



DEPARTMENT OF HOMELAND SECURITY

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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 503

[DOL Docket No. ETA-2018-0003]

RIN 1205-AB91

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

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security and Employment and Training Administration and Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) and the Department of Labor (DOL) (collectively, the Departments), are jointly issuing this final rule to amend the regulations governing DOL's certification of nonagricultural labor or services to be performed by temporary foreign workers in H-2B nonimmigrant status (H-2B workers). Pursuant to Section 214(c)(1) of the Immigration and Nationality Act (INA), this certification serves as DHS's consultation with DOL regarding whether a qualified United States (U.S.) worker is available to fill the petitioning H-2B employer's job opportunity, and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. This final rule modernizes and improves the labor market test that DOL uses to assess

whether 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, and expanding and enhancing DOL's electronic job registry to disseminate available job opportunities to the widest audience possible.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Regarding the Department of Homeland Security: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave NW, Suite 1100, Washington, DC 20529-2120, telephone (202) 272-8377 (not a toll-free call). Regarding the Department of Labor: 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). Regarding 29 CFR part 503: Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; telephone (202) 693-0071 (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 Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes the H-2B nonimmigrant visa classification for a nonagricultural temporary 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 . . . temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition DHS for classification of prospective temporary workers as H-2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). DHS must approve this petition before a beneficiary may be considered eligible for an H-2B visa. Finally, the INA requires that “[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],¹ after consultation with appropriate agencies of the Government.” *Id.*

DHS regulations provide that an H-2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification (TLC) from DOL issued pursuant to regulations established at 20 CFR part 655. *See* 8 CFR 214.2(h)(6)(iii)(A), (C)-(E), (h)(6)(iv)(A); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6), INA section

¹ As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the DHS by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

214(c)(1), 8 U.S.C. 1184(c)(1). The TLC serves as DHS's consultation with DOL regarding whether: (i) a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity, and (ii) whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D).

Through the application process set forth in these regulations, DOL acquires the information necessary to make these factual determinations, including whether there are sufficient qualified U.S. workers available to perform the nonagricultural labor or services for which an employer seeks H-2B certification. 20 CFR 655.1. To that end, the regulations require an employer seeking H-2B temporary labor certification to test the labor market by recruiting U.S. workers for the position(s) in which it intends to employ H-2B workers. *See, e.g.*, 20 CFR 655.16, 655.40 through 655.46. The outcome of this labor market test forms the basis of DOL's determination, through consultation with DHS before DHS makes the final determination on an H-2B petition, as to whether there are sufficient qualified U.S. workers available to fill the employer's job opportunity.

The INA also authorizes DHS to impose appropriate remedies against an employer for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H-2B nonimmigrant worker. INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). The INA expressly authorizes DHS to delegate certain enforcement authority to DOL. INA section 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). DHS has delegated its authority pursuant to INA section 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B) and INA section 103(a)(6), 1103(a)(6), to DOL. *See* DHS, Delegation of Authority to DOL under Section

214(c)(14)(A) of the Immigration and Nationality Act (Jan. 16, 2009); INA section 103(a)(6), 8 U.S.C. 1103(a)(6); 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of, among other things, an H-2B petition and a DOL-approved TLC). Within DOL, this enforcement authority has been delegated to the Wage and Hour Division (WHD), and is governed by regulations at 29 CFR part 503.

B. Current Recruitment Requirements

Under the regulations currently in effect, an employer seeking H-2B workers generally initiates the temporary labor certification process by filing the following with DOL: (1) an *Application for Temporary Employment Certification*, Form ETA-9142B (H-2B application) and (2) a copy of the job order submitted concurrently to the State Workforce Agency (SWA) serving the area of intended employment; and other documentation supporting the H-2B application. 20 CFR 655.15(a). Absent limited exceptions, an employer must file a completed H-2B application no more than 90 days, but no fewer than 75 days, before it seeks to employ H-2B workers. 20 CFR 655.15(b).

An Office of Foreign Labor Certification (OFLC) Certifying Officer (CO) will review the H-2B application and job order for compliance with program requirements. 20 CFR 655.30. The SWA concurrently reviews the job order to confirm that the employer's job opportunity complies with applicable requirements and notifies the CO of any deficiencies within 6 business days of receipt of the job order. 20 CFR 655.16(b). If the H-2B application and job order meet all applicable requirements, the CO will issue a Notice of Acceptance (NOA) within 7 business days from the date the H-2B application was received. 20 CFR 655.33. The NOA authorizes the next step in the temporary labor certification process—the recruitment of U.S. workers—and

specifies a date on which the employer must provide an initial written report of its recruitment efforts. *See* 20 CFR 655.33(b).

The NOA directs the SWA to place the job order into intrastate clearance and circulate a copy of the job order to other states listed as anticipated worksites and designated by the CO for interstate clearance, where the job orders must remain active until 21 days before the date of need as set forth in 20 CFR 655.40(c). *Id.* Where the occupation or industry is traditionally or customarily unionized, the NOA instructs the SWA to circulate a copy of the job order to the central office of the State Federation of Labor and the office(s) of local union(s) representing employees in the same or a substantially equivalent job classification in the geographic area(s) where work will be performed. *Id.* Additionally, the NOA specifies the recruitment steps that the employer must conduct, within 14 calendar days from the date the NOA is issued, to complete the labor market test, unless the CO instructs otherwise. *Id.* Upon receipt of the employer's initial recruitment report, the CO will make a final determination whether to grant, partially grant, or deny the employer's H-2B application, based on the criteria for certification set forth in 20 CFR 655.50-655.51.

