordance with §655.102(d). §655.106(a)(5)(ii);
- To satisfy the requirements of §655.102(h), the H-2ALC must contact all U.S. employees that worked for the H-2ALC during the previous season, except those excluded by that section, before filing its application, and must advise those workers that a separate job opportunity exists for each area of intended employment that is covered by the application. §655.106(a)(7);
- In addition to the assurance and obligations listed in § 655.105, H-2ALC applicants are also required to:

- Provide the MSPA Farm Labor Contractor certificate of registration number and expiration date if required under MSPA at 29 USC 1801, to have such a certificate; §655.106(b)(1);
- Identify the farm labor contracting activities the H-2ALC is authorized to perform as an FLC under MSPA as shown on the FLC certificate of registration. §655.106(b)(2);
- List the name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each site, and a description of the crops and activities the workers are expected to perform at each site. §655.106(b)(3);
- Provide proof of its ability to discharge financial obligations under the H-2A program by attesting that it has obtained a surety bond as required by 29 CFR 501.8, stating on the application the name, address, phone number, and contact person for the surety, and providing the amount of the bond and any identifying designation utilized by the surety for the bond.

Processing of Applications (§655.107):

- If the CO determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification in paragraph (a) of this section, the CO will promptly notify the employer within 7 calendar days of the CO's receipt of the application. §655.107(b);
- The notice will state the reasons why the application fails to meet the criteria and offer the employer an opportunity to submit a modified application within 5 business days from the date of receipt, stating the modification that is needed for the CO to accept the application for consideration. §655.107(b)(2)(i-ii)

Offered Wage Rate (§655.108):

- Retention of documentation. An employer filing an application must maintain documentation of its wage determination from the NPC as required in this subpart and be prepared to submit this documentation with the filing of its application. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of certification. §655.108(h)

Labor Certification Determinations (§655.109):

- Payment of processing fees. A determination by the CO to grant an Application in whole or in part under paragraph (d) or (f) of this section will include a bill for the required fees. Each employer of H-2A workers under the Application must pay in a timely manner a non-refundable fee upon issuance of the certification granting the application as follows:
- The application fee for each employer receiving a temporary agricultural labor certification is \$100 plus \$10 for each H-2A worker certified under the Application, provided that the fee will be no greater than \$1,000.00. The fees must be paid by check or money order to "United States Department of Labor." §655.109(h)(1);
- Fees received by the CO no more than 30 days after the date the labor certification is granted will be considered timely. §655.109(h)(2)

Required Departure (§655.111):

- Notice to worker. Upon establishment of a program by DHS for registration of departure, an employer must notify any H-2A worker that when the worker departs the U.S. by land at the conclusion of employment, the worker must register such departure at the place and in the manner prescribed by DHS. §655.111(b)

Audits (§655.112):

- Discretion. The Department will conduct audits of temporary labor certification applications for which certification has been granted. The applications selected for audit will be chosen within the sole discretion of the Department. §655.112(a)

Setting meal charges, petition for higher meal charges (§655.114):

- Meal charges. Until a new amount is set under this paragraph an employer may charge workers up to \$9.90 for providing them with three meals per day. §655.114(a)

Debarment (§655.118):

