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**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

**[Docket No. ETA-2018-0002]**

**RIN 1205-AB90**

**Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States**

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Department of Labor (Department or DOL) is amending its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H-2A nonimmigrant status (H-2A workers). The Department issues this certification pursuant to Section 218(a) of the Immigration and Nationality Act (INA), which requires a prospective employer of H-2A workers to apply for a certification from the Secretary of Labor (Secretary) that there are not sufficient able, willing, and qualified United States (U.S.) workers available to fill the petitioning employer's job opportunity, and that the employment of H-2A workers in that job opportunity will not adversely affect the wages and working conditions of workers in the United States similarly employed. This final rule modernizes and improves the labor market test that the Department uses to assess whether able, willing, and qualified U.S. workers are available by: rescinding the requirement that an employer advertise its job

opportunity in a print newspaper of general circulation in the area of intended employment; expanding and enhancing the Department's electronic job registry; and leveraging the expertise and existing outreach activities of State Workforce Agencies (SWAs) to promote agricultural job opportunities.

**DATES:** This final rule is effective [INSERT 30 DAYS AFTER DATE OF PUBLICATON].

**FOR FURTHER INFORMATION CONTACT:** Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12-200, 200 Constitution Ave NW, Washington, DC 20210, telephone (202) 513-7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary**

**A. Statutory and Regulatory Background**

The INA, as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an "H-2A" nonimmigrant visa classification for a worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services ... of a temporary or seasonal nature." 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1) and 1188.<sup>1</sup> The admission of foreign

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<sup>1</sup> For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

workers under this classification involves a multi-step process before several Federal agencies.

First, a prospective H-2A employer must apply to the Secretary for a certification that:

(A) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The INA prohibits the Secretary from issuing this certification—known as a “temporary labor certification”—unless both of the above-referenced conditions are met and none of the conditions in 8 U.S.C. 1188(b) concerning strikes or lock-outs at the worksite, labor certification program debarments, workers’ compensation assurances, and positive recruitment apply.

8 U.S.C. 1188(b). The Secretary has delegated his authority to issue H-2A temporary labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who in turn has delegated that authority to ETA’s Office of Foreign Labor Certification (OFLC). Secretary’s Order 06-2010 (Oct. 20, 2010). Second, once an employer obtains a temporary labor certification from DOL, it may file a nonimmigrant visa petition with the Secretary of Homeland Security. 8 U.S.C. 1184(c).<sup>2</sup> Finally, if the employer’s petition is approved, the foreign workers whom it seeks to employ must, generally, apply for a nonimmigrant visa at a U.S. embassy or consulate abroad. *Id.*

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<sup>2</sup> Under Section 1517 of title XV of the Homeland Security Act of 2002 (“HSA”), Pub. L. No. 107-296, 116 Stat. 2135, reference to the Attorney General’s or other Department of Justice Official’s responsibilities under section 1184(c) have been expressly transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202, 271(b).

The regulatory process whereby an employer may apply for and receive an H-2A labor certification is set forth in Title 20, part 655, subpart B of the Code of Federal Regulations (CFR). The Department's last significant revision to these regulations took effect in 2010.<sup>3</sup> The application process set forth in these regulations is designed to ensure that OFLC acquires sufficient information to make the factual determinations required by the INA, including the determination as to whether there are sufficient able, willing, and qualified U.S. workers available to perform the agricultural labor or services for which an employer seeks H-2A workers. 20 CFR 655.100. To that end, the Department's regulations require an employer seeking an H-2A temporary labor certification to test the labor market by recruiting U.S. workers for the position(s) in which it intends to employ H-2A workers. *See, e.g.*, 20 CFR 655.121, 655.141-655.144. The outcome of this labor market test forms the basis of OFLC's determination as to whether there are sufficient able, willing, and qualified U.S. workers available to fill the employer's job opportunity.

## **B. Current Recruitment Requirements**

Under the regulations currently in effect, an employer seeking H-2A workers generally initiates the labor market test by filing an *Agricultural and Food Processing Clearance Order*, Form ETA-790 (job order) with the SWA in the area where it seeks to employ H-2A workers. 20 CFR 655.121. Absent limited exceptions, an employer must file this job order no more than

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<sup>3</sup> *See Temporary Agricultural Employment of H-2A Aliens in the United States*; Final Rule, 75 FR 6884 (Feb. 12, 2010) (2010 Final Rule). The Department originally promulgated regulations governing H-2A labor certifications in 1987. *See Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*; Interim Final Rule, 52 FR 20496 (June 1, 1987).

75 days, but no less than 60 days, before it seeks to employ H-2A workers. *Id.* The SWA will review the job order to confirm that the employer's job opportunity complies with the Department's regulations and, if so, it will place the job order into intrastate clearance, where the job order must remain active until 50 percent of the period of employment certified by the Department is complete. 20 CFR 655.135. The SWA will refer each qualified U.S. worker who applies during this period to the employer, and the employer may reject applicants only for lawful, job-related reasons. *Id.*

Unless a specific exemption applies, an employer must include a copy of this job order with the *Application for Temporary Employment Certification*, Form ETA-9142A (H-2A application) that it files with the Department. 20 CFR 655.130. An OFLC Certifying Officer (CO) will review the H-2A application and job order for compliance with program requirements. 20 CFR 655.140. If the H-2A application and job order meet all applicable requirements, the CO will issue a Notice of Acceptance (NOA) authorizing conditional access to the interstate clearance system and direct the SWA to circulate a copy of the employer's job order to other states where there are potential sources of U.S. workers. 20 CFR 655.153. The NOA will also specify the recruitment steps that the employer must conduct to complete the labor market test, as well as the date by which the employer must provide the Department an initial written report of its recruitment efforts. *Id.* Upon receipt of this report, the CO will make a final determination whether to grant, partially grant, or deny the employer's H-2A application, based on the criteria for certification set forth in 20 CFR 655.160-655.161.

Sections 655.151 through 655.153 outline the recruitment steps that most employers seeking H-2A labor certification will be required to conduct. Under these regulations, unless a limited exception applies, an employer must place two print advertisements that meet certain

content requirements in a newspaper of general circulation serving the area of intended employment, *see* 20 CFR 655.151-655.152, and contact the former U.S. workers whom it employed in the previous year, *see* 20 CFR 655.153.

In addition, under section 655.154, when an employer's job opportunity is served by an area of traditional or expected labor supply, the CO may direct an employer to recruit U.S. workers in up to three additional states. 20 CFR 655.154. This latter regulation implements the statutory requirement that an employer make "positive recruitment efforts" in regions "where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed." 8 U.S.C. 1188(b)(4). Paragraph (c) of section 655.154 leaves the precise nature of the additional positive recruitment that an employer must conduct to the discretion of the CO. In practice, however, when an employer's job opportunity is served by traditional or expected labor supply states, the CO has traditionally required the employer to place print advertisements in newspapers with the largest circulations in those states.<sup>4</sup>

### **C. Summary Of Proposed Changes To The Recruitment Requirements and The Changes Adopted In This Final Rule**

On November 9, 2018, the Department issued a Notice of Proposed Rulemaking (NPRM) announcing its intent to modernize the recruitment that an employer must conduct in conjunction with an H-2A application. *See* 83 FR 55985 (Nov. 9, 2018). Specifically, the Department

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<sup>4</sup> *See Temporary Agricultural Employment of H-2A Aliens in the United States*; Final Rule, 75 FR 6884, 6930 (Feb. 12, 2010) (2010 Final Rule).

proposed to eliminate the requirement that every employer advertise its job opportunity in a print newspaper and replace it with a requirement to post an electronic advertisement on a website. The Department invited interested parties to submit written comments on all aspects of this proposal, including a variety of issues related to the electronic advertising requirement. The Department also solicited comments as to whether there were alternative methods of recruitment that would more broadly and effectively disseminate information about agricultural job opportunities to U.S. workers. The Department originally stated that it would accept comments through December 10, 2018, but in response to a request for an extension, it subsequently extended this period through December 28, 2018. The public may review all comments that the Department received in response to the NPRM in the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number ETA-2018-0002.

Upon careful consideration of the comments that it received, the Department has decided to adopt its proposal to transition to electronic advertising with several changes. Specifically, this final rule adopts the NPRM's proposal to eliminate the existing requirement for most employers seeking H-2A labor certification to advertise their job opportunities in print newspapers of general circulation in the area of intended employment. The Department's transition to electronic advertising will not require an employer to place an electronic advertisement on the internet in the manner proposed in the NPRM. As explained in detail below, the Department will instead advertise all H-2A job opportunities by posting them on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov), the expanded and improved version of the Department's existing electronic job registry. This final rule further strengthens the labor market test by enhancing the existing role of the SWAs in conducting outreach activities. Specifically, this final rule allows the CO to direct a SWA, where appropriate, to offer written notice of an employer's H-2A job

opportunity to organizations that provide employment and training services to workers who are likely to apply for the job and/or place written notice in other physical locations where such workers are likely to gather.

#### **D. Severability**

To the extent that any portion of this final rule is declared invalid by a court, the Department intends for all other parts of the final rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a court decision invalidating a portion of this final rule results in a partial reversion to the current regulations or to the statutory language itself, the Department intends that the rest of the final rule continue to operate, to the extent possible, in tandem with the reverted provisions.

## **II. Revisions to 20 CFR Part 655, Subpart B**

### **A. The Department Is Rescinding The Regulation Generally Requiring Employers To Place Print Newspaper Advertisements In The Area Of Intended Employment**

#### **1. Background**

In the NPRM, the Department proposed to revise section 655.151(a) to replace the requirement for an employer to place print newspaper advertisements with a requirement for an employer to post an electronic advertisement on a website that is widely viewed and appropriate for use by workers who are likely to apply for the job opportunity in the area of intended employment. The Department based this proposal on data indicating that print newspaper circulation continues to decline and that U.S. workers are increasingly turning to the internet in their job searches. The Department also relied on data from the National Agricultural Workers Survey (NAWS), which indicated that farmworkers in the United States very rarely, if ever, learn about job opportunities or obtain employment through print newspaper advertisements. The



Department noted that the NAWS data was consistent with its experience conducting audit examinations of H-2A applications and anecdotal evidence from stakeholders who reported that newspaper advertisements were not an effective means of recruiting prospective U.S. workers for agricultural job opportunities. In light of this data, experience, and stakeholder feedback, the Department asserted that classified advertisements in print editions were becoming a less effective means of recruiting U.S. workers, and it proposed to replace section 655.151's current requirement to place a print newspaper advertisement with a requirement to post an electronic advertisement on the internet.

Many of the H-2A employers, agents, agricultural associations, and farm bureaus that submitted comments in response to the NPRM applauded the Department's efforts to modernize the recruitment process and confirmed that, based on their experience, the existing newspaper advertising requirement was not effective in recruiting U.S. workers for agricultural positions. A number of these commenters expressed concern about the high costs associated with placing newspaper advertisements under the existing rule. They asserted these costs are unwarranted because newspaper advertisements result in few, if any, referrals of U.S. applicants. For instance, one agent for H-2A employers reported that its employer-clients had spent about \$75,000 to advertise roughly 5,000 positions, and the employers did not receive a single applicant in response to the advertisements. An association representing agricultural employers similarly reported that its members spent millions of dollars on newspaper advertisements for H-2A positions each year and received no U.S. applicants in response.