Sections 655.40 through 655.48 outline the recruitment standards and procedures that the CO may order an employer to conduct. Under these regulations, an employer is generally required to: (1) place two print advertisements in a newspaper of general circulation serving the area of intended employment, *see* 20 CFR 655.42; (2) contact U.S. workers the employer employed in the previous year to solicit their return, *see* 20 CFR 655.43; and (3) contact the bargaining unit, if one exists, to seek referrals of U.S. workers, or if a bargaining unit does not exist, post notice of the job opportunity at the place(s) of employment for at least 15 consecutive business days, *see* 20 CFR 655.45. If relevant to the occupation and area of intended

employment, the CO may also direct the employer to provide written notice of the job opportunity to a community-based organization, as provided in 20 CFR 655.45(c). Both print newspaper advertisements and the notice of posting at the place(s) of employment must meet the minimum content requirements set forth in 20 CFR 655.41, and an employer must maintain documentation of all advertising and recruitment efforts in the event of an audit or other review, as required by 20 CFR 655.56.

Finally, the CO may direct an employer to conduct additional recruitment where the CO determines there is a likelihood that qualified U.S. workers will be available to fill the employer's job opportunity. 20 CFR 655.46(a). The regulation provides the CO with flexibility to select the appropriate methods of recruitment on a case-by-case basis to ensure an adequate test of the labor market and that U.S. workers are apprised of available job opportunities. 20 CFR 655.46(b) leaves to the CO's discretion the precise nature of the additional recruitment an employer may need to conduct, and provides a non-exclusive list of advertising options. The flexibilities contained in this regulatory provision permit the CO to keep pace with labor market trends and changes in technology that may affect how information about job opportunities is disseminated and how many U.S. workers search for and find jobs. Equally important, when assessing the appropriateness of a particular recruitment method, the CO considers all options at his or her disposal, including relying on the SWA's experience and expertise with local labor markets, and where appropriate, selects the appropriate methods of recruitment on a case-by-case basis.

C. Summary of Proposed Changes to the Recruitment Requirements and the Changes Adopted in this Final Rule

On November 9, 2018, the Departments issued a notice of proposed rulemaking (NPRM) announcing their intent to modernize the recruitment that an employer must conduct in conjunction with an H-2B application. *See* 83 FR 55977, 55979 (Nov. 9, 2018). Specifically, the Departments proposed to eliminate the general requirement that an employer advertise its job opportunity in a print newspaper and replace it with a requirement to post an electronic advertisement on a qualifying website. The Departments 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 Departments specifically solicited comments as to whether there were alternative methods of recruitment that would more broadly and effectively disseminate information about temporary nonagricultural job opportunities to U.S. workers. The Departments originally stated that they would accept comments through December 10, 2018, but in response to a request for an extension, they subsequently extended this period through December 28, 2018. The public may review all comments that the Departments received in response to the NPRM in the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number ETA-2018-0003.

Upon careful consideration of the comments received, the Departments have decided to adopt their 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-2B labor certification to advertise their job opportunities in print newspapers of general circulation in the area of intended employment. The Departments' 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, DOL will instead advertise all H-2B job opportunities by posting them on

SeasonalJobs.dol.gov, the expanded and improved version of DOL’s existing electronic job registry.

D. Joint Issuance of this Final Rule

In order to effectuate DHS’s requirement for DOL consultation pursuant to 8 U.S.C. 1184(c)(1), which is provided in the form of temporary labor certifications, DOL must issue regulations to structure procedures and standards for its issuance of labor certifications, as DOL has done for almost 50 years. On April 29, 2015, following a court’s vacatur of nearly all of DOL’s H-2B regulations, the Departments jointly promulgated an interim final rule (IFR) governing DOL’s role in issuing temporary labor certifications and in enforcing the statutory and regulatory rights and obligations applicable to employment under the H-2B program. *See* Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 FR 24042 (Apr. 29, 2015) (“2015 H-2B IFR”).

As explained in the 2015 H-2B IFR, following conflicting legal decisions about DOL’s authority to independently issue legislative rules to carry out its duties for the H-2B program under the INA, the Departments jointly issued the 2015 H-2B IFR to ensure that there can be no question about the authority for and validity of the regulations in this area. 80 FR at 24045; *see also* 80 FR at 24044-47.²

² The Departments’ authority to jointly regulate has not been found invalid, and nothing otherwise precludes joint action in the H-2B program. While the same district court twice issued an injunction against DOL’s unilaterally-issued H-2B rules, *see Bayou Lawn & Landscape Servs. v. Solis*, 2012 WL 12887385 (N.D. Fla. Apr. 26, 2012) and *Bayou Lawn v. Perez*, 81 F. Supp. 3d 1291, 1300 (N.D. Fla. 2014) (*Bayou II*), the court has since upheld the joint rules, *Bayou Lawn v. Johnson*, 173 F. Supp. 3d 1271, 1277, 1289–91 (N.D. Fla. 2016) (*Bayou III*), noting that the primary difference between the enjoined 2012 rules and the 2015 rules was their joint promulgation. *Id.* at 1277 n.2.

