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Title 29 — Labor

Subtitle B — Regulations Relating to Labor

Chapter V — Wage and Hour Division, Department of Labor

Subchapter A — Regulations

Part 502 Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 218 of the Immigration and Nationality Act (Suspended 6-29-2009)

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PART 502—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT (SUSPENDED 6-29-2009)

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Subpart A—General Provisions

§ 502.0 Introduction.

These regulations cover the enforcement of all contractual obligation provisions applicable to the employment of H-2A workers under sec. 218 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of United States (U.S.) workers newly hired by employers of H-2A workers in the same occupations as the H-2A workers during the period of time set forth in the labor certification approved by ETA as a condition for granting H-2A certification, including any extension thereof. Such U.S. workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.

§ 502.1 Purpose and scope.

(a) **Statutory standard.** Section 218(a) of the INA provides that:

- (1) A petition to import an alien as an H-2A worker (as defined in the INA) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied to the Secretary of the United States Department of Labor (Secretary) for a certification that:
 - (i) 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
 - (ii) 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.

(2) [Reserved]

(b) **Role of the Employment and Training Administration (ETA).** The issuance and denial of labor certification under sec. 218 of the INA has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL). In general, matters concerning the obligations of an employer of H-2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are issues such as whether U.S. workers are available, whether adequate recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing AEWR, whether workers' compensation insurance has been provided, whether employment was offered to U.S. workers as required by sec. 218 of the INA and regulations at 20 CFR part 655, subpart B, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in 20 CFR part 655, subpart B.

(c) **Role of the Employment Standards Administration (ESA), Wage and Hour Division (WHD).**

- (1) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under sec. 218 of the INA, the regulations at 20 CFR part 655, subpart B, or these regulations, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. See 8 U.S.C. 1188(g)(2).
- (2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of sec. 218 of the INA have been delegated by the Secretary to the ESA, WHD. In general, matters concerning the obligations under a work contract between an employer of H-2A workers and the H-2A workers and U.S. workers hired in corresponding employment by H-2A employers are enforced by ESA, including whether employment was offered to U.S. workers as required under sec. 218 of the INA or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s) or debarment from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an H-2A Labor Contractors (H-2ALC), from the H-2ALC directly and/or from the insurer who issued the surety bond to the H-2ALC as required by 20 CFR part 655, subpart B and 29 CFR 501.8).

- (d) **Effect of regulations.** The amendments to the INA made by Title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the WHD under the INA and these regulations apply to the employment of any H-2A worker and any other U.S. workers hired by H-2A employers in corresponding employment as the result of any application filed with the Department on and after June 1, 1987.

§ 502.2 Coordination of intake between DOL agencies.

Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H-2A labor standards between the employer and the employee will be immediately forwarded to the appropriate WHD office for appropriate action under these regulations.

§ 502.3 Discrimination prohibited.

- (a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:
- (1) Filed a complaint under or related to sec. 218 of the INA or these regulations;
 - (2) Instituted or caused to be instituted any proceedings related to sec. 218 of the INA or these regulations;
 - (3) Testified or is about to testify in any proceeding under or related to sec. 218 of the INA or these regulations;
 - (4) Exercised or asserted on behalf of himself or others any right or protection afforded by sec. 218 of the INA or these regulations; or
 - (5) Consulted with an employee of a legal assistance program or an attorney on matters related to sec. 218 of the INA, or to this subpart or any other Department regulation promulgated pursuant to sec. 218 of the INA.
- (b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may recommend to ETA debarment of any such violator from future labor certification. Complaints alleging discrimination against U.S. workers and immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

§ 502.4 Waiver of rights prohibited.

No person shall seek to have an H-2A worker, or other U.S. worker hired in corresponding employment by an H-2A employer, waive any rights conferred under sec. 218 of the INA, the regulations at 20 CFR part 655, Subpart B, or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the INA or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the INA or these regulations. This does not prevent agreements to settle private litigation.