Nevertheless, many of these same commenters disagreed with the Department's proposal to completely eliminate print newspaper advertisements and urged that the Department provide an individual employer with the option to choose whether to post two print newspaper

advertisements in accordance with the requirement in the existing rule *or* an electronic advertisement in accordance with the requirement in the proposed rule. These commenters provided varied reasons to justify their request. For instance, some asserted that mandating electronic advertisements would unfairly exclude employers who do not have reliable access to the internet or who do not use the internet due to religious reasons. Others maintained that an individual employer is in the best position to know whether newspaper or electronic advertisements are most likely to be successful in its area and urged that the Department allow employers to select the method that works best for them.

The Department also received comments from others—including individuals, a SWA, and a group of farmworker advocacy organizations—that generally expressed support for its proposal to transition to electronic advertising. Although the farmworker advocacy organizations conditioned their support on several issues they felt needed to be addressed before the Department issued a final rule, they did not contend that the newspaper advertisements placed under the current rule are effective in recruiting U.S. agricultural workers, nor did they urge the Department to retain this requirement.

While the vast majority of commenters supported eliminating (or partially replacing) the print newspaper advertising requirement, the Department received some comments—mostly from newspapers or organizations associated with the newspaper industry—expressing opposition to eliminating this requirement. These commenters generally questioned whether electronic advertisements would be effective in reaching U.S. workers interested in agricultural employment and pointed to data suggesting that some of these workers may have limited access to the internet. Others urged the Department to consider the effect that the proposed rule would have on the newspaper industry.

Commenters associated with the newspaper industry additionally alleged that the Department's proposal to eliminate its print newspaper advertising requirement overlooked certain factors. For instance, a trade association alleged newspapers are more effective than the internet in disseminating information to relevant viewers. In support of this assertion, the trade association cited two instances in which non-job related public notices went unnoticed for weeks after they were exclusively posted on the internet, but drew thousands of public comments several weeks after newspapers had published stories about the proposals in print. This same trade association also alleged that many local newspapers reach an audience that is larger than their subscribership indicates because a single newspaper is often read by multiple people and the content in these newspapers is often available online. According to this trade association, the distribution and readership of a local newspaper, including all of its formats (print and electronic), can easily exceed the number of visits to a third-party job search website.

Others similarly noted that print newspapers are widely accessible and distributed in local and regional communities where agricultural job opportunities exist. Some of these commenters argued that the Department incorrectly focused on large newspapers and subscribership numbers, and maintained that newspapers continue to have large readership, especially in smaller and more rural communities. Accordingly, they urged the Department to revise section 655.151 to allow advertisements in local community newspapers, which according to these commenters, are more likely to be effective in recruiting U.S. agricultural workers than larger newspapers with broader markets.

Finally, several commenters asserted that the electronic advertising requirement proposed in the NPRM would sacrifice accountability and transparency. In particular, they argued

newspaper advertisements are more difficult for unscrupulous employers to alter or falsify and thus provide better evidence to demonstrate compliance with regulatory requirements.

## **2. Discussion**

After carefully considering the comments it received, the Department has decided to rescind section 655.151, and it will no longer generally require a prospective H-2A employer to advertise its job opportunity in a newspaper serving the area of intended employment. This decision is grounded in the Department's determination that the newspaper advertisements required under this section do not meaningfully contribute to the labor market test that the Department administers to assess the availability of able, willing, and qualified U.S. workers. Accordingly, this final rule rescinds the regulation imposing this requirement, as set forth at 20 CFR 655.151, and the regulation prescribing the content that an employer must include in those advertisements, as set forth at 20 CFR 655.152.

This determination is supported by the lack of data indicating newspaper advertisements are an effective means of recruiting U.S. workers for agricultural positions. Specifically, as noted in the NPRM, available data indicate that farmworkers in the United States very rarely, if ever, learn about job opportunities or obtain employment through print newspaper advertisements. *See* 83 FR at 55987. For instance, none of the farmworkers interviewed in connection with the latest NAWS identified print newspaper advertisements as a source for obtaining their current job. In addition, the Department considered anecdotal accounts in comments from farmers, agents, and agricultural associations, who reported that the newspaper advertisements they have placed in connection with this requirement have yielded very few, if any, applications from able, willing, and qualified US workers.

Moreover, as noted in the NPRM, these comments and available data are consistent with the Department's experience in conducting audit examinations of H-2A labor certifications, as well as anecdotal evidence that the Department has received from stakeholders, both of which illustrate that print newspaper advertisements are not an effective method of recruiting

prospective U.S. workers for agricultural job opportunities. *See* 83 FR at 55987. Specifically, as part of the audit process, the Department reviews the recruitment reports that H-2A employers must maintain under 20 CFR 655.156(b). An employer's recruitment report must identify each recruitment source (e.g., newspaper advertisements, contact with former employees, word-of-mouth), the names and contact information for each U.S. worker who applied or was referred to the job opportunity, and the disposition of each U.S. applicant. 20 CFR 655.156(a). Based on the Department's experience in conducting audit examinations under current regulations, few of these recruitment reports indicate that U.S. workers have applied to agricultural job opportunities in response to the print newspaper advertisements that employers have placed under section 655.151.

In arriving at this determination, the Department carefully considered the arguments that commenters raised in support of retaining the requirement to place print newspaper advertisements. As explained below, however, none of these arguments contradict the findings discussed above that newspaper advertisements are rarely, if ever, an effective means of recruiting U.S. workers for agricultural positions. Accordingly, these arguments have not persuaded the Department that it must require every employer seeking H-2A workers to place print advertisements in order to effectively test the labor market for able, willing, and qualified, and available U.S. workers. As is currently the case, to the extent the Department receives information that an advertisement in a particular print publication is likely to reach able, willing, qualified, and available U.S. workers in specific areas or across certain populations, a CO may direct an employer to place such an advertisement, on a case-by-case basis, under his or her authority to order additional positive recruitment. *See* 20 CFR 655.154.

Significantly, the commenters who urged the Department to retain a general print newspaper-advertising requirement did not point to data that showed such advertisements are effective in recruiting U.S. workers for *agricultural* positions. Rather, these commenters discussed the purported advantages of newspaper advertisements in general terms, compared to the purported advantage of electronic advertisements proposed in the NPRM, without specifically addressing the efficacy of newspaper advertisements in recruiting U.S. agricultural workers. For instance, some commenters cited data indicating certain populations and demographics are less likely to use the internet when searching for jobs and are more likely to turn to community newspapers than the internet to obtain local news. As it was not specific to agricultural workers, such data do not speak to whether U.S. workers seeking agricultural job opportunities actually use newspapers to look for work. The arguments that commenters raised regarding the circulation and distribution of newspapers suffer from the same flaw: they do not refute the Department's observation in the NPRM, nor do the assertions and anecdotes received in response to the NPRM, that farmworkers in the United States very rarely, if ever, learn about job opportunities or obtain employment using print newspaper advertisements. Similarly, the fact that the Department can easily verify whether an employer has placed a newspaper advertisement is irrelevant if the Department determines that the placement of such advertisements is not always required to adequately test the labor market.

Moreover, as discussed in detail below, the Department has decided not to adopt its proposal to replace the requirement to place newspaper advertisements with a requirement for *an employer* to post an electronic advertisement on the internet. Instead, the Department will post an electronic advertisement on an employer's behalf on SeasonalJobs.dol.gov, an improved and expanded version of the electronic job registry that the Department is required to maintain under

its existing regulations. *See* 20 CFR 655.144. This addresses concerns that some commenters expressed regarding the effect of the proposed rule on those employers who have limited or no access to the internet and/or religious objections to internet use, because such employers will not need to access the internet in order to participate in the H-2A program. Accordingly, employers who lack access to the internet will not need to acquire access to the internet in order for SeasonalJobs.dol.gov to advertise their job opportunities or for them to respond to any applications received from U.S. workers in response to these advertisements. Likewise, employers will not need to determine whether a particular website meets applicable regulatory criteria or retain evidence of this posting. Rather, the Department will use information that an employer provides on its job order and H-2A application to generate the advertisement that the Department posts on the employer's behalf on SeasonalJobs.dol.gov, and U.S. workers interested in a particular job opportunity can apply to the employer directly using the contact information that the employer provided to the Department.

While the Department is aware that the final rule may have an impact on the newspaper industry, the Department is also obligated to carry out its statutory mandate in a manner that ensures the methods and locations in which employers conduct positive recruitment yield concrete results and are cost effective. As a general requirement for all employers, the Department has determined that newspaper advertisements do not meaningfully contribute to the labor market test, which must be carried out by prospective employers to determine the availability of able, willing, and qualified U.S. workers. Therefore, the impact the newspaper industry experiences as a result of this final rule is outweighed by the Department's need to more effectively carry out its statutory mandate to ensure an adequate test of the U.S. labor market.



The relevant question is whether this requirement is an effective component of the labor market test that the Department conducts in connection with an H-2A application. Given the absence of evidence suggesting print newspaper advertisements are effective in recruiting U.S. workers for agricultural job opportunities, the Department has decided not to continue requiring most employers seeking an H-2A labor certification to place print newspaper advertisements. Accordingly, the Department is rescinding the regulation that generally requires employers to place such advertisements, *see* 20 CFR 655.151, and the regulation that prescribes the content of such advertisements, *see* 20 CFR 655.152. Moreover, as proposed in the NPRM, the Department is also amending the regulation that specifies the post-acceptance requirements for positions engaged in the herding or production of livestock on the range, *see* 20 CFR 655.225, to conform to the rescission of section 655.151.

**B. Instead of Requiring A Prospective H-2A Employer To Post Its Own Electronic Advertisement, As Originally Proposed, The Department Will Advertise The Employer's Job Opportunity On Seasonaljobs.gov, An Improved and Expanded Version Of The Department's Electronic Job Registry**

## **1. Background**

In the NPRM, the Department proposed to amend section 655.151 to require that an employer post an advertisement on a website meeting certain criteria. The Department suggested that such websites might include those operated by state or local agricultural associations, job search websites that advertise agricultural job opportunities, and other classified advertisement websites with sections focused on local jobs. The Department requested comments on whether it should establish additional qualifying criteria (e.g., minimum number of unique visitors per month) or more specifically define the types of websites that an employer may use.