Specifically, DHS’s participation in the rulemaking is pursuant to its broad authority to issue rules in the H-2B program under 8 U.S.C. 1103(a)(3) and 1184(a), and, as referenced above, DOL—which has the institutional expertise on all matters relating to the domestic labor market and has for decades issued temporary labor certifications and legislative rules governing them in the nonagricultural foreign worker program—is necessarily authorized to promulgate rules governing its issuance of temporary labor certifications pursuant to 8 U.S.C. 1184(c). *See also* 8 U.S.C. 1103(a). The Departments further explained in the 2015 H-2B IFR that by jointly issuing that rule, “the Departments affirm that [it] is fully consistent with the INA and implementing DHS regulations and is vital to DHS’s ability to faithfully implement the statutory labor protections attendant to the program.” 80 FR at 24045-46. Litigation on these and related matters is ongoing. Accordingly, notwithstanding that DOL has the authority to independently issue this Final Rule, DHS is joining DOL in this rulemaking to ensure that there can be no question about the authority underlying this action.

E. Severability

To the extent that any portion of this final rule is declared invalid by a court, the Departments intend 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 Departments intend that the rest of the final rule continues to operate, if at all possible, in tandem with the reverted provisions.

II. Revisions to 20 CFR Part 655, Subpart A

A. The Departments are Rescinding the Regulation Generally Requiring Employers to Place Print Newspaper Advertisements in the Area of Intended Employment

1. Background

In the NPRM, the Departments proposed to revise 20 CFR 655.42 to replace the requirement for an employer to place print newspaper advertisements with a requirement 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 Departments 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 Departments also relied on DOL's experience in administering temporary and permanent labor certification programs, as well as anecdotal evidence received from stakeholders, who reported that advertisements in print newspapers were not an effective means of recruiting prospective U.S. workers for temporary nonagricultural job opportunities. In light of this data, experience, and stakeholder feedback, the Departments asserted that classified advertisements in print editions were becoming a less effective means of recruiting U.S. workers, and proposed to replace 20 CFR 655.42's current requirement to place a print newspaper advertisement with a requirement to post an electronic advertisement on the internet.

Many of the H-2B employers and employer associations that submitted comments in response to the NPRM applauded the Departments' efforts to modernize the recruitment process and confirmed, based on their experience, print newspaper advertising is expensive and ineffective in attracting U.S. workers who are likely to apply for temporary nonagricultural job opportunities in most cases. For example, one commenter stated that most of the H-2B petitioner employers it represents "almost never . . . receive U.S. applicants as a result of the print advertisements," and asserted, based on its experience, that print newspaper advertisements are not a meaningful source for recruiting workers for temporary nonagricultural job opportunities.

Similarly, a commenter representing an employer stated it prefers to advertise electronically, on social media and online job boards, because it never receives applications in response to print newspaper advertisements. Another commenter agreed that print advertising is ineffective and asserted that advertising costs are rising due to decreasing competition in the newspaper industry.

Nevertheless, a number of these commenters disagreed with the Departments' proposal to completely eliminate print newspaper advertisements. Some expressed concern that the proposed rule would have a significant adverse impact on the newspaper industry. One of these commenters acknowledged online advertising would be more effective but expressed concern only with the financial impact of the proposed rule.

One commenter associated with the newspaper industry asserted that the Departments' proposal to eliminate the print newspaper advertising requirement overlooked certain factors. This commenter stated that newspapers are more effective than the internet in disseminating information to relevant viewers. The same commenter also opined that many local newspapers reach a larger audience than their subscribership indicates because a single newspaper is read by multiple people, and the content in these newspapers is often available online. According to this commenter, the distribution and readership of a local newspaper, in all of its formats (print and electronic), can easily exceed the number of visits to a third-party job search website. Finally, this commenter maintained that newspapers play an essential role in placing electronic advertisements and noted that some newspapers use services that will not only post an employer's advertisement to large internet job boards, but also distribute the advertisements to other job search websites.

A number of commenters urged that the Departments 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 to post an electronic advertisement in accordance with the requirement in the proposed rule. These commenters provided varied reasons to justify their request. For instance, some were concerned about internet accessibility issues for employers. Others were concerned that mandating electronic advertisements would unfairly exclude U.S. workers who are uncomfortable with certain technology or live in areas without ready access to the internet. Some pointed to the studies cited in the NPRM as evidence that the Departments did not adequately consider whether online advertisements would be effective in reaching the types of U.S. workers who typically work in jobs filled by H-2B workers. One commenter asserted that the Departments' proposal would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because the Government would "restrict access to potential jobs" to people who have internet access.

Other commenters suggested that the Departments require employers to post advertisements both in print and electronic formats. Most of these commenters expressed general support for electronic advertising, but also noted that the Departments provided insufficient or incomplete evidence to demonstrate that electronic advertising would be any more effective in recruiting U.S. workers most likely to apply for temporary nonagricultural job opportunities. Some of these commenters expressed concerns that the Departments relied on information and data trends focusing on U.S. job seekers generally, and failed to consider more specific information regarding how job seekers located in rural communities and, more specifically, temporary nonagricultural workers obtain employment, as well as how employers recruit for temporary nonagricultural workers. These commenters cited data suggesting that many U.S. workers who might be interested in filling temporary nonagricultural job

opportunities may not have reliable high speed internet access, which would impede U.S. workers from viewing and responding to advertisements for H-2B job opportunities.