§ 502.5 Investigation authority of Secretary.

- (a) **General.** The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places (including housing) and such vehicles, and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under sec. 218 of the INA or these regulations.
- (b) **Failure to cooperate with an investigation.** Where any employer (or employer's agent or attorney) using the services of an H-2A worker does not cooperate with an investigation concerning the employment of H-2A workers or U.S. workers hired in corresponding employment, the WHD shall report such occurrence to ETA and may recommend that ETA revoke the existing certification that is the basis for the employment of the H-2A workers giving rise to the investigation, and the WHD may recommend to ETA the debarment of the employer from future certification for up to 3 years. In addition, the WHD may take such action as may be appropriate, including the seeking of an injunction and/or assessing civil money penalties, against any person who has failed to permit the WHD to make an investigation.
- (c) **Confidential investigation.** The Secretary shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.
- (d) **Report of violations.** Any person may report a violation of the work contract obligations of sec. 218 of the INA or these regulations to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of DOL, WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 502.6 Cooperation with DOL officials.

All persons must cooperate with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The WHD will take such action as it deems appropriate, including seeking an injunction to bar any failure to cooperate with an investigation and/or assessing a civil money penalty therefore. In addition, the WHD will report the matter to ETA, and the WHD may recommend to ETA the debarment of the employer from future certification and/or recommend that the person's existing labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.

§ 502.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S. knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both.

§ 502.8 Surety bond.

- (a) 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 form 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.

- (b) 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 H-2A and U.S. workers, based on a final decision finding a violation or violations of this part or 20 CFR part 655, subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond shall be written to cover liability incurred during the term of the period listed in the application for labor certification made by the H-2ALC, and shall be amended to cover any extensions of the labor certification requested by the H-2ALC. Surety bonds may not be canceled or terminated unless 30 days' notice is provided by the surety to the Administrator, WHD.
- (c) 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 to 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 potential liabilities.

§ 502.10 Definitions.

- (a) Definitions of terms used in this part. For the purpose of this part:

Administrative Law Judge (ALJ) means a person within the Department's 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 (BALCA) established by part 656 of this chapter, which will hear and decide appeals as set forth at 20 CFR 655.115.

Administrator, WHD means the Administrator of the Wage and Hour Division (WHD), ESA and such authorized representatives as may be designated to perform any of the functions of the Administrator, WHD under this part.

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator of the Office of Foreign Labor Certification (OFLC) has determined must be offered and paid to every H-2A worker employed under the DOL-approved *Application for Temporary Employment Certification* in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H-2A recruitment period, to ensure 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, that—

- (1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;
- (2) Is not itself an employer, or a joint employer, as defined in this section, with respect to a specific application; and
- (3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3, 1003.101.

Agricultural association means any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses or transports any worker that is subject to sec. 218 of the INA. An agricultural association may act as the agent of an employer for purposes of filing an *H-2A Application for Temporary Employment Certification*, and may also act as the sole or joint employer of H-2A workers.

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary agricultural labor certification determination from DOL. A complete submission of the *Application for Temporary Employment Certification* includes the form and the initial recruitment report.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of the regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Department of Homeland Security (DHS) means the Federal agency having control over certain immigration functions that, through its sub-agency, *United States Citizenship and Immigration Services (USCIS)*, makes the determination under the INA on whether to grant visa petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the U.S.

DOL or Department means the United States Department of Labor.

Eligible worker means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

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. Other applicable factors may be considered and no one factor is dispositive.

Employer means a person, firm, corporation or other association or organization 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 part; and
- (3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

Employment Service (ES) refers to the system of Federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the SWAs and OFLC, including the National Processing Centers (NPCs).

Employment Standards Administration (ESA) means the agency within DOL that includes the WHD, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

Employment and Training Administration (ETA) means the agency within the DOL that includes OFLC.