Under the Department's proposed revision to section 655.151, an employer's advertisement would need to be clearly visible on the website's homepage or easily retrievable using the search tools on the website, posted for a period of no less than 14 consecutive calendar days, and publicly accessible to U.S. workers at no cost using the latest browser technologies and mobile devices. The proposed rule also required employers to use commonly understood terms and keywords to describe their job opportunities, so that U.S. workers likely to apply could easily retrieve advertisements using the website's search function. Moreover, in an attempt to ensure the advertisement would be readily available to U.S. workers at no cost, the proposed rule prohibited employers from placing it on a website that required U.S. workers to establish personal accounts or make payments of any kind to view the advertisement. For the same reason, the proposed rule also required the website to be functionally compatible with the latest commercial web browser platforms and easily viewable on mobile smartphones and similar portable devices. To ensure employers retained the documentation necessary to demonstrate their compliance with these requirements, the proposed rule required employers to print and

retain screen shots of the webpages on which their advertisements appeared, as well as screen shots of the webpages establishing the path used to access their advertisements.

Separately, in the NPRM, the Department provided notice that it was evaluating the development of a centralized online platform to automate the advertising of H-2A job opportunities in order to assist employers in complying with the proposed electronic advertising requirement. Specifically, the Department envisioned that this electronic advertising platform would maintain a standard set of data on each job opportunity for integration with a wide array of job search website technologies. As envisioned in the NPRM, employers who elected to use this electronic advertising platform would consent to have the Department transmit information about their H-2A job opportunities to companies offering to provide advertising services. These companies would, in turn, advertise the employers' job opportunities on their respective job-search websites.

## **2. Discussion**

The Department received comments both in support and in opposition to the proposal to replace the print newspaper-advertising requirement in section 655.151 with a requirement to post an electronic advertisement on the internet. Some commenters fully supported the Department's proposed transition to electronic advertising, agreeing it was a necessary modernization of the H-2A program and had the capacity to reach a larger number of U.S. job seekers across a larger geographic area. These commenters noted that online advertisements would permit employers to recruit labor more quickly and reliably than print newspaper advertisements and offer an easier method for applicants to contact agricultural employers looking for labor.

However, the Department also received a number of comments that raised significant concerns with various aspects of its proposal. For instance, many commenters expressed concern that the Department had not adequately considered whether farmworkers are likely to search for jobs online. A number of commenters cited data indicating people in rural communities and lower skilled positions are less likely to have reliable high-speed internet access than those in urban areas who seek higher skilled positions, which could impede employers' ability to post—and U.S. workers' ability to view—electronic advertisements. Other commenters raised significant issues with the proposed criteria for websites, the minimum required duration of the posting, and the documentation that employers would be required to retain to establish compliance.

After considering these comments, the Department continues to believe that electronic advertising is an effective medium through which to reach U.S. workers. However, upon further consideration of how an electronic posting requirement can be effective in testing the U.S. labor market, how it can be effectively administered and enforced, and by whom, the Department has decided to rescind, rather than revise, the advertising requirement in section 655.151. Instead, the Department has decided to carry out the electronic advertising itself by posting H-2A job opportunities on [Seasonaljobs.dol.gov](http://Seasonaljobs.dol.gov), an improved and expanded version of the electronic job registry that the Department is required to maintain under its existing regulations. *See* 20 CFR 655.144. To accomplish this, in addition to placing copies of all approved H-2A job orders on its publicly accessible electronic job registry, 20 CFR 655.144, the Department will enhance the functional capabilities of this registry so that it also serves as a job search website that broadly advertises and disseminates H-2A job opportunities to U.S. workers. As discussed in detail below, the Department believes this approach strikes an appropriate balance between addressing

the concerns that stakeholders have raised with the proposed electronic advertising requirement and realizing the Department's goal of modernizing and improving the labor market test conducted in connection with an H-2A application.

Having the Department facilitate the electronic advertising of H-2A job opportunities will have several salutary effects. First, it addresses concerns raised in public comments regarding the effect that this rule will have on employers who lack internet access and/or who have religious objections to using the internet. The employer will not need internet access to advertise job opportunities because the Department will be placing advertisements on [seasonaljobs.dol.gov](http://seasonaljobs.dol.gov) on behalf of all employers using the information that employers provide to the Department in their H-2A applications. U.S. workers interested in a particular job opportunity can apply by directly contacting the employer, using the contact information—regardless whether that is an email or physical address—that the employer provided to the Department. Second, it eliminates the need to establish regulatory criteria for the websites on which employers may place advertisements or the documentation employers must retain to establish compliance with those criteria. It also reduces burden on prospective H-2A employers—who historically have been the parties tasked with placing advertisements—by effectively transferring the responsibility (and cost) for this activity from prospective H-2A employers to the Department. Finally, and most importantly, it strengthens the integrity and efficiency of the labor market test that is conducted in connection with an H-2A application by leveraging the latest job search technologies to more broadly disseminate information about H-2A job opportunities through a centralized website. The enhancements that the Department is making to its electronic H-2A job registry, as well as each of these salutary effects, are discussed in further detail below.

**(a) The Department will improve and expand its electronic H-2A job registry instead of creating a separate DOL-assisted advertising platform**

As previously mentioned, after considering the comments it received in response to the NPRM, the Department has decided that the best approach is to assume the responsibility for posting an electronic advertisement through the Department's own website. Accordingly, this final rule provides notice that the Department intends to improve and enhance the electronic job registry that the Department maintains under its existing regulations. *See* 20 CFR 655.144 (generally requiring the CO to place a copy of an employer's job order on an electronic job registry once the employer's H-2A application has been accepted for processing, and generally requiring that this job order remain posted on the electronic job registry until 50 percent of the employer's contract period has elapsed).

The Department has used the iCERT Visa Portal System (iCERT System) to host its electronic job registry since July 2010, shortly after section 655.144 originally went into effect. Under this system, once an employer's application has been accepted for processing, the CO will redact any confidential information on the employer's job order and upload a redacted image of the job order onto the iCERT system, where it will generally remain posted until 50 percent of the employer's contract period has elapsed. At the conclusion of this period, the CO will change the job order to inactive status, so that the information on the job order will still be available for public research and access. The iCERT System currently allows the public to search and retrieve H-2A job orders using several common data points—including the H-2A application number, employer name, area of intended employment, work contract period, job title, and primary crop or agricultural activity.

The Department implemented the job registry for two reasons. *See* 75 FR 6884, 6927 (Dec 12, 2010). One was to promote public disclosure and transparency, and the other was to have an additional tool through which U.S. workers and other intermediaries providing services to agricultural workers could more easily identify available job opportunities. The Department's experience demonstrates that many stakeholders value the transparency of a publicly available job registry and use the current job registry to locate H-2A job orders.

Currently, however, the technology supporting the current job registry is more than 10 years old, lacks compatibility with the latest mobile devices, and provides limited search options for the public to retrieve H-2A job orders. It also serves as a static repository of H-2A job orders and lacks functionality that can facilitate the dissemination of these job opportunities to the widest audience. Finally, the manual process of scanning, redacting, and uploading scanned images of job orders creates the risk of error, incomplete information, and delays in posting, especially during the late fall and winter months when employers are filing large numbers of applications for the upcoming spring season.

To address these limitations and expand U.S. workers' awareness and access to agricultural job opportunities, the Department is in the process of transitioning its electronic job registry to a new platform, [SeasonalJobs.dol.gov](https://SeasonalJobs.dol.gov), and it plans to decommission the public job registry on the iCERT System in the fall of 2019.<sup>5</sup> [SeasonalJobs.dol.gov](https://SeasonalJobs.dol.gov) is a mobile-friendly website that leverages the latest technologies to automate the electronic advertising of H-2A job

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<sup>5</sup> The Department first announced that it would be launching [SeasonalJobs.dol.gov](https://SeasonalJobs.dol.gov) on December 21, 2018. *See* <https://www.dol.gov/newsroom/releases/eta/eta20181221>.

opportunities *and* ensures copies of H-2A job orders are promptly available for public examination.

SeasonalJobs.dol.gov is currently operational. Once a CO has accepted an employer's H-2A application for further processing, the Department posts a brief description of the employer's job opportunity on SeasonalJobs.dol.gov that includes a link to a full copy of the employer's job order. The employer's job opportunity appears on the website in a concise and easy-to-read format, using information that the employer reports to the Department on its H-2A application and job order. While currently functional, the Department continues to enhance the functionality of SeasonalJobs.dol.gov to make information about H-2A job opportunities more accessible to U.S. workers. For instance, the search options available in the iCERT system are limited to job title, employer name, job order posting date, and the state where work will be performed. SeasonalJobs.dol.gov will offer a more targeted and robust set of search options than those on the current job registry. Users will be able to create and save customizable job search profiles and request email notifications informing them when the Department posts positions that match their search criteria. In addition, a geolocation Application Programming Interface will connect a user's current geographic location (when available) to the website's automated search tool, so that search results favor job opportunities near the user's current location. Location history will also help the Department identify how many users are searching for work in certain areas of the country and more effectively steer H-2A job opportunities to groups of job seekers located in certain regional areas and/or seeking different types of agricultural work.

In addition, SeasonalJobs.dol.gov will make information about H-2A job opportunities more accessible to U.S. workers with limited English proficiency by posting the jobs in a format that allows language translation services to access and translate both the general web content on



SeasonalJobs.dol.gov and specific terms and conditions of the job opportunities presented on job orders through the site. It will also facilitate broader dissemination of available job opportunities by making a standard set of job data available to third-party job search websites, which will allow job-search websites to execute web-scraping protocols that extract new H-2A job opportunities from SeasonalJobs.dol.gov and index them for advertising to U.S. workers. In fact, Jobs on Google and LinkedIn job search features index the H-2A job opportunities currently advertised on SeasonalJobs.dol.gov, and the Department is evaluating additional integrations with other commonly used job search and social media websites to cast as wide a net as possible to help Americans find jobs. Finally, the Department will be further enhancing the RSS feed capability to allow interested U.S. workers and stakeholders to tailor notifications of relevant job opportunities.

The Department believes that the enhancements it has and will continue to make to the electronic job registry will improve the existing labor market test and resolve many of the concerns that commenters raised in response to the NPRM. This approach is also consistent with suggestions that the Department received from numerous commenters who urged the Department to either allow postings on its electronic job registry to fulfill the proposed electronic advertisement requirement or to implement a DOL-assisted electronic advertising platform. In fact, most of the commenters who addressed the DOL-assisted advertising platform expressed support for the proposal, noting it would reduce regulatory burdens on employers, assist employers in complying with advertising requirements, and enhance U.S. worker access to employers' job opportunities in a centralized location and standardized format.

However, a few commenters questioned the Department's decision to expend resources developing this platform and suggested it was unnecessary, while another generally supported

the idea as long as it did not impede or disrupt the processing of H-2A applications and was not mandated. In addition, a few commenters urged the Department to consult stakeholders prior to developing or implementing a DOL-assisted advertising platform.