Some commenters cited Pew Research Center data suggesting that the internet was used in job searches much less frequently by job seekers possessing less than a high school education, earning less than \$30,000 per year, and residing in rural community areas, characteristics they asserted are often shared by workers in temporary nonagricultural employment.³ A commenter representing a newspaper industry association cited a recent study conducted by the Federal Communications Commission (FCC) indicating that nearly 40 percent of Americans, or approximately 24 million people, living in rural areas lack access to fixed broadband internet service, 30 percent of rural Americans lack access to mobile LTE broadband, and cellular reception is generally poorer in these areas. Some of these commenters urged the Departments to engage in additional consultation with the stakeholder community and State Workforce Agencies, and conduct a more formal assessment of internet access and usage by U.S. workers most likely to apply for temporary nonagricultural jobs.

At times citing reasons similar to those who advocated for giving employers the option to use either method (for example, pointing to data suggesting that some workers still use print sources to search for jobs and may have limited access to the internet), some commenters generally questioned whether electronic advertisements alone would be effective in reaching U.S. workers interested in temporary nonagricultural employment. They suggested the dual

³ Aaron Smith, *Searching for Work in the Digital Era*, Pew Research Center, Nov. 19, 2015, <http://www.pewinternet.org/2015/11/19/searching-for-work-in-the-digital-era>

requirement would ensure the broadest possible exposure to U.S. applicants. One commenter recommended leaving the print requirement in place until the new DOL platform discussed in the NPRM was fully operational, opining that the online advertising the NRPM described was unlikely to have sufficient oversight or consistency.

Finally, a commenter representing a newspaper industry association stated that electronic advertising would be less effective in recruiting temporary nonagricultural workers than the currently required newspaper advertisements. Citing the FCC report and the Pew Research Center report noted above, this commenter asserted that the proposed rule would make it more difficult for U.S. workers to apply for H-2B job opportunities because such jobs attract job seekers less likely to search for employment online, including those with a low income, low level of educational attainment, minorities, and job seekers residing in rural areas. The commenter stated that the Pew Research Center data showed rural Americans are less likely to use the internet to search for work than suburban or urban Americans. Despite these concerns, this commenter supported placement of advertisements on online job boards operated by newspapers or websites that partner with newspapers, such as Careerbuilder.com and Monster.com, but urged the Department to require both print and online advertising.

2. Discussion

After carefully considering the comments received, the Departments have decided to rescind 20 CFR 655.42. The regulations will no longer generally require a prospective H-2B employer to advertise its job opportunity in a newspaper serving the area of intended employment. This decision is grounded in the Departments' determination that the newspaper advertisements required under this section do not generally contribute in a significant way to the

labor market test that DOL administers to assess the availability of qualified U.S. workers, as compared to the electronic advertising as described in this rule.

This determination is supported by the lack of data indicating newspaper advertisements are an effective means of recruiting U.S. workers for temporary nonagricultural positions. Specifically, as noted in the NPRM, available data indicates that U.S. workers are now much more likely to turn to the internet to search for work, and classified advertisements in print newspaper editions are becoming a less effective means of notifying potential applicants about available job opportunities. *See* 83 FR 55877, 55979. The data available to the Departments and the supportive comments reviewed in preparation of this final rule lead DOL to conclude that electronic advertising is a more effective means of reaching U.S. workers seeking temporary nonagricultural job opportunities, and of achieving the goals of the H-2B labor certification program.⁴ In addition, the Departments considered anecdotal accounts in comments from employers and employer associations, who reported that the newspaper advertisements they have placed in connection with this requirement have yielded very few, if any, applications from qualified U.S. workers.

In arriving at this determination, the Departments carefully considered the arguments that some commenters raised in support of retaining the requirement to place print newspaper

⁴ *See* Aaron Smith, *Searching for Work in the Digital Era*, Pew Research Center, Nov. 19, 2015, <http://www.pewinternet.org/2015/11/19/searching-forwork-in-the-digital-era> (only 32 percent of Americans use “ads in print publications” when searching for employment and only four percent found ads in print publications to be the most useful tool in obtaining their recent employment); Elaine C. Kamarck and Ashley Gabriele, *The News Today: Trends in Old and New Media*, The Brookings Institution (Nov. 10, 2015)(Stating there are now only 400 newspapers for every 100 million Americans, and that only 15 percent of Americans receive a daily newspaper). <https://www.brookings.edu/research/the-news-today-7-trends-in-old-and-new-media>.

advertisements. As explained below, however, none of these arguments contradict the findings discussed above that newspaper advertisements as a general requirement of prospective H-2B employers are a less effective means of recruiting U.S. workers for temporary nonagricultural positions. Accordingly, these arguments have not persuaded the Departments that the regulations must require every employer seeking H-2B workers to place print advertisements in order to effectively test the labor market for able, willing, qualified, and available U.S. workers. As is currently the case, to the extent DOL determines that an advertisement in a particular print publication is likely to reach qualified and available U.S. workers in specific areas or across certain populations, the CO retains the discretion to 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 655.46.

Significantly, the commenters who urged the Departments 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 temporary nonagricultural positions. Rather, these commenters asserted advantages of newspaper advertisements in general terms or pointed to their importance in certain communities, compared to the advantage of electronic advertisements proposed in the NPRM, without specifically addressing the efficacy of requiring all prospective H-2B employers to post newspaper advertisements when recruiting U.S. workers for temporary or seasonal nonagricultural job opportunities. For instance, some commenters cited data indicating certain populations and demographics are less likely to use the internet when searching for jobs and one commenter asserted that Americans in some communities are more likely to turn to community newspapers than the internet to obtain local news and information. However, the referenced non-public data only purports to show newspaper readership; it does not

address individual job search habits, so the conclusion drawn is not supported by the data on which it is based and the Departments are unable to determine whether it offers any useful information with respect to this rulemaking. The arguments that commenters raised regarding the circulation and distribution of newspapers similarly do not refute the Departments' observation in the NPRM that job seekers rarely learn about job opportunities using print newspaper advertisements, nor do the assertions and anecdotes received in response to the NPRM. Similarly, the fact that DOL can easily verify whether an employer has placed a newspaper advertisement is irrelevant to whether the placement of such advertisements is an effective means of testing the labor market.