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

Fixed-site employer means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this part who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to sec. 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this part, *person* includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

H-2A Labor Contractor (H-2ALC) means any person who meets the definition of employer in this section and is not a fixed-site employer, an agricultural association, or an employee of 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 sec. 218 of the INA or these regulations.

H-2A worker means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

INA/Act 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 eligible 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 U.S. to which a U.S. worker can be referred.

Joint employment means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a "joint employer" of that employee.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the U.S. to perform work described in sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

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.

Prevailing means with respect to practices engaged in by employers and benefits other than wages provided by employers, that:

- (1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; but only if
- (2) This 50 percent or more of employers also employs in aggregate 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 H-2ALCs).

Prevailing hourly wage means the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.

Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.) to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1¹/₂ bushels), a bushel of potatoes, and Eastern apple box (1¹/₂ metric bushels), a flat of strawberries (twelve quarts), etc.

Representative means a person or entity employed by, or duly authorized to act on behalf of, the employer with respect to activities entered into for, and/or attestations made with respect to, the *Application for Temporary Employment Certification*.

Secretary means the Secretary of the United States Department of Labor or the Secretary's designee.

State Workforce Agency (SWA) means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's One-Stop delivery system in accordance with the Wagner-Peyser Act, 29 U.S.C. 49, *et seq.* Separately, SWAs receive ETA grants, administered by OFLC, to assist them in performing certain activities related to foreign labor certification, including conducting housing inspections.

Successor in interest means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor for purposes of this part, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in a debarment recommendation. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

- (1) Substantial continuity of the same business operations;

- (2) Use of the same facilities;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Similarity in machinery, equipment, and production methods;
- (7) Similarity of products and services; and
- (8) The ability of the predecessor to provide relief.

Temporary agricultural labor certification means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to secs. 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 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 foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed as stated at 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

United States (U.S.), when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110-229, Title VII, the Commonwealth of the Northern Mariana Islands.

U.S. worker means a worker who is:

- (1) A citizen or national of the U.S., or;
- (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under sec. 207 of the INA, is granted asylum under sec. 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

Wages means all forms of cash remuneration to a worker by an employer in payment for personal services.

Work contract means all the material 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, *Labor Certification for Temporary Agricultural Employment of H-2A Aliens in the U.S. (H-2A Workers)*, 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 work 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.

(b) **Definition of agricultural labor or services of a temporary or seasonal nature.** For the purposes of this part, *agricultural labor or services of a temporary or seasonal nature* means the following:

- (1) **Agricultural labor or services**, pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), is defined as:

- (i) **Agricultural labor** as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1954 at 26 U.S.C. 3121(g);
 - (ii) **Agriculture** as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f) (Work performed by H-2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the provisions of the FLSA as provided therein, including the overtime provisions in sec. 7(a) at 29 U.S.C. 207(a));
 - (iii) The pressing of apples for cider on a farm;
 - (iv) Logging employment; or
 - (v) 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 while in the employ of the operator of a farm where no H-2B workers are employed to perform the same work at the same establishment; or
 - (vi) Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H-2A worker was sought.
- (2) An occupation included in either of the statutory definitions cited in paragraphs (b)(1)(i) and (ii) of this section is *agricultural labor or services*, notwithstanding the exclusion of that occupation from the other statutory definition.
- (i) **Agricultural labor** for purposes of paragraph (b)(1)(i) of this section means all services performed:
 - (A) 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;
 - (B) 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;
 - (C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended at 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;
 - (D)