The Department has considered these comments, and while the Department has decided not to go forward with the DOL-assisted advertising platform that was proposed in the NPRM, it anticipates that stakeholders will be pleased with the improvements the Department has—and continues—to make to the electronic job registry. The Department has administered this electronic job registry in some form for nearly a decade. Accordingly, employers have been and continue to be on notice that, as a condition of participating in the H-2A program, the CO will place a copy of their approved H-2A job order on an electronic job registry. As explained above, the Department created this job registry to promote greater public awareness of and access to H-2A job opportunities. The enhancements the Department has and continues to make to SeasonalJobs.dol.gov, including the capability for third-party websites to extract H-2A job opportunities for broader advertising, are designed to further this goal and increase the likelihood that U.S. workers interested in agricultural opportunities, as well as intermediaries providing services to those workers, receive timely notice of H-2A job opportunities. In addition, to increase the speed with which positions are posted on the public job registry, the website will generate postings using the information that an employer provides on the newly designed *H-2A Agricultural Clearance Order* (Form ETA-790/790A), which an employer will electronically submit through the Foreign Labor Application Gateway (FLAG) System beginning no later than October 1, 2019. This enhanced job order will replace the current paper-based submission process in the iCERT System, reduce the frequency of inadvertent errors or manual corrections,

and improve the efficiency of posting H-2A job opportunities on the electronic job registry by eliminating the need to manually redact, scan, and upload physical image files.

Because the Department is not implementing a separate advertising platform, but rather enhancing the electronic job registry that it is currently required to maintain, the Department has decided that U.S. workers will be best served if it implements these enhancements as soon as practicable. Nevertheless, the Department values all suggestions and ideas to improve the functionality of SeasonalJobs.dol.gov and invites public input on changes that it can make to attract U.S. workers who are likely to apply for seasonal or temporary agricultural jobs. To facilitate public input, the Department has made the site easily accessible and included a specific function to collect stakeholder feedback and questions. The Department will also continue—as is its practice—to solicit and incorporate informal feedback from program users and other stakeholders in the course of outreach and technical assistance activities (including DOL-hosted stakeholder meetings and webinars) and at conferences, forums, and events hosted by interested stakeholders.

The Department has also considered issues that several commenters raised regarding technical difficulties with its existing job registry and the iCERT system, and agrees that it is critical for SeasonalJobs.dol.gov to function effectively and reliably. Although this is a goal of the Department independent of public comments in response to the NPRM, the above-referenced steps that the Department is taking to meet this goal should address and allay the concerns of the stakeholder community.

**(b) Posting H-2A job opportunities on SeasonalJobs.dol.gov will reduce regulatory burden and address concerns about the proposed criteria for employer-posted electronic advertisements**

The Department received numerous comments addressing electronic advertisements, the criteria that would apply to these advertisements, and the documentation that an employer would be required to maintain. Many commenters generally agreed with the Department's proposal to transition to electronic advertising, but a number of commenters urged the Department to modify its proposal in various ways. For example, a number of commenters expressed concern that the proposed rule did not accommodate employers who had limited or no access to the internet (or those employers who did not access the internet for religious reasons), and they urged the Department to provide employers the option of posting an electronic advertisement *or* print newspaper advertisements. Other commenters speculated that electronic advertisements—and in particular, advertisements on publicly accessible websites—might result in employers being inundated with hundreds of applications from unqualified or disinterested workers, and they urged the Department to consider the burden employers would face in reviewing and documenting responses to such applications.

The Department also received many comments suggesting that the standard it proposed to define the websites on which an employer could place an electronic advertisement required clarification. A number of commenters felt the proposed standard was ambiguous and did not sufficiently identify the websites—or types of websites—that would be permissible under the proposed rule. These commenters expressed varying opinions about the types of websites they believed should qualify and, for differing reasons, urged the Department to further clarify, define, or list the websites where it would be appropriate for an employer to advertise an H-2A job opportunity.

For example, farmworker advocacy organizations urged the Department to identify additional qualifying criteria and suggested that the Department and SWAs provide a list of

approved websites, including websites widely viewed by U.S. workers in areas of traditional or expected labor supply. Farmers, H-2A agents, and agricultural associations, by contrast, opposed the adoption of more specific qualifying criteria, which they argued would be cumbersome and make the regulation difficult to adapt to future changes in practices and technologies. Indeed, at least one commenter expressed concern that the proposed standard would require employers to monitor website platforms and technologies to ensure that they remain compliant with regulatory criteria. The Department also received comments from stakeholders who assumed job postings on SWA websites or the Department's existing electronic job registry would satisfy the proposed standard and/or who urged the Department to clarify that advertisements on such websites were acceptable.

In addition, several commenters sought clarification on the documentation that an employer would be required to retain under the proposed recordkeeping requirements. For example, some stakeholders complained that the proposed rule did not clearly articulate how many screen shots an employer needed to retain (e.g., one screen shot, a screen shot from the first and last day of the posting, or a screen shot for each day the advertisement is posted), while others asserted it was overly burdensome. Commenters associated with the newspaper industry additionally alleged that newspapers are a more reliable means of documenting compliance, because they are archived and available if an employer loses its copy of the tear sheet, whereas screen shots of websites can be easily lost, altered, or fabricated. Other commenters urged the Department to require other, more specific documentation (e.g., electronic confirmation of posting or invoice payment from third-party website).

The issues that these commenters raised have persuaded the Department that it would be extraordinarily difficult to develop, interpret, and implement qualifying criteria to govern the

types of websites on which employers should place an electronic advertisement, as well as the documentation that an employer should retain to demonstrate compliance with this requirement. Accordingly, as explained above, the Department has decided not to adopt its proposal to amend section 655.151 to require that an employer post an electronic advertisement. Instead, the Department will advertise on an employer's behalf by posting its job opportunity on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov).

Assuming control over the posting of the electronic advertisement and placing it on a centralized, DOL-administered platform addresses many, if not all, of the above-referenced concerns. As a preliminary matter, the Department will no longer need to establish—and employers will no longer need to comply with—regulatory criteria limiting the types of websites on which employers must place an electronic advertisement or the documentation necessary to demonstrate compliance with this requirement. Moreover, the advertisement that the Department posts on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov) will not create any additional regulatory burden for an employer because the employer will have already provided the Department with information about its job opportunity on its job order and H-2A application, which the Department will use to generate the advertisement it posts on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov). U.S. workers interested in a particular job opportunity can apply by directly contacting the employer, using the contact information that the employer provided on its job order and H-2A application. As noted above, employers who lack access to the internet will not need to acquire access to the internet to post advertisements on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov) or respond to any applications that they receive from U.S. workers in response to these advertisements; and employers will not need to determine whether a particular website meets applicable regulatory criteria or retain evidence of this posting.

The Department has also considered comments suggesting that it rely on SWAs to post job orders on their websites. The Department believes that the advertisements it places on SeasonalJobs.dol.gov and the intra- and interstate clearance process administered by SWAs serve important, but distinct, purposes in facilitating the labor market test conducted in connection with an H-2A application. Specifically, SeasonalJobs.dol.gov will accomplish the Department's objective of broadly disseminating information about H-2A job opportunities nationwide to the widest possible audience. The intra- and interstate clearance process, by contrast, target specific regional labor markets, so that SWAs in particular areas (the area of intended employment and areas of traditional or expected labor supply) assist in matching U.S. workers with H-2A job opportunities and facilitate applications for those jobs. The combination of these recruitment activities and, if ordered, an employer's positive recruitment efforts, help cast as wide a net as possible to apprise U.S. workers of agricultural job opportunities that could otherwise be filled by H-2A workers.

The Department also appreciates the suggestion from worker advocacy organizations to expand the criteria in the NPRM to include websites that are widely viewed by U.S. workers in areas of traditional or expected labor supply. If the Department becomes aware of websites that are widely viewed by U.S. workers in areas of traditional or expected labor supply, the CO may order an employer to post an advertisement on such a website under section 655.154.

Finally, while the Department is hopeful that advertising H-2A job opportunities on SeasonalJobs.dol.gov will increase the number of U.S. workers who apply for these positions, the Department does not believe that employers will be inundated with applications from unqualified or unwilling U.S. workers. The concerns some commenters raised to the contrary were speculative, generalized, or based on undocumented anecdotal experience from a different

job search website. The Department reminds commenters that the electronic job registry, including the enhancements the Department has and continues to make through SeasonalJobs.dol.gov, is designed to promote greater public awareness of and access to H-2A job opportunities and increase the likelihood that U.S. workers interested in these jobs will apply. Any burden that an employer incurs reviewing increased applications from U.S. workers is a fundamental obligation for choosing to participate in the H-2A program and outweighed by the Department's statutory obligation to ensure that able, willing, and qualified U.S. workers are not available. Because H-2A job opportunities typically require minimal education, skills, and experience, employers should not find it especially burdensome to assess the qualifications of U.S. workers who submit applications for job opportunities advertised on SeasonalJobs.dol.gov or to document their assessment of these applicants in a recruitment report.

**(c) The advertisements that the Department places on SeasonalJobs.dol.gov will improve the information that U.S. workers receive about H-2A job opportunities**

The Department also received numerous comments questioning whether U.S. workers would be able—or likely—to access the electronic advertisements required under the proposed rule. As explained below, the Department's decision to assume control over the posting of the electronic advertisement not only reduces the burden of applying for an H-2A labor certification, but also improves access to information about H-2A job opportunities.

First, it ensures that all H-2A job opportunities are advertised in a centralized location and in a uniform manner. This eliminates the concern raised by some commenters that U.S. workers would not know where to go to look for information about available H-2A job opportunities if employers were not posting advertisements in consistent locations or that unscrupulous employers could intentionally post advertisements on websites that able, willing,



and qualified U.S. workers are unlikely to view. Second, the Department can assure broader dissemination of H-2A job opportunities without requiring an employer to ensure that the website on which it places its advertisement is functionally compatible with the latest commercial web browser platforms and easily viewable on mobile smartphones and similar portable devices. Under the Department's revised proposal, it is the Department (and not the employer) who will ensure compliance with these requirements. The Department will stay abreast of broader changes in technologies and implement appropriate upgrades to the usability and security of the SeasonalJobs.dol.gov. For example, unlike the iCERT System, SeasonalJobs.dol.gov uses Responsive Web Design (RWD), which allows the Department to optimize the design and content structure of the website to fit on the screen of the user's computer, smartphone, or other similar portable device, regardless of size. The RWD approach allows the Department to create a single website design that can reach users across a wide array of computing devices. The Department continuously tests the site's mobile device compatibility using a series of emulation tools and a wide array of actual mobile devices.

Third, the Department will be able to improve the presentation of H-2A job opportunities to U.S. workers. For example, some commenters complained about the Department's existing advertising content requirements and suggested that they require employers to place advertisements that are too formalistic and contain too much information to attract U.S. workers. While the Department continues to believe that U.S. workers should have access to all of the information that is currently required by section 655.152, it also understands that, in some situations, a concise summary of the job opportunity may be more attractive to U.S. workers. Accordingly, the advertisements that the Department places on SeasonalJobs.gov highlight select information about an employer's job opportunity and include a link to the job order, so that U.S.

workers can quickly review listings to assess whether they are interested in a particular job and, if interested, review the job order to access all of the terms and conditions of employment. The Department additionally intends to upgrade SeasonalJobs.dol.gov to allow users to create and manage customizable notifications for the H-2A job opportunities. Specifically, as noted above, the Department plans to enhance the site's current RSS feed capability, which includes a basic function that alerts users when the Department updates web-based content, with more sophisticated options that will allow users to personalize these alerts so that they only receive notifications of new postings for specific types of agricultural work and/or in pre-determined frequencies (e.g., immediately, daily, weekly, monthly) tailored to their individual preferences. Users will be able to manage these notifications and turn them off when they are no longer needed or relevant.