The Departments acknowledge that the rates of internet access and use of the internet to search for job opportunities vary among cross-sections of the population based on factors like age, location of residence, income, education level, and ethnicity. However, as noted in the NPRM, data indicates that the internet is an increasingly popular method that job seekers among all demographics use most often and find most reliable. For example, the Pew Research Center report cited in the NPRM and by the newspaper industry commenter concluded that the internet “is a near-universal resource among those who have looked for work recently.”⁵ The report noted that the data was “based on the entire public – many of whom are retired, not in the job market, or have simply not had a reason to look for a job recently” and while it is not possible to parse the data to determine precise rates of online job searching among all populations, it is clear

⁵ Aaron Smith, *Searching for Work in the Digital Era*, Pew Research Center, Nov. 19, 2015, <https://www.pewinternet.org/2015/11/19/1-the-internet-and-job-seeking/>.

that the internet is, by an increasing margin, the most widely used job search tool among job seekers across demographics. The Pew Research Center report ultimately found that when “[n]arrowing the focus to the 34% of Americans who have actually looked for a new job in the last two years, fully 90% of these recent job seekers have ever used the internet to research jobs, and 84% have applied to a job online.”⁶ Importantly, while the Pew Research Center data indicates rural Americans are less likely to use the internet to search for job opportunities than urban or suburban Americans, the data does not support the conclusion that rural Americans are more likely to use print newspapers than the internet when searching for job opportunities.

Similarly, while the Departments also acknowledge that some job seekers may lack reliable access to advertisements on the internet, such access limitations are true of advertisements in any form, and the Departments believe the data supports the conclusion that electronic advertisements are currently, and will be increasingly, accessible to an overwhelming majority of job seekers across a much broader geographic area than print advertisements. The Departments understand the concerns of some commenters that job seekers, particularly in rural areas, are less likely to have access to reliable internet service. However, as noted in the FCC report cited by the newspaper industry association commenter, the number of Americans that lack access is declining, including Americans living in rural areas.⁷ Importantly, while the FCC

⁶ Aaron Smith, *Searching for Work in the Digital Era*, Pew Research Center, Nov. 19, 2015, <http://www.pewinternet.org/2015/11/19/searching-for-work-in-the-digital-era/>.

⁷ Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 17-199, FCC 18-10 (Feb. 2, 2018), <https://docs.fcc.gov/public/attachments/FCC-18-10A1.pdf> (“2018 Broadband Deployment Report”) (noting that

report indicated a number of rural areas still lag behind the rest of the country in access to fixed-site, terrestrial broadband internet, the report also noted that the number of Americans with access to broadband internet is much higher when additionally considering sources like satellite internet service providers and mobile LTE.⁸ In contrast to increasing access to internet, the data cited in the NPRM shows that access to print newspapers continues to decline, there are now only 400 newspapers for every 100 million Americans, and only 15 percent of Americans receive a daily newspaper.⁹ In addition, print newspaper advertisements are often accessible only to persons in the areas where that newspaper is circulated, while electronic advertisements can reach job seekers in a much larger geographic area.

The Departments agree that no single recruitment method will reach all job seekers and do not disagree with comments asserting that other forms of advertising, such as print newspaper advertisements, may be effective in some limited circumstances. The move to electronic advertisements—and to SeasonalJobs.dol.gov in particular—is simply one important step in the Departments’ broader effort to modernize the H-2B program, which has for many years been

between 2012 and 2016, mobile and fixed terrestrial broadband access was deployed to 43.4 million Americans and the number of Americans without mobile or fixed terrestrial broadband access fell from 72.1 million to 20.6 million. When taking into account fixed terrestrial, satellite, and mobile internet access, the report also notes that “approximately 99.9 percent of Americans have access to one of these services, including 99.3 percent in rural areas and nearly all Americans in urban areas.”)

⁸ 2018 Broadband Deployment Report at 26, 87 (stating 99.9 percent of all Americans and 99.3 percent of those in rural areas have access to either fixed broadband or mobile LTE, indicating 99 percent have access to mobile LTE and 95.6 percent have access to broadband at speeds of 25/3 Mbps).

⁹ See Elaine C. Kamarck and Ashley Gabriele, *The News Today: 7 Trends in Old and New Media*, The Brookings Institution, Nov. 10, 2015, <https://www.brookings.edu/research/the-news-today-7-trends-in-old-and-new-media>.

hampered by the tools of another era. As explained further below, COs will retain their discretion under 20 CFR 655.46(a) to evaluate, on a case-by-case basis, whether additional recruitment is necessary to ensure an adequate test of the labor market for the employer's job opportunity. And, in some limited circumstances where newspaper print advertisements would be effective, the CO has the authority to direct such advertising.

Moreover, as discussed in detail below, the Departments have decided not to adopt the proposal to replace the requirement to place newspaper advertisements with a requirement for *an employer* to post an electronic advertisement on the internet. Instead, DOL 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 DOL is required to maintain under its existing regulations. *See* 20 CFR 655.34. 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, because such employers will not need to access the internet in order to participate in the H-2B 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, DOL will use information that an employer provides on its job order and H-2B application to generate the advertisement that DOL 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 DOL.