- The Administrator, OFLC may not issue future labor certifications under this subpart to an **employer and any successor in interest to the debarred employer**, subject to the time limits set forth in paragraph (c) of this section, if:
- The Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification with respect to the employment of domestic or nonimmigrant workers; and
- The Administrator, OFLC issues a Notice of Intent to Debar no later than 2 year after the occurrence of the violation. §655.118(a)(1-2)
- The Administrator, OFLC may not issue future labor certifications under this subpart to an **employer represented by an agent or attorney**, subject to the limits set forth in paragraph (c) of this section, if:
- The Administrator finds that the agent or attorney participated in, had knowledge of, or had reason to know of, an employer's substantial violation; and
- The Administrator issues the agent or attorney a Notice of Intent to Debar no later than 2 years after the occurrence of the violation. §655.118(b)(1-2)
- No employer, attorney, or agent may be debarred for more than 3 years. §655.118(c)
- For purposes of this section, a substantial violation includes: 1) a pattern or practice of acts of commission or omission on the part of the employer or the employer's agent which:
 - Are significantly injurious to the wage or benefits required to be offered under the H-2A program, or working conditions of a significant number of the employer's U.S. or H-2A workers (§655.118(d)(1)(i)); or
 - Reflect a significant failure to offer employment to all qualified domestic worker who applied for the job opportunity for which certification was being sought, except lawful job-related reasons; or
 - Reflect a willful failure to comply with the employer's obligations to recruit U.S. workers as set forth in this subpart; or

- Reflect the employment of an H-2A worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than activity and incidental to the job activity/activities listed in the job order and any approved extension); (§655.118(d)(1)(v))
- The employer's persistent or prolonged failure to pay the necessary fee in a timely manner, following the issuance of a deficiency notice to the applicant and allowing for a reasonable period for response;
- A significant failure to cooperate with a DOL investigation, inspection or law enforcement function;
- A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violations of obligations found by that agency; or
- A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

Document Retention Requirements (§655.119):

- All employers receiving a certification of the Application for Temporary Employment Certification for agricultural workers under this subpart are required to retain the documents and records as provided in the regulations cited in paragraph (c) of this section.
- Records and documents must be retained for a period of 3 years from the date of certification of the Application. §655.119(b);
- All applicants must retain the following documentation:
 - Proof of recruitment efforts;
 - Job order placement;
 - Advertising;
 - Contact with former U.S. workers;
 - Multi-state recruitment efforts;
 - Substantiation of information submitted in the recruitment report;
 - The supplemental recruitment report and any supporting résumés and contact information;
 - Proof of worker's compensation insurance;
 - Records of each worker's earnings;
 - The work contract or a copy of the Application for Temporary Employment Certification;
 - The wage determination provided by NPC;
 - Copy of the request for housing inspection submitted to the SWA; and
- In addition to the documentation specified in paragraph (c)(1) of this section, H-2ALCs must also retain:
 - Proof of surety bond coverage which includes the name, address, and phone number of the surety, the bond number of other identifying designation, the amount of coverage, and the payee. §655.119(c)(2)(ii)

Title 19 Part 501—Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under §218 of the Immigration and Nationality Act:

- Statutory standard. Section 218(a) of the INA provides that:
- A petition to import an alien as an H-2A worker (as defined in the INA) may not be approved by the Secretary unless the petitioner has applied to the Secretary of the U.S. DOL for a certification that:
 - 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
 - The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. §501.1(a)-(ii)

Surety Bond (§501.8):

- H-2ALCs shall obtain a surety bond to assure compliance with the provisions of this part and 20 CFR part 655, Subpart B for each labor certification being sought. The H-2ALC shall attest on the application for labor certification that such a bond meeting all the requirements of this section has been obtained and shall provide on the labor certification application information that fully identifies the surety, including the name, address and phone number of the surety, and which identifies the bond by number or other identifying designation. §501.8(a);
- The bond shall be payable to the Administrator, Wage and Hour Division, United States Department of Labor. It shall obligate the surety to pay any sums to the Administrator, WHD, for wages and benefits owed to the H-2A and U.S. workers, based on a final decision finding a violation or violations relating to the labor certification the bond is intended to cover. §501.8(b);
- The bond shall be in the amount of \$5,000 for a labor certification for which a H-2ALC will employ fewer than 25 employees, \$10,000 for a labor certification for which a H-2ALC will employ 25-49 employees, and \$20,000 for a labor certification for which a H-2ALC will employ 50 or more employees. The amount of the bond may be increased by the Administrator, WHD after notice and an opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet the potential liabilities. §501.8(c)