Fourth, it addresses the concerns that some commenters raised regarding effective language access. Specifically, several commenters urged the Department to require employers to include commonly used search terms in English, Spanish, and other languages spoken by the agricultural workers whom they typically employ. To justify this recommendation, the commenters cited data from the NAWS, which showed that most farmworkers identified Spanish as their primary language, and that many farmworkers reported they did not speak or read English well or even at all.

The Department appreciates suggestions on ways to improve the accessibility of electronic advertisements to U.S. workers, especially those workers with limited English proficiency. The internet offers an abundance of content presented in languages other than English, and the Department recognizes there are already a number of free browser applications and extension technologies (e.g., Google Translate, Chrome Duolingo, Firefox's Flagfox) that

provide users with translations, definitions, and other dialect-related assistance. To assist U.S. workers who search for jobs online but who have limited proficiency in English, jobs available on SeasonalJobs.dol.gov will be posted in a format that allows language translation services to access and translate both the general web content and specific terms and conditions of the job opportunities presented on job orders. The Department is further evaluating whether existing technologies and services can provide effective language translation services, and can be implemented through the site, to both general web content on SeasonalJobs.dol.gov and specific information about H-2A job opportunities presented on the site. The Department understands the challenges (e.g., numerous language dialects, accurately applying grammatical rules) associated with language translation tools and services, but believes that it is important for the information on SeasonalJobs.dol.gov to be accessible and understandable to the widest possible audience of U.S. workers who are looking for employment. The Department will therefore work as expeditiously as possible within existing budgetary constraints to implement additional built-in language translation services for all job opportunities advertised on SeasonalJobs.dol.gov.

Finally, the Department acknowledges that some U.S. workers may lack reliable access to the internet, and it agrees that no single recruitment method will reach all job seekers. The Department likewise does not dispute that other methods of recruitment may be effective in limited circumstances. But the Department's move to electronic advertising—and to SeasonalJobs.dol.gov in particular—is only one aspect of the labor market test conducted in connection with an H-2A application. The existing labor market test additionally includes the intra- and interstate clearance process, *see* 20 CFR 655.121 and 655.150, the requirement for an employer to contact former U.S. employees, *see* 20 CFR 655.153, and in certain circumstances, additional positive recruitment. The Department believes that the enhancements it has and

continues to make to the electronic job registry will improve the existing labor market test by increasing awareness of H-2A job opportunities, which interested parties may then share with U.S. workers who do not have access to the internet or who may not use the internet to search for job opportunities. Moreover, as discussed in detail below, this final rule further encourages word-of-mouth recruitment by requiring a SWA, if directed by the CO, to provide written notice of H-2A job opportunities to certain types of organizations or in physical locations where U.S. agricultural workers are likely to gather. Accordingly, even if certain U.S. agricultural workers are unlikely to view an advertisement on SeasonalJobs.dol.gov (e.g., workers who do not have internet access or who are otherwise unlikely to turn to the internet to search for available job opportunities), they may be identified through other steps in this labor market test. Indeed, the only SWA to submit a comment in response to the NPRM agreed that SWAs could address this gap, explaining SWAs provide in-person assistance to job seekers who currently lack the skills and knowledge to conduct job searches online.

**C. The Department will leverage SWA expertise and service delivery systems in local labor markets to more broadly disseminate information about H-2A job opportunities.**

As mentioned above, this final rule will further strengthen the labor market test conducted in connection with an H-2A application by leveraging the existing localized services, knowledge, and expertise of SWAs to promote awareness of H-2A job opportunities. Specifically, in addition to activities already performed by the SWA, the Department has decided to leverage the contact networks that its SWA grantees have with organizations that provide services to U.S. workers who are likely to apply for agricultural job opportunities and utilize their knowledge of recruitment and job search patterns in the state to determine the appropriate places to post the job opportunity. In the Department's view, this will lead to broader

dissemination of information about available jobs and will expand word-of-mouth recruitment by friends and family members.

In arriving at this determination, the Department has given careful consideration to comments regarding alternative methods of recruitment that would more broadly and effectively disseminate information about available agricultural job opportunities to U.S. workers. A number of commenters informed the Department that word-of-mouth recruitment is the most effective and most commonly cited method of recruiting U.S. agricultural workers. A few commenters suggested other methods of recruitment, such as placing advertisements on radio stations serving farmworkers; posting advertisements at the employer's worksite or other locations within the community where farmworkers are known to congregate (e.g., local businesses and churches); placing advertisements in community-based or other publications that target populations who may be interested in agricultural work; and leveraging social media. Commenters representing worker advocacy organizations also urged the Department to require employers to contact organizations that serve farmworkers, such as migrant health centers and farmworker unions, to disseminate information about the job opportunity using their networks.

Several commenters also recommended that the Department expand outreach and recruitment activities of the SWAs to make job seekers, particularly those who lack adequate access to the internet, aware of H-2A job opportunities. These commenters stated that the SWAs have resources and expertise in locating and screening, on behalf of employers, available and qualified U.S. agricultural workers through their existing outreach programs. In its comment, a SWA reinforced this suggestion, stating it provides in-person assistance, as needed, to both employers and job seekers who lack the skills and knowledge to post job openings and conduct job searches online. Worker advocacy organizations similarly urged the Department to work

with SWAs to promote effective recruitment based on state-level recruitment and farmworker migration patterns. One of these commenters further stated that SWA staff located in traditional or expected labor supply states are likely to have particular knowledge of how U.S. agricultural workers in their region seek out and learn about job opportunities.

The Department appreciates the ideas and suggestions that it received on alternative forms of recruitment. The Department has considered each of these suggestions but notes that many of these proposals—including advertising on local radio stations or in community-based and ethnic publications, posting physical notices at worksites or other places frequented by potential job applicants, or using social media—are challenging to regulate and monitor. Because the Department does not currently have sufficient information regarding the efficacy of these proposals in recruiting U.S. agricultural workers, the Department has decided against requiring every employer to use these methods. However, to the extent that the Department receives information indicating that one or more of these methods are effective in a particular area or among specific groups of workers, the CO retains the authority under section 655.154 to order an employer to use that method to recruit U.S. workers.

While the Department agrees with worker advocacy organizations that word-of-mouth remains one of the simplest, yet most effective, recruitment tools for U.S. agricultural workers, as the Department previously pointed out in prior rulemaking efforts, it is almost impossible to mandate and enforce compliance with a requirement to recruit U.S. workers via word-of-mouth. *See Temporary Agricultural Employment of H-2A Aliens in the United States*; Final Rule, 75 FR 6928 (Feb. 12, 2010) (2010 Final Rule). Nevertheless, the Department seeks to encourage this form of recruitment, and it has decided to do so by enhancing the SWA's existing employment service and outreach activities. Specifically, the CO may direct a SWA, where appropriate, to

provide written notice of an employer's H-2A job opportunity to organizations that provide employment and training services to workers likely to apply for the job and/or to place written notice in other physical locations where such workers are likely to gather. Because SWAs have knowledge of local labor markets in their state and already coordinate regional outreach activities with organizations, SWAs are in the best position to identify which organizations or physical locations in their state will be effective in reaching U.S. workers who are able, willing, qualified and available for the job opportunity.

Accordingly, this final rule amends section 655.143(b) to include a new paragraph (5), which authorizes the CO to direct a SWA to provide written notice of the job opportunity to organizations providing employment and training services to workers likely to apply for the job and/or to place written notice of the job opportunity in other physical locations where such workers are likely to gather. Specifically, after reviewing the job opportunity and consulting with the applicable SWA, the CO will determine whether to direct the SWA to provide the written notice described above. If the CO determines such a direction is appropriate, the CO will include directions to this effect in the Notice of Acceptance, as specified in paragraph (b)(5) of this section. Depending on the situation, the written notice need not necessarily include a full copy of the approved H-2A job order and all attachments, but rather, may consist of a written summary of the terms and conditions of the job opportunity. The Department does not anticipate that SWAs will find this task to be particularly burdensome, as SWAs may deliver this notice in a manner that is cost effective and consistent with section 653.501(d)(10).

The Department has decided to direct SWAs, rather than employers, with distributing the written notice described above, because employers may not be able to discern when and what types of organizations should be provided written notice of available job opportunities and/or the

physical locations that would be best suited for such postings. SWAs, on the other hand, are uniquely situated to perform this function given their existing role in, and the Department's funding to support, the Wagner-Peyser Employment Services program.

The Wagner-Peyser Employment Services program provides job search and placement services for job seekers as well as recruitment services for employers. The Department envisions that the SWAs existing services and obligations under the Employment Service (ES)—in particular services provided to Migrant and Seasonal Farmworkers (MSFWs)—can be leveraged to carry out the notification that the CO may direct under 655.143(b)(5). For instance, SWAs are already required to publicize the availability of employment services to MSFWs through such means as newspaper and electronic media publicity and to use contacts with public and private community agencies, employers and/or employer organizations, and MSFW groups to facilitate the widest possible distribution of information concerning employment services. SWAs are required to perform these functions as the administrators of partner programs in the One-Stop System, which provides a wide range of employment and training services for U.S. workers through job training and outreach programs such as job search assistance and job referral and placement services. In carrying out their obligations under this new provision, SWAs are encouraged to reach out to other partners in the American Job Centers (AJCs) to help identify those organizations serving U.S. workers who might be interested in H-2A job opportunities.

One group of partners that SWAs currently work with and are encouraged to reach out to are the National Farmworker Jobs Program (NFJP) grantees. The NFJP program is a nationally directed, locally administered program of services for migrant and seasonal farmworkers. It includes 52 Career Services and Training grants, also known as Employment and Training grants, and 11 Housing grants across the United States and Puerto Rico. Grantees of this



program are a required partner in the AJC network with the SWAs, and they work closely with other local organizations to provide a wide array of support services to counter the chronic unemployment and underemployment experienced by farmworkers who depend primarily on jobs in agriculture performed across the country. In regional areas where there are significant numbers of migrant and seasonal farmworkers, NFJP grantees also coordinate outreach with SWA monitor advocates and farm labor staff to provide services to farmworkers and their families working in agriculture employment. In carrying out their obligations under 655.143(b)(5), if a SWA is not already doing so, the Department encourages SWAs to include NFJP grantees among the organizations to which it provides notice of the job opportunity.

Additionally, after consulting with a SWA, the CO may order the SWA to place written notice of the job opportunity in other physical locations where such workers are likely to gather, and determine the appropriate location using its local knowledge and expertise. SWAs will have discretion in determining the methods and physical locations used to place such notices based on the circumstances of the job opportunity, an assessment of local conditions and concentrations of U.S. workers likely to apply the job, and the prior effectiveness of such methods and physical locations in attracting referrals.