While the Departments are aware that the final rule may have an impact on members of the newspaper industry, the Departments are also obligated to carry out the statutory mandate in a manner that ensures the methods and locations in which employers conduct positive recruitment are effective. As a general requirement for all employers, the Departments have determined that newspaper advertisements do not generally contribute in a significant way 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, to the extent that it is relevant at all, is outweighed by the Departments' needs to more effectively carry out the 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 DOL conducts in connection with an H-2B application. Given the absence of evidence suggesting print newspaper advertisements are comparably effective in recruiting U.S. workers for temporary or seasonal nonagricultural job opportunities, the Departments have decided not to continue requiring most employers seeking an H-2B labor certification to place print newspaper advertisements. Accordingly, DOL is rescinding 20 CFR 655.42, the regulation that generally requires employers to place such advertisements.

B. Instead of Requiring a Prospective H-2B Employer to Post its Own Electronic Advertisement, as Originally Proposed, DOL Will Advertise the Employer's Job Opportunity on SeasonalJobs.dol.gov, an Improved and Expanded Version of the DOL's Electronic Job Registry

1. Background

In the NPRM, the Departments proposed to amend 20 CFR 655.42 to require that an employer post an advertisement on a website meeting certain criteria, namely 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 Departments suggested that such job search websites might include those that specialize in advertising job opportunities for the specific industry or occupation, and other classified advertisement websites with sections focused on local jobs. The Departments requested comments on whether they 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 Departments' proposed revision to 20 CFR 655.42, 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 Departments provided notice that DOL was evaluating the development of a centralized online platform to automate the advertising of H-2B job opportunities in order to assist employers in complying with the proposed electronic advertising requirement. Specifically, DOL 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 DOL transmit information about their H-2B 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 Departments received comments both in support and in opposition to the proposal to replace the print newspaper-advertising requirement in 20 CFR 655.42 with a requirement to post an electronic advertisement on the internet. Some commenters fully supported the Departments' proposed transition to electronic advertising, agreed it was a necessary modernization of the H-2B program, and expressed a belief that online advertisements would permit employers to recruit labor more quickly and reliably than print newspaper advertisements.

However, the Departments also received a number of comments that raised significant concerns with various aspects of the proposal. For instance, some commenters cited data indicating people in rural communities are less likely to have reliable high-speed internet access than those in urban areas, which could impede employers' ability to post—and U.S. workers' ability to view—electronic advertisements. These commenters raised concerns that workers in particular demographic groups, such as lower income workers or workers with low levels of education, are less likely to use the internet to search for job opportunities. 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 Departments continue 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 Departments have decided to rescind, rather than revise, the advertising requirement in 20 CFR 655.42. Instead, the Departments have decided that DOL will carry out the electronic advertising itself by posting H-2B job opportunities on SeasonalJobs.dol.gov, an improved and expanded version of the electronic job registry that DOL is required to maintain under its existing regulations. *See* 20 CFR 655.34. To accomplish this, in addition to placing copies of all approved H-2B job orders on its publicly accessible electronic job registry, 20 CFR 655.34, DOL will continue to enhance the functional capabilities of the registry so that it also serves as a job search website that broadly advertises and disseminates H-2B job opportunities to U.S. workers. As discussed in detail below, the Departments believe this approach strikes an appropriate balance between addressing the concerns that stakeholders have raised with the proposed electronic advertising requirement and realizing the Departments' goal of modernizing and improving the labor market test conducted in connection with an H-2B application.

Having DOL facilitate the electronic advertising of H-2B 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 DOL will be placing advertisements on SeasonalJobs.dol.gov on behalf of all employers using the information that employers provide to DOL in their H-2B applications. U.S. workers interested in a particular job opportunity can apply by directly contacting the employer, using the contact information—regardless of whether that is an email or physical address—that the employer provided to DOL. 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-2B employers—who historically have been the parties tasked with placing advertisements—by effectively transferring the responsibility (and cost) for this activity from prospective H-2B employers to DOL. Finally, and most importantly, it strengthens the integrity and efficiency of the labor market test that is conducted in connection with an H-2B application by leveraging the latest job search technologies to more broadly disseminate information about H-2B job opportunities through a centralized website. The enhancements that DOL is making to its electronic H-2B job registry, as well as each of these salutary effects, are discussed in further detail below.

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

As previously mentioned, after considering the comments received in response to the NPRM, the Departments have decided that the best approach is for DOL to assume the responsibility for posting an electronic advertisement through its own website. Accordingly, this final rule provides notice that DOL intends to continue to improve and enhance the electronic job registry that it maintains under its existing regulations. *See* 20 CFR 655.34 (generally requiring the CO to place a copy of an employer’s job order on an electronic job registry once the

employer's H-2B application has been accepted for processing, and generally requiring that this job order remain posted on the electronic job registry until 21 calendar days before the certified start date of work).

DOL initially implemented the job registry to accommodate the posting of H-2A job orders for two reasons. *See* 75 FR 6884, 6927 (Feb. 12, 2010) (2010 H-2A Final Rule). 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 employers could more easily identify available job opportunities. DOL later expanded use of the job registry to include H-2B job orders to disseminate temporary nonagricultural job opportunities to the widest audience possible. *See* 80 FR at 24074. DOL has used the same technology platform to host its electronic job registry—the iCERT Visa Portal System (iCERT System)—since July 2010, shortly after § 655.144 as promulgated in its 2010 H-2A Final Rule went into effect.