- (1) 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;
 - (2) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators will 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;
 - (3) The provisions of paragraphs (b)(2)(i)(D)(1) and (2) of this section do not apply to services 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
 - (4) On a farm operated for profit if such service is not in the course of the employer's trade or business and is not domestic service in a private home of the employer.
- (E) For the purposes of this section, the term *farm* includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. See sec. 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g)).
- (ii) **Agriculture.** For purposes of paragraph (b)(1)(ii) of this section *agriculture* means 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 12 U.S.C. 1141j(g)), 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. See sec. 29 U.S.C. 203(f), as amended.
- (iii) **Agricultural commodity.** For purposes of paragraph (b)(1)(ii) of this section, *agricultural commodity* includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree and *gum rosin* means rosin remaining after the distillation of gum spirits of turpentine. See 12 U.S.C. 1141j(g) (sec. 15(g) of the Agricultural Marketing Act, as amended), and 7 U.S.C. 92.
- (3) **Of a temporary or seasonal nature—**
- (i) **On a seasonal or other temporary basis.** For the purposes of this part, *of a temporary or seasonal nature* means *on a seasonal or other temporary basis*, as defined in the WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

- (ii) **MSPA definition.** The definition of *on a seasonal or other temporary basis* found in MSPA is summarized as follows:
 - (A) 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 the worker may continue to be employed during a major portion of the year.
 - (B) A worker is employed on *other temporary basis* where the worker is employed for a limited time only or the worker's performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.
 - (C) *On a seasonal or other temporary basis* does not include
 - (1) 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; or
 - (2) The employment of any worker who is living at his or her 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 or her employer and is not primarily employed to do field work.
- (iii) **Temporary.** For the purposes of this part, the definition of *temporary* in paragraph (b)(3) of this section refers to any job opportunity covered by this part where the employer needs a worker for a position for a limited period of time, including, but not limited, to a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to 20 CFR 655.110.

Subpart B—Enforcement of Work Contracts

§ 502.15 Enforcement.

The investigation, inspections and law enforcement functions to carry out the provisions of sec. 218 of the INA, as provided in these regulations for enforcement by the WHD, pertain to the employment of any H-2A worker and any other U.S. worker hired in corresponding employment by an H-2A employer. Such enforcement includes work contract provisions as defined in § 501.10(a). The work contract also includes those employment benefits which are required to be stated in the job offer, as prescribed in 20 CFR 655.104.

§ 502.16 Sanctions and remedies—General.

Whenever the Secretary believes that the H-2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

- (a) Institute appropriate administrative proceedings, including: The recovery of unpaid wages, including wages owed to U.S. workers as a result of a layoff or displacement prohibited by these rules (either directly from the employer, a successor in interest, or in the case of an H-2ALC also by claim against any

surety who issued a bond to the H-2ALC); the enforcement of covered provisions of the work contract as set forth in 29 CFR 501.10(a); the assessment of a civil money penalty; reinstatement; or the recommendation of debarment for up to 3 years.

- (b) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including the withholding of unpaid wages and/or reinstatement, to restrain violation of the H-2A provisions of the INA, 20 CFR part 655, Subpart B, or these regulations by any person.
- (c) Petition any appropriate District Court of the U.S. for specific performance of covered contractual obligations.

§ 502.17 Concurrent actions.

The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by the H-2A provisions of the Act and these regulations, or the regulations of 20 CFR part 655.

§ 502.18 Representation of the Secretary.

- (a) Except as provided in 28 U.S.C. 518(a) relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act.
- (b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator, WHD and the Secretary in all administrative hearings under the H-2A provisions of the Act and these regulations.

§ 502.19 Civil money penalty assessment.

- (a) A civil money penalty may be assessed by the Administrator, WHD for each violation of the work contract as set forth in § 501.10(a) of these regulations.
- (b) In determining the amount of penalty to be assessed for any violation of the work contract as provided in the H-2A provisions of the Act or these regulations the Administrator, WHD shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:
 - (1) Previous history of violation or violations of the H-2A provisions of the Act and these regulations;
 - (2) The number of H-2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation or violations;
 - (3) The gravity of the violation or violations;
 - (4) Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;
 - (5) Explanation of person charged with the violation or violations;
 - (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provisions of the Act;
 - (7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.
- (c) A civil money penalty for violation of the work contract will not exceed \$1,000 for each violation committed (with each failure to pay a worker properly or to honor the terms or conditions of a worker's employment that is required by sec. 218 of the INA, 20 CFR 655, subpart B, or these regulations constituting a separate violation), with the following exceptions:

- (1) For a willful failure to meet a covered condition of the work contract, or for willful discrimination, the civil money penalty shall not exceed \$5,000 for each such violation committed (with each willful failure to honor the terms or conditions of a worker's employment that are required by sec. 218 of the INA, 20 CFR 655, subpart B, or these regulations constituting a separate violation);
- (2) For a violation of a housing or transportation safety and health provision of the work contract that proximately causes the death or serious injury of any worker, the civil money penalty shall not exceed \$25,000 per worker, unless the violation is a repeat or willful violation, in which case the penalty shall not exceed \$50,000 per worker, or unless the employer failed, after notification, to cure the specific violation, in which case the penalty shall not exceed \$100,000 per worker.
- (3) For purposes of paragraph (c)(2) of this section, the term *serious injury* means:
 - (i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);
 - (ii) Permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or
 - (iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.
- (d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed \$5,000 per investigation;
- (e) For a willful layoff or displacement of any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within 60 days of the date of need other than for a lawful, job-related reason, except that such layoff shall be permitted where all H-2A workers were laid off first, the civil penalty shall not exceed \$10,000 per violation per worker.

§ 502.20 Debarment and revocation.

- (a) The WHD shall recommend to the Administrator, OFLC the debarment of any employer and any successor in interest to that employer (or the employer's attorney or agent if they are a responsible party) if the WHD finds that the employer substantially violated a material term or condition of its temporary labor certification for the employment of domestic or nonimmigrant workers.
- (b) 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:
 - (i) Are significantly injurious to the wages, 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;
 - (ii) Reflect a significant failure to offer employment to all qualified domestic workers who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons;
 - (iii) Reflect a willful failure to comply with the employer's obligations to recruit U.S. workers as set forth in this subpart; or

- (iv) 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 an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension;
 - (2) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or
 - (3) A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or
 - (4) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.
- (c) Procedures for Debarment Recommendation. The WHD will send to the employer a *Notice of Recommended Debarment*. The *Notice of Recommended Debarment* must be in writing, must state the reason for the debarment recommendation, including a detailed explanation of the grounds for and the duration of the recommended debarment. The debarment recommendation will be forwarded to the Administrator, OFLC. The *Notice of Recommended Debarment* shall be issued no later than 2 years after the occurrence of the violation.
- (d) The WHD may recommend to the Administrator, OFLC the revocation of a temporary agricultural labor certification if the WHD finds that the employer:
- (1) Willfully violated a material term or condition of the approved temporary agricultural labor certification, work contract, or this part, unless otherwise provided under paragraphs (d)(2) through (4) of this section.
 - (2) Failed, after notification, to cure a substantial violation of the applicable housing standards set out in 20 CFR 655.104(d);
 - (3) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or
 - (4) Failed to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order Secured by the Secretary under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations).
- (e) In considering a recommendation made by the WHD to debar an employer or to revoke a temporary agricultural labor certification, the Administrator, OFLC shall treat final agency determinations that the employer has committed a violation as res judicata and shall not reconsider those determinations.

§ 502.21 Failure to cooperate with investigations.

No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.6 and 501.19 of this part, a civil money penalty may be assessed for each failure to cooperate with an investigation, and other appropriate relief may be sought. In

addition, the WHD shall report each such occurrence to ETA, and ETA may debar the employer from future certification. The WHD may also recommend to ETA that an existing certification be revoked. The taking of any one action shall not bar the taking of any additional action.