The Department does not intend for the written notice required by this final rule to create significantly new responsibilities for SWAs, but rather, to supplement activities already undertaken by SWAs. As noted above, SWAs already administer the ES and MSFW programs, coordinating where appropriate with NFJP grantees, and SWAs are a required partner in the AJC network. The purpose of this notice is to broaden dissemination of H-2A job opportunities to relevant populations and thereby increase word-of-mouth recruitment for these positions, which the Department hopes will increase the pool of potential applicants for H-2A job opportunities.

Finally, the final rule recognizes that the CO's determination to direct the SWA to provide additional written notice must be appropriate to the job opportunity and area of intended employment. The Department acknowledges that this provision may not be an effective recruitment option in certain circumstances, and after discussions with the SWA, the CO may decline to order the SWA to take this action. Examples of circumstances where such recruitment may not be appropriate include where it would be impractical, such as where the work is to be performed in remote or isolated geographic areas where organizations providing employment and training services do not exist.

**D. The Department is retaining section 655.154's positive recruitment requirement**

As explained above, the INA requires an employer seeking an H-2A temporary labor certification to engage in positive recruitment of U.S. workers in a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. 8 U.S.C. 1182(b)(4).

In enacting this statutory requirement, Congress did not intend to impose unduly burdensome requirements on employers nor did it intend to require employers to continuously return to areas that have not proven to be a reliable source of qualified U.S. workers. Rather, Congress believed the methods and locations in which employers conduct positive recruitment must yield concrete results and be cost effective.<sup>6</sup> Accordingly, the "positive recruitment"

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<sup>6</sup> House Conference Report No. 99-682(I), House Judiciary Committee, July 16, 1986, p. 81.

mandated by the INA is defined in the Department’s regulations as “[t]he active participation of an employer or its authorized hiring agent, performed under the auspices and direction of the OFLC, in recruiting and interviewing 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.” *See* 20 CFR 655.103.

Currently, when an employer’s job opportunity is served by traditional or expected labor supply states, the CO will designate no more than three states in which the employer must perform positive recruitment for each area of intended employment listed on the employer’s application. 20 CFR 655.154(c). The Notice of Acceptance that the CO issues will describe the additional positive recruitment steps that the employer must conduct in those states. Section 655.154 authorizes the CO to select the appropriate methods of recruitment on a case-by-case basis. As explained in the NPRM, the standard practice has been for the CO to order print advertisements in newspapers serving the traditional or expected labor supply states, but the Department does not intend to continue this practice.<sup>7</sup>

After carefully considering the comments it received addressing this regulation, the Department continues to believe that a CO must retain the flexibility to evaluate whether a job

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<sup>7</sup> *See Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States*; Notice of Proposed Rulemaking, 83 FR 55989 (Nov. 9, 2018) (2018 NPRM). *See Temporary Agricultural Employment of H-2A Aliens in the United States*; Final Rule, 75 FR 6884 (Feb. 12, 2010) (2010 Final Rule). The Department originally provided notice that the types of recruitment used in the H-2A program have not varied tremendously through the decades, and that stated its intention to continue to rely on newspaper advertising. *See Temporary Agricultural Employment of H-2A Aliens in the United States*; Final Rule, 75 FR 6930 (Feb. 12, 2010) (2010 Final Rule).

opportunity is served by areas of traditional or expected labor supply—and the appropriate means of recruitment in those areas—on a case-by-case basis. Accordingly, this final rule adopts the NPRM’s proposal to retain section 655.154 without amendment.

When evaluating an employer’s application, a CO will continue to evaluate, on a case-by-case basis, the appropriate locations and methods of recruiting in traditional or expected labor supply states where a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. In retaining section 655.154 as drafted, the Department understands that Congress did not intend the positive recruitment requirement ordered under section 218(b)(4) to be unduly burdensome, and it believes that section 655.154 is consistent with Congressional intent. Notably, section 655.154 does not afford the CO unlimited discretion; rather, it authorizes the CO to order the recruitment necessary to ensure an adequate test of the labor market for the employer’s job opportunity, after taking into account the location and characteristics of the position.

In determining whether and what positive recruitment is required for a position, the CO will continue to consider information that the Department obtains from SWAs and other relevant stakeholders. The Department also continues, as it did when it adopted this regulation in 2010, to invite stakeholders to submit information on areas of traditional or expected labor supply and effective means of recruiting U.S. workers in those areas. The Department acknowledges the comments it received suggested a wide array of alternative methods of advertising that, depending on the information provided to the CO, may effectively disseminate information about available job opportunities to U.S. workers. For example, based on the information the Department receives from SWAs and other stakeholders, the CO may determine that a particular method of advertising (e.g., community-based newspaper, agricultural careers website) covering

a regional area, whether in print and/or electronic, may be effective in recruiting U.S. workers for a particular position, in a specific location, or during a certain period of the year. In requiring the use of a particular method of advertising, the CO will take into consideration all available information about whether that method has been, or is likely to be, effective in generating referrals of qualified U.S. workers.

The Department also recognizes that the increased rates of innovation in job search technologies and infrastructure development designed to improve internet access within rural communities may be changing the way many U.S. workers search for and find available job opportunities in the future. Fortunately, section 655.154 provides the CO with flexibility to keep pace with the ever-changing labor market trends and technologies and select the most appropriate method(s) of recruitment for a particular job opportunity.

Finally, the Department acknowledges the concerns that several associations raised regarding the areas in which a CO has ordered employers to perform additional positive recruitment under section 655.154. These associations contend that the Department should no longer require additional positive recruitment under this section because there has been significant growth in certified H-2A positions in areas of alleged labor supply. The Department reminds the commenters that under current regulations the CO has the flexibility to gather information, including current use of the H-2A program in areas of alleged labor supply, to determine whether U.S. workers may be found and available for work at the time and place needed. The Department's statutory mandate to ensure that positive recruitment efforts are made within a multistate region of traditional or expected labor supply remains a factual determination with respect to the employer's job opportunity and location and time of year. Because many farm workers migrate over the course of the year and the time it takes to perform various farm

work activities varies from year to year, the CO must consider current information to determine the states to which to refer an employer to conduct positive recruitment. The CO's review of such information, with respect to the job opportunity located in certain states and during certain seasons of the year, may or may not lead to the designation of traditional or expected labor supply states with respect to other states in which H-2A applications are filed.

#### **E. Out of scope comments on the proposed rule**

The Department received comments on several issues that were unrelated to its proposal to modernize the recruitment that an employer must conduct under its regulations by replacing print newspaper advertisements with electronic advertisements posted on the internet.

The Department recognizes and appreciates the value of these comments and suggestions. However, they are outside the scope of this rulemaking and the Department cannot adopt them without additional regulatory—and in some cases Congressional—action. To the extent that parties who submitted such comments seek further revisions to the H-2A program, the Department intends to propose a separate rule to streamline the process by which employers obtain an H-2A temporary labor certification, and it invites all interested parties to review this proposal, when published, and submit comments in response.

### **III. Administrative Information**

#### **A. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)**

Under Executive Order (E.O.) 12866, the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is

likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* OMB has determined that this final rule is a significant, but not economically significant, regulatory action under Sec. 3(f) of E.O. 12866. Consequently, OMB has reviewed this rule.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This final rule is an E.O. 13771 deregulatory action because the cost savings to H-2A employers associated with the rule are larger than the costs. The estimated cost savings associated with this regulatory action are derived from the rescission of section 655.151 to remove the newspaper-advertising requirement, the rescission of section 655.152 to eliminate the

corresponding ad content requirements, and the revision of section 655.167 to eliminate document retention requirements associated with print newspaper advertisements.

### **1. Discussion of Comments**

Some commenters expressed concern about the cost of posting online advertisements, and the burden of reviewing a large volume of online applications. One commenter suggested that the Department's estimates for the costs of online advertisements underestimated actual fees, stating that prices for advertising online are in some instances the same as, if not greater than, the cost of a single newspaper advertisement. The commenter asserted that posting an advertisement online typically cost just as much as placing a print advertisement. An additional commenter stated that print advertising requirements add significant cost to H-2A employers already facing multiple other costs (e.g., agent fees, filing fees, housing, transportation, and adverse effect wage rates) and argued that print advertising has no value in targeting prospective job applicants. Another commenter suggested that newspaper advertisement packages often include options to advertise in either the print or online edition. A few other commenters took issue with the assumption that online advertising has no cost to the employer, stating that several websites have a price associated with the cost of posting advertisements online. Some commenters argued that the proposed requirements help neither workers nor employers, since they do not actually protect the rights of U.S. workers but impose unnecessary costs on employers.

Lastly, one commenter remarked that as the newspaper industry declines and fewer competitors are available, instances of abusive pricing have been reported, since newspaper companies know that employers have no alternative because of government-mandated advertisements. The commenter reasoned that the cost savings of switching to electronic advertisements would be beneficial to employers already incurring other large expenses from



participating in the program (e.g., filing fees, transportation, subsistence, consular fees, DOL-mandated prevailing wages).

Several commenters asserted that the proposal was based on an incomplete analysis of recruiting costs and the burden placed on employers. These commenters described employers' experiences with high volumes of applicants to online job postings to argue that the overall cost of electronic advertisements could be higher than print advertisements because of the increased burden of vetting hundreds of unqualified applicants. The commenters stated that large job posting websites often include "Apply Now" options that increase the likelihood of large responses to online postings, which they argued drives up costs for employers.

The Department agrees with the commenters' concern that the Department may have underestimated the cost of online advertising. As explained elsewhere in this preamble, the Department has concluded that, to reduce this cost and burden, expand the reach of each ad, and leverage the Department's existing technology and infrastructure, it is appropriate for the Department rather than employers to place H-2A electronic advertisements. The final rule replaces the print newspaper-advertising requirement with employers' job opportunities posted on a DOL-maintained website, [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov), thus eliminating the cost to employers. Additionally, the enhancements the Department has and continues to make to [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov) are designed to further the Department's goal to promote greater public awareness of and access to H 2A job opportunities in order to increase the likelihood that U.S. workers interested in agricultural opportunities, as well as intermediaries providing services to those workers, receive timely notice of H-2A job opportunities. Any costs or burden that an employer incurs reviewing increased applications from U.S. workers is a fundamental obligation

for choosing to participate in the H-2A program and outweighed by the Department's statutory obligation to ensure that able, willing, and qualified U.S. workers are not available.

The Department also received comments on the recordkeeping costs associated with employers' online advertising. One commenter suggested that the per-employer costs required to adjust to the new electronic notifications might be slightly higher than estimated due to the increased recordkeeping fees incurred from vetting more applicants. The commenter stated that while these fees may be greater than the Department's estimates, the new requirements and fees associated with the rule are far more favorable to employers than the current print newspaper costs. A second commenter concluded that DOL's estimates of stakeholder time and cost required to conform business practices to the new rule are adequate.

As the final rule eliminates an H-2A employer's recordkeeping obligation as it pertains to print advertisements, it also eliminates the cost associated with that requirement. Accordingly, the Department has estimated the cost savings associated with eliminating the requirements of document retention.