Under the current H-2B program, 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 21 calendar days before the certified start date of work. *See* 20 CFR 655.40(c). 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-2B job orders using several common data points—including the H-2B application number, employer name, area of intended employment, work contract period, and job title. Stakeholder feedback suggests that many

stakeholders value the transparency of a publicly available job registry and consistently use the current job registry to locate H-2B job orders.

Currently, however, the technology supporting the 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-2B job orders. It also serves as a static repository of H-2B 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 increases the risk of error, incomplete information, and delays in posting, especially during the winter months when employers are filing large numbers of applications for the upcoming spring and summer seasons.

To address these limitations and expand U.S. worker awareness and access to temporary and seasonal job opportunities, DOL is in the process of transitioning its electronic job registry to a new platform, SeasonalJobs.dol.gov, and it plans to decommission the public job registry on the iCERT System in the fall of 2019.¹⁰ SeasonalJobs.dol.gov is a mobile-friendly website that leverages the latest technologies to automate the electronic advertising of H-2B job opportunities *and* ensures copies of H-2B job orders are promptly available for public examination.

SeasonalJobs.dol.gov is currently operational. Once a CO has accepted an employer's H-2B application for further processing, DOL 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

¹⁰ DOL first announced that it would be launching SeasonalJobs.dol.gov on December 21, 2018. *See* <https://www.dol.gov/newsroom/releases/eta/eta20181221>.

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 DOL on its H-2B application and job order. While currently functional, DOL continues to enhance the functionality of SeasonalJobs.dol.gov to make information about H-2B 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. Users will be able to create and save customizable job search profiles and request email notifications informing them when DOL 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 DOL identify how many users are searching for work in certain areas of the country and more effectively steer H-2B job opportunities to groups of job seekers located in certain regional areas and/or seeking different types of temporary nonagricultural work.

In addition, SeasonalJobs.dol.gov will make information about H-2B 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-2B 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-2B job opportunities currently

advertised on SeasonalJobs.dol.gov, and DOL 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, DOL will be further enhancing the RSS feed capability to allow interested U.S. workers and stakeholders to tailor notifications of relevant job opportunities.

The Departments believe that the enhancements DOL 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 Departments received from commenters who urged DOL 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 these comments expressed support for a DOL-administered-advertising platform, 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. A labor union commenting on the proposal urged DOL to ensure that the platform would be compatible with smart phone technology, and that the platform provide notice of job opportunities to unions and worker advocacy organizations. It also urged the Departments to permit those organizations time to review the advertisements and provide input to DOL regarding the appropriateness of the occupational classification and designated prevailing wage. In contrast, one commenter believed it would be unnecessary for DOL to create a new or updated platform because it could use commercial applicant tracking systems that post advertisements to all of the major online job boards and permit applicants to complete applications at any time from any device.

The Departments have considered these comments, and while the Departments have decided not to go forward with the DOL-assisted advertising platform that was proposed in the NPRM, they anticipate that stakeholders will be pleased with the improvements DOL has—and continues—to make to the electronic job registry. DOL 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-2B program, the CO will place a copy of their approved H-2B job order on an electronic job registry. As explained above, DOL created this job registry to promote greater public awareness of and access to H-2A and H-2B job opportunities. The enhancements DOL has made and continues to make to SeasonalJobs.dol.gov, including the capability for third-party websites to extract H-2B job opportunities for broader advertising, are designed to further this goal and increase the likelihood that U.S. workers interested in temporary nonagricultural opportunities, as well as intermediaries providing services to those workers, receive timely notice of H-2B job opportunities.

Because the Departments are not implementing a separate DOL-assisted advertising platform, but rather enhancing the electronic job registry that DOL is currently required to maintain, the Departments have decided that U.S. workers will be best served if DOL implements these enhancements as soon as practicable. Nevertheless, the Departments value all suggestions and ideas to improve the functionality of SeasonalJobs.dol.gov and invites public input on changes that DOL can make to attract U.S. workers who are likely to apply for seasonal or temporary nonagricultural jobs. To facilitate public input, DOL has made the site easily accessible and included a specific function to collect stakeholder feedback and questions. DOL 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 Departments have also considered issues that several commenters raised regarding technical difficulties with DOL's existing job registry and the iCERT System, and agree that it is critical for SeasonalJobs.dol.gov to function effectively and reliably. Although this is a goal of the Departments independent of public comments in response to the NPRM, the above-referenced- steps that DOL is taking to meet this goal should address and allay the concerns of the stakeholder community.

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

The Departments 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 Departments' proposal to transition to electronic advertising, but a number of commenters urged the Departments to modify the proposal in various ways. For example, several commenters expressed concern that the proposed rule did not accommodate employers who had limited or no access to the internet, and they urged the Departments to provide employers the option of posting an electronic advertisement *or* print newspaper advertisements.

The Departments also received many comments suggesting that the standard they 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. One commenter explained that the approach announced in the NPRM was

“unworkable and unpredictable,” given the sheer number of websites that would qualify under the proposed standard. These commenters expressed varying opinions about the types of websites they believed should qualify and, for differing reasons, urged the Departments to further clarify, define, or list the websites where it would be appropriate for an employer to advertise an H-2B job opportunity. For example, several commenters suggested the Departments should require advertising on specific websites, including social media websites, state and county employment websites, and the National Labor Exchange, an online advertising platform operated by SWAs in partnership with operators of private online job boards.