§ 502.22 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty is due within 30 days and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator, WHD by certified check or by money order, made payable to the order of *Wage and Hour Division, United States Department of Labor*. The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 502.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to impose an assessment of civil money penalties, and which may be applied to the enforcement of covered provisions of the work contract as set forth in § 501.10(a), including the collection of unpaid wages due as a result of any violation of the H-2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

PROCEDURES RELATING TO HEARING

§ 502.31 Written notice of determination required.

Whenever the Administrator, WHD decides to assess a civil money penalty or to proceed administratively to enforce covered contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

§ 502.32 Contents of notice.

The notice required by § 501.31 shall:

- (a) Set forth the determination of the Administrator, WHD including the amount of any unpaid wages due or actions necessary to fulfill a covered contractual obligation, the amount of any civil money penalty assessment and the reason or reasons therefore.
- (b) Set forth the right to request a hearing on such determination.
- (c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator, WHD shall become final and unappealable.
- (d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

§ 502.33 Request for hearing.

- (a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in § 501.32.
- (b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:
 - (1) Be typewritten or legibly written;
 - (2) Specify the issue or issues stated in the notice of determination giving rise to such request;
 - (3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;
 - (4) Be signed by the person making the request or by an authorized representative of such person; and
 - (5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.
- (c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.
- (d) The determination shall take effect on the start date identified in the determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

RULES OF PRACTICE

§ 502.34 General.

Except as specifically provided in these regulations, the *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges* established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

§ 502.35 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

§ 502.36 Caption of proceeding.

- (a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of __, Respondent.

- (b) For the purposes of such administrative proceedings the Administrator, WHD shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 502.37 Referral to Administrative Law Judge.

- (a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the Administrator, WHD, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by *Order of Reference*, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.
- (b) A copy of the *Order of Reference*, together with a copy of these regulations, shall be served by counsel for the Administrator, WHD upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 502.38 Notice of docketing.

Upon receipt of an *Order of Reference*, the Chief Administrative Law Judge shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the *Order of Reference* was filed.

§ 502.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

§ 502.40 Consent findings and order.

- (a) **General.** At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.
- (b) **Content.** Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:
 - (1) That the order shall have the same force and effect as an order made after full hearing;
 - (2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

- (3) A waiver of any further procedural steps before the ALJ; and
 - (4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.
- (c) **Submission.** On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:
 - (1) Submit the proposed agreement for consideration by the ALJ; or
 - (2) Inform the ALJ that agreement cannot be reached.
- (d) **Disposition.** In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the ALJ, within 30 days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

POST-HEARING PROCEDURES

§ 502.41 Decision and order of Administrative Law Judge.

- (a) The ALJ shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator, WHD.
- (b) The decision of the ALJ shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD. The reason or reasons for such order shall be stated in the decision.
- (c) The decision shall be served on all parties and the Administrative Review Board (ARB) in person or by certified mail.
- (d) The decision concerning civil money penalties and/or back wages when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION

§ 502.42 Procedures for initiating and undertaking review.

- (a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ shall, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition shall be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision concerning civil money penalties and/or back wages within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ shall be deemed the final agency action. If the ARB does not issue a notice accepting a petition for review of the decision concerning the debarment recommendation within 30 days after the receipt of a timely filing of the petition, or if no petition has been received by the ARB within 30 days of the date of the decision, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be inoperative unless and until the ARB issues an order affirming the decision.

- (b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding in person or by certified mail.

§ 502.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the ARB's Notice pursuant to § 501.42 of these regulations, the Office of ALJ shall promptly forward a copy of the complete hearing record to the ARB.

§ 502.44 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB shall notify each party of:

- (a) The issue or issues raised;
- (b) The form in which submissions shall be made (*i.e.*, briefs, oral argument, etc.); and
- (c) The time within which such presentation shall be submitted.

§ 502.45 Final decision of the Administrative Review Board.

The ARB's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail.

RECORD

§ 502.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge, or, where the case has been the subject of administrative review, the ARB.

§ 502.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge or, where the case has been the subject of administrative review, the ARB shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.