Some commenters took issue with the specifics of the Department's calculations. This final rule eliminates costs, including recordkeeping costs, associated with employer-posted advertisements, both print and electronic. In the interest of transparency and responsiveness, the Department explains key elements of these calculations below.

One commenter stated that the cost assessment in the rulemaking appeared to underestimate the actual cost to H-2A employers. According to this commenter, data for FYs 2015 through 2018 showed a trend toward ever-increasing numbers of certifications each year (e.g., 10,917 certifications for FY 2017, and 11,319 certifications in FY 2018), suggesting that an average of 9,796 was simply too low to use as a basis for estimating certification totals in future

years. The Department agrees with the commenter that the number of certifications is likely to grow in future years. Therefore, for this final rule, the Department has estimated an annual growth rate for the number of certifications in the 10-year analysis period, and revised our estimates of cost and cost-savings accordingly.

Another commenter believed the use of advertisement rates for the largest newspapers in the five states with the most H-2A temporary labor certifications inflated the cost estimates. From the commenter's perspective, many employers may not use the largest newspapers to fulfill their advertising requirements, and smaller newspapers are likely to have lower ad rates. The commenter was concerned that the analysis did not specify which criteria were used to develop the rate estimates, and that rates vary depending on the advertisement size, number of lines, and placement. Another commenter agreed with DOL's average print advertisement cost estimate (\$336 per advertisement), but pointed to additional costs associated with the print advertising requirement, including staff time required to place the advertisement, process the payment, and document and maintain records of print advertisements in case of an audit. All such efforts, the commenter concluded, had attracted no applicants in over four years.

The Department based the cost estimates for two newspaper advertisements on advertising costs from newspapers with the widest circulation in the five states where H-2A certifications are most prevalent, as well as the advertising costs from the most widely circulating newspapers in the top feeder states that are adjacent to the primary H-2A prevalent states. The Department believes that its estimate of \$672 represents, on average, a reasonable cost-savings of removing print newspaper requirements. The cost of active recruitment now disappears completely, as the Department will assume responsibility for posting employer

advertisements. As explained above, the Department has also estimated the cost savings from eliminating the document retention requirement.

Two commenters expressed concern that the proposed rule did not consider the impact on the newspaper industry. One commenter argued that the rule could potentially reduce budgets for vital local journalism since local newspapers may rely on revenue from H-2A job postings. As a safeguard, the commenter recommended the rule provide for a period of adjustment to allow employers to compare the effect and usefulness of electronic advertising versus print. Another commenter argued that removing newspaper-advertising requirements would be detrimental to the newspaper industry. In contrast, another commenter – arguing U.S. farmworkers looking for work would no longer be required to purchase print newspapers for the classified advertisements– remarked that many comments against the proposed rule were from local newspaper publishers complaining that the rule change would reduce their profits. U.S. farms and farmworkers, this commenter asserted, are not responsible for subsidizing the newspaper industry. Further, the commenter stated that newspaper companies do not know how many applications employers receive because of a newspaper job posting and, therefore, cannot comment on the effectiveness of print advertisements.

The Department concludes that while this rule may have an effect on the newspaper industry, the advertising revenue lost from employers who are no longer required to post job openings in print is expected to represent an insignificant portion of the industry’s overall advertisement revenue.

## **2. Subject-by-Subject Analysis**

The Department’s analysis below considers the expected impacts of the following aspects of the final rule against the baseline (i.e., the 2010 Final Rule): (a) rescission of the requirement

that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment; (b) elimination of the document retention requirement associated with print newspaper advertisements; and (c) the time it takes the regulated community to read and review the rule.

Based on historical program data on H-2A labor certifications issued from FY 2012–2018—the only data available to the Department for estimates a growth rate in certifications—the Department estimated a 14 percent annual growth rate in the number of certified H-2A applications. The Department cautions, however, that this growth rate estimate represents the extreme upper bounds of projected certified H-2A applications, and the actual number of certifications could very well be lower.<sup>8</sup> The Department applied this average annual growth rate to the number of H-2A certifications for the 10-year study period to account for projected program growth.

**(a) Eliminating the Use of Print Newspaper Advertisements**

This final rule modernizes H-2A recruitment by rescinding the regulation imposing the requirement for print newspaper advertisements, at 20 CFR 655.151, and the regulation prescribing the content that an employer must include in those advertisements, at 20 CFR 655.152. In conjunction with this rule, the Department will assume responsibility for these recruitment activities by advertising each employer’s job opportunity on a DOL website designed to make the job opportunity more broadly available to U.S. workers.

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<sup>8</sup> The Department of Labor believes that an annual growth rate of 14 percent is unlikely to be sustained over the next 10 years, as this would require that workers in these industries all be H-2A employees.

To estimate the cost savings to employers that would result from this final rule, the Department multiplied the average number of H-2A labor certifications issued each fiscal year by the average cost to an employer of placing a print advertisement. First, the Department used program data for FYs 2015-2017 to estimate that the H-2A program approves, on average, 9,796 labor certifications each fiscal year.<sup>9</sup> Next, the Department applied a growth rate of 14 percent to this average number of certifications to estimate an annual count of H-2A certifications. To estimate the average cost of a print ad, the Department identified the top five states in which prospective H-2A employers received temporary labor certifications,<sup>10</sup> and it researched the cost of placing a newspaper advertisement in the most populous city in each of these states (for several newspapers, including large and local papers), for advertisements satisfying the content requirements set forth in section 655.152. Based on this data, the Department estimated that, on average, it costs an employer \$336 to place a single ad complying with section 655.152's content requirements. Thus, placing the two advertisements required by section 655.151 costs an employer, on average, twice as much, or \$672 (\$336 for each advertisement).

As mentioned above, employers can advertise using the DOL-maintained website free of charge, so removing the requirement to advertise in a print newspaper would result in a cost savings equal to the cost of complying with the current regulation. Although section 655.151 currently requires employers to advertise on two consecutive days, one of which must be a

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<sup>9</sup> The average is based on 8,721 H-2A temporary labor certifications in FY 2015; 9,751 temporary labor certifications in FY 2016; and 10,917 temporary labor certifications in FY 2017. See <https://www.foreignlaborcert.doleta.gov/performance/data.cfm>.

<sup>10</sup> The top 5 states in which employers seek to place H-2A workers are California, Florida, Georgia, North Carolina, and Washington.

Sunday, the Department did not identify a significant difference in cost between advertisements placed on Sundays and weekdays, so the Department did not distinguish between these two costs when calculating total advertising cost savings. To estimate the annual newspaper advertising costs that employers will avoid under the final rule, the Department multiplied the estimated annual number of H-2A temporary labor certifications (9,796 multiplied by the 14 percent annual growth rate) by the average newspaper advertising cost of \$672. This yielded annual cost savings ranging from \$7.48 million in year one to \$23.48 million in year ten. The annualized cost savings over the ten-year period is \$14.14 million and \$14.11 million at discount rates of 3 and 7 percent, respectively. The Department believes that the cost to the Department of upgrading its database and posting employer's job opportunities on its website would be *de minimis* on an annual basis. The Department also notes that the startup investment for SeasonalJobs.dol.gov is a cost which exists in the baseline as DOL initiated the job posting site separate and apart from this rule. As a result, these costs are not considered costs of this rule.

#### **(b) Eliminating Document Retention Requirements**

The final rule amends section 655.167 to eliminate the document retention requirement associated with print newspaper advertisements. To estimate the cost savings from this revision, the Department calculated the average cost for each employer to retain print ad records for each H-2A certification. To do so, the Department multiplied each employer's per-certification staff time by its per-certification staff cost. The Department estimates that it takes a human resources (HR) manager, on average, two minutes to store (print and file) proof of print advertisement.

The Department estimated a wage rate by multiplying the median hourly wage of an HR manager at an agricultural business (\$31.84) by the loaded wage rate (1.63) to account for fringe benefits and overhead.<sup>11</sup> The Department then multiplied the resulting wage rate by the staff time (two minutes), which yielded a cost of \$1.73 per certification. As explained above, the Department estimated that the Department issues, on average, 9,796 labor certifications each fiscal year, and applied an annual growth rate of 14 percent to this total. By multiplying the estimated annual number of certifications by the cost per certification (\$1.73), the Department estimated an annual cost savings ranging from \$19,245 in year one to \$60,437 in year ten. The annualized cost savings over the ten-year period is \$36,392 and \$36,337 at the discount rates of 3 percent and 7 percent, respectively.

**(c) Time to Review and Understand the Rule**

During the first year after this rule takes effect, employers seeking H-2A workers will need time to learn about the new requirements. The Department assumes that many employers participating in the H-2A program will learn about the requirements of the new rule from an industry newsletter or bulletin. The Department estimates that an employer will require approximately 10 minutes to understand the rule change, as this final rule addresses only the job-advertising requirement for employers seeking H-2A workers.

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<sup>11</sup> The loaded wage factor is calculated using a fringe benefit rate of 46 percent, which is based on the Bureau of Labor Statistics Employer Cost for Employee Compensation data. This fringe benefit rate was added to an overhead rate of 17 percent, which is based on DOL practices.



The requirement to review and understand the rule represents a cost to employers participating in the H-2A program in the first year of the rule. The Department estimates this cost for each employer by multiplying the staff time required to read and review the new rule by the estimated staff cost. As above, the Department estimated a wage rate by multiplying the median hourly wage of an HR manager at an agricultural business (\$31.84)<sup>12</sup> by the loaded wage rate (1.63) to account for fringe benefits and overhead. The Department then multiplied the resulting wage rate by the required staff time (10 minutes), which yielded a cost of \$8.65 per employer. The Department estimated the total cost of reading and reviewing the rule by multiplying \$8.65 by the average number of employers participating in the H-2A program over FY 2015–2017 (6,676). This calculation results in a cost of \$57,747 in the first year. The annualized cost over the ten-year period is \$6,770 and \$8,222 at the discount rates of 3 percent and 7 percent, respectively.

### **3. Summary of Impacts**

The Department estimates the total first-year costs of the final rule to be \$57,747. This cost results from the time required to read and review the final rule, for all current H-2A employers combined. The Department estimates first-year cost savings of \$7.49 million. This cost savings results from eliminating the requirement that employers place print newspaper advertisements and retain ad-related documents. Net first-year cost savings, therefore, amount to \$7.44 million.

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<sup>12</sup> Wage derived from Bureau of Labor Statistics median hourly wage for HR Specialists (occupational code 13-1071), May 2017.

Generally, annual cost savings are expected to range from \$8.51 million to \$23.54 million in years following the first. The 10-year discounted net cost savings of the rule range from \$120.90 million to \$99.39 million (with 3 percent and 7 percent discount rates, respectively). The annualized net cost savings of the final rule ranges from \$14.17 million to \$14.14 million (with 3 percent and 7 percent discount rates, respectively). When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost savings of this final rule are \$14.15<sup>13</sup> million at a discount rate of 7 percent in 2016 dollars.

### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 and 604.

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<sup>13</sup> Cost savings in current dollars are \$14.16 million. To comply with E.O. 13771 accounting costs calculated on a perpetual time horizon are multiplied by the GDP deflator (0.980702077) to convert to 2016 dollars then multiplied by a discount rate (0.816297877) in order to set to discount the amount to 2016 figures.

This rule may impact small businesses that request H-2A temporary labor certifications. Based on data obtained from the Small business Administrations, the department identified that on average 1,195 total unique small employers could be affected by the implementation of this rule.<sup>14</sup> The Department assumes that the average number of H-2A temporary labor certifications requested by any small business per year will be one. The Department estimates that small businesses will incur a one-time cost of \$8.65 to familiarize themselves with the rule. Following the initial familiarization period, employers will experience annualized cost savings of \$674<sup>15</sup> associated with advertising online rather than in print newspapers and the elimination of document retention requirements. To estimate the cost savings to small businesses the Department multiplied the average cost of a single newspaper advertisement by the number of advertisements required by 20 CFR § 655.42 (\$336 per advertisement x 2 advertisements). This amount was added to the estimated cost savings from the elimination of the document retention requirement (\$1.73). Over a 10-year period, the net annualized cost savings for a small business would be \$716 at a 7-percent discount rate.

The Department reviewed the impacts of the final rule for two North American Industry Classification System (NAICS) Codes that frequently request H-2A temporary labor certifications—NAICS 115115: Farm Labor Contractors & Crew Leaders, and NAICS 111998:

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<sup>14</sup> The average is based on 1,136 unique small business entities FY 2016; and 1,253 unique small business entities in FY 2017.

<sup>15</sup> \$674 = (\$336 for newspaper advertisement cost X 2 required advertisements) + \$2 for the elimination of document retention requirement.

All Other Miscellaneous Crop Farming. The Small Business Administration (SBA) estimates that annual revenue for a small business with NAICS Code 115115 is \$15 million and for NAICS Code 111998 is \$750,000.<sup>16</sup> The Department estimates that the impact of the final rule will be less than 1 percent of annual revenue for the small businesses in these industries with the employment size fewer than 5 (\$710,717 for NAICS 115115 and \$430,835 for NAICS 11).<sup>17</sup> Based on this determination, the Department certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

One commenter asserted that the final rule might impact small businesses that request H-2A temporary labor certifications. The commenter argued that DOL's assumption that small businesses would only request one H-2A temporary labor certification is incorrect because a large percentage of small employers submit multiple certification applications. Another commenter, expressing support for the rule, argued that increasingly costly and cumbersome aspects of the H-2A program have precluded many small family farms from participating. The commenter argued that the new rule would mitigate such costs and make the program more economically viable for those employers who lack the size and scale to absorb the additional overhead.

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<sup>16</sup> U.S. Small Business Administration. (2017). *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*. Retrieved from: [https://www.naics.com/wp-content/uploads/2017/10/SBA\\_Size\\_Standards\\_Table.pdf](https://www.naics.com/wp-content/uploads/2017/10/SBA_Size_Standards_Table.pdf).

<sup>17</sup> U.S. Census, *2012 SUSB Annual Data Tables by Establishment Industry*, <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html>.

The Department understands that some small businesses may have more than one certification, but this final rule makes no change to affect small employers to increase or decrease their number of certifications. This final rule will provide cost savings to small businesses by removing print newspaper advertisement requirements and associated document retention requirements.

### **C. Paperwork Reduction Act**

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR), concerning OMB Control Number 1205-0532, contained in this final rule to OMB to obtain approval using emergency clearance procedures outlined at 5 CFR 1320.13.

The revisions detailed in this final rule closely relate to existing information collections approved for the H-2A Foreign Labor Certification Program under OMB control number 1205-0466. The Department is not submitting this ICR under that control number, however, because the ROCIS database, which is OMB's system for processing requests, allows only one ICR per control number to be pending at any given time, and the existing control number will be encumbered by an unrelated ICR when submitting the final rule in this regulatory process. The Department is therefore submitting the instant ICR under a different control number, 1205-0532, which was assigned by OMB, for administrative purposes only. Once all of the outstanding

actions are complete, the Department intends to submit a non-material change request to transfer the burden from this OMB control number (1205-0532) to the existing OMB control number for the H 2A Foreign Labor Certification Program (1205-0466) and proceed to discontinue the use of this OMB control number 1205-0532

This final rule modernizes and improves the labor market test that the Department uses to assess whether able, willing, and qualified U.S. workers are available by: (1) rescinding the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment; (2) expanding and enhancing the Department's electronic job registry; and (3) further leveraging the knowledge and expertise of State Workforce Agencies (SWAs) to promote agricultural job opportunities. More specifically, this final rule eliminates the general requirement for a prospective H-2A employer to advertise its job opportunity in a print newspaper of general circulation in the area of intended employment. However, in contrast to the NPRM, this final rule does not require the employer to place this electronic advertisement. Rather, as explained in detail in this final rule, the Department will advertise the employer's job opportunity on its behalf by posting it on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov), an expanded and improved version of the Department's existing H-2A job registry website. In addition, this final rule further strengthens the labor market test by leveraging existing recruitment outreach activities of the SWAs to provide written notice of the job opportunity to organizations providing employment and training services to workers likely to apply for the job, or place written notice in other physical locations where such workers are likely to gather.

The information collection change in requirements associated with this final rule are summarized as follows:

*Agency:* DOL-ETA.

*Type of Information Collection:* New OMB Control Number 1205-0532.

*Title of the Collection:* Advertising Requirements for Employers Seeking to Employ H-2A Nonimmigrant Workers.

*Agency Form Number:* None.

*Affected Public:* Private Sector—businesses or other for-profits and state/local agencies.

*Total Estimated Number of Respondents:* 9,796.

*Average Responses per Year per Respondent:* 2.

*Total Estimated Number of Responses:* 19,592.

*Average Time per Response:* 7 minutes per application.

*Total Estimated Annual Time Burden:* 137,144 hours.

*Total Estimated Other Costs Burden:* \$0.

#### **D. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on state, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector.

SWAs are mandated to perform certain activities for the Federal Government under the H-2A program, and receive grants to support the performance of these activities. The current regulation requires SWAs to review and place approved job orders into their intrastate and interstate clearance systems, which includes dissemination of the job opportunity to all offices where SWA staff are located as well as one-stop partner sites and other specialized offices

affiliated with the state one-stop delivery system. SWAs are also responsible for assisting U.S. workers to understand the terms and conditions of employment set forth in intrastate and interstate clearance orders, actively referring qualified U.S. workers to available job opportunities, and performing housing inspections to ensure compliance with applicable housing standards.

Under the final rule, SWAs will continue to play a significant and active role in disseminating available job opportunities and providing the full range of employment and training services to the agricultural community, both workers and employers, through the state one-stop delivery system. Specifically, the final rule strengthens the labor market test by leveraging existing recruitment outreach activities of the SWAs to provide written notice of the job opportunity to organizations providing employment and training services to workers likely to apply for the job, or place written notice in other physical locations where such workers are likely to gather.

Regulations under the Wagner-Peyser Act require each state to conduct outreach activities to U.S. agricultural workers and circulate available job opportunities throughout the state's one-stop delivery system, including NFJP grantees serving migrant and seasonal farmworkers. The Department recognizes that this final rule may slightly increase the outreach activities of some SWAs, particularly those who do not serve significant numbers of U.S. agricultural workers, in terms of identifying organizations providing employment and training services to workers likely to apply for agricultural job opportunities or gathering information on where such workers are likely to gather. However, the Department anticipates that the workload associated with these activities will be minimal, since information needed to contact employment



and training service providers is readily available, and the SWAs possess extensive experience conducting a wide array of outreach services to U.S. agricultural workers.

Funding to carry out these activities under the H-2A program is provided by the Department through grants under the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*, and directly through appropriated funds for administration of the Department's foreign labor certification program. The Department anticipates continued funding under the Wagner-Peyser Act to support the activities of the SWAs. Furthermore, this final rule does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation, and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and the Department has not prepared a statement under the Act.

#### **E. Small Business Regulatory Enforcement Fairness Act of 1996**

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104-121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). This final rule has not been found to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic or export markets.

#### **F. Executive Order 13132 (Federalism)**

This final rule does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Accordingly, Executive Order 13132, Federalism, requires no further agency action or analysis.

### **G. Executive Orders 13175 (Indian Tribal Governments)**

This final rule does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Accordingly, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

### **H. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families**

This final rule will have no effect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action, analysis, or assessment.

### **I. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)**

This final rule will have no adverse impact on children. Accordingly, Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by Executive Orders 13229 and 13296, requires no further agency action or analysis.

### **J. Environmental Impact Assessment**

This action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This action is therefore categorically excluded from further review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4375.

### **K. Executive Order 13211 (Energy Supply)**

This final rule will not have impacts on energy supply. Accordingly, Executive Order 13211 requires no further Agency action or analysis.

**L. Executive Order 12630 (Constitutionally Protected Property Rights)**

This final rule will not implement a policy with takings implications. Accordingly, Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, requires no further agency action or analysis.

**M. Executive Order 12988 (Civil Justice Reform Analysis)**

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**List of Subjects in 20 CFR Part 655**

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

Accordingly, DOL amends part 655 of title 20 of the Code of Federal Regulations as follows:

**PART 655--TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES**

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

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; sec. 205 of division M, Pub. L. 115-141, 132 Stat. 348; 8 CFR 2.1, 214.2(h)(4)(i), and 214.2(h)(6)(iii).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. Amend § 655.143 by revising paragraph (b)(3) and (b)(4) and by adding paragraph (b)(5) to read as follows:

**§655.143 Notice of acceptance.**

\* \* \* \* \*

(b) \* \* \*

(3) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under §655.150 of this subpart and will terminate on the actual date on which the H-2A workers depart for the place of work, or 3 calendar days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first;

(4) State that the CO will make a determination either to grant or deny the Application for Temporary Employment Certification no later than 30 calendar days before the date of need, except as provided for under §655.144 for modified Applications for Temporary Employment Certification.; and

(5) Where appropriate to the job opportunity and area of intended employment, direct the SWA to provide written notice of the job opportunity to organizations that provide employment and training services to workers likely to apply for the job and/or to place written notice of the job opportunity in other physical locations where such workers are likely to gather.

**§ 655.151 [Removed and Reserved]**

3. Remove and reserve § 655.151.

**§ 655.152 [Removed and Reserved]**

4. Remove and reserve § 655.152.

**§ 655.161 [Amended]**

5. In § 655.161(a), remove the reference to “§655.121 and §655.152” and add in its place “this subpart”.

**§655.167 [Amended]**

6. Amend § 655.167 by removing paragraph (c)(1)(ii) and redesignating paragraphs (c)(1)(iii) and (iv) as paragraphs (c)(1)(ii) and (iii).

**§655.225 [Amended]**

7. Amend § 655.225 by removing paragraph (d) and redesignating paragraph (e) as paragraph (d).

John P. Pallasch,

Assistant Secretary for Employment and Training, Labor.

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