Other commenters, 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 Departments also received comments from stakeholders on whether the final rule should exclude advertisements placed on websites operated by employers or the employer-client of a job contractor. An association of attorneys and legal professionals, as well as several labor unions, asserted that placement of advertisements on websites operated by employers is insufficient to satisfy an employer’s recruitment obligations. One commenter expressed concern that such advertising would require potential applicants to know that a specific employer is seeking to hire H-2B workers and permit unscrupulous employers to “hide” advertisements. A few of these commenters believed that employers should be required to post job advertisements on their websites as a supplement to advertisements on other websites, but did not believe advertising on these websites alone would be effective. In contrast, a commenter representing an

employer association believed advertising on employer websites would be effective because these websites would be appropriate to both the industry and location of the job opportunity.

In addition, some commenters sought clarification on the documentation that an employer would be required to retain under the proposed recordkeeping requirements. For example, one commenter expressed concern that the proposed rule did not clearly articulate what documentation an employer must retain. Another commenter suggested it would be overly burdensome to print and retain screen shots documenting compliance with this rule and suggested an employer's attestation should be sufficient to verify compliance. A labor union urged the Departments to require employers to include in their recruitment reports both the advertisements and the documentation of advertising. Another commenter believed the proposed screenshot documentation method was outdated, but did not suggest an alternative. Finally, 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.

The issues that these commenters raised have persuaded the Departments that it would be unduly difficult at this time 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. In addition, it is unnecessary to impose such requirements upon employers, when DOL has the capacity to produce similar benefits through its own website. Accordingly, as explained above, the Departments have decided not to adopt their proposal to require that an employer post an

electronic advertisement. Instead, DOL will advertise on an employer's behalf by posting its job opportunity on 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 Departments 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 DOL posts on SeasonalJobs.dol.gov will not create any additional regulatory burden for an employer because the employer will have already provided DOL with information about its job opportunity on its job order and H-2B application, which DOL will use to generate the advertisement it posts on 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-2B 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 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.

Finally, the Departments believe this approach leaves unscrupulous employers no leeway to “hide” their job opportunities on websites that they suspect are unlikely to attract qualified and available U.S. workers. SeasonalJobs.dol.gov will offer U.S. workers a free, publicly accessible, and easy-to-use job search platform that identifies all job opportunities for which employers are seeking to hire H-2B workers.

Thus, the Departments' revisions to the labor market test in this final rule seeks to reduce the burden of applying for an H-2B labor certification, while simultaneously broadening the dissemination of all H-2B job opportunities in a more uniform format through a modernized technology platform.

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

The Departments also received several comments questioning whether U.S. workers would be able—or likely—to access the electronic advertisements required under the proposed rule. In addition to concerns over issues of internet accessibility, explained elsewhere, commenters expressed concerns that U.S. workers would encounter difficulty determining where to look for information about potential job opportunities. A labor union, for example, stated that it would be difficult for job seekers to know where to look for advertisements because a vast number of websites might be appropriate under the criteria proposed in the NPRM. As explained below, the Departments' decision for DOL to assume control over the posting of the electronic advertisement not only reduces the burden of applying for an H-2B labor certification, but also improves worker access to information about H-2B job opportunities.

First, it ensures that all H-2B 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-2B job opportunities if employers were not posting advertisements in consistent locations or that unscrupulous employers could intentionally post advertisements on websites that are unlikely to yield applications from able, willing, and qualified U.S. workers.

Second, DOL can assure broader dissemination of H-2B 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 Departments' approach, it is DOL (and not the employer) who will ensure compliance with these requirements. DOL 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 DOL 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 DOL to create a single website design that can reach users across a wide array of computing devices. DOL continuously tests the site's mobile device compatibility using a series of emulation tools and a wide array of actual mobile devices.

Third, DOL will be able to improve the presentation of H-2B job opportunities to U.S. workers. While the Departments continue to believe that U.S. workers should have access to all of the information that is currently required by 20 CFR 655.41, they also understand that, in some situations, a concise summary of the job opportunity may be more attractive to U.S. workers, at least as a starting point. Accordingly, the advertisements that DOL places on SeasonalJobs.dol.gov provide a concise summary of the job opportunity, highlighting select information about an employer's job opportunity and including 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. Additionally, DOL intends to upgrade SeasonalJobs.dol.gov to allow users to create and manage

customizable notifications for the H-2B job opportunities. Specifically, as noted above, DOL plans to enhance the site's current RSS feed capability, which includes a basic function that alerts users when DOL 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 temporary or seasonal work and/or in predetermined 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, DOL will be able 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 Departments recognize 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 language 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. DOL 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-2B job opportunities presented on the site. The Departments understand the challenges (*e.g.*, numerous language dialects, accurately applying grammatical rules) associated with language translation tools and services, but believe 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.

DOL 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 Departments acknowledge that some U.S. workers may lack reliable access to the internet and agree that no single recruitment method will reach all job seekers. The Departments likewise do not dispute that other methods of recruitment may be effective in limited circumstances. Nevertheless, the Departments' 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-2B application. The existing labor market test additionally includes the intrastate and interstate clearance process administered by the SWA, *see* 20 CFR 655.16(c), the requirement for an employer to contact former U.S. employees, *see* 20 CFR 655.43, the requirement to post notice of the job opportunity at the worksite, and, in certain circumstances, provide written notice of the job opportunity to a community-based organization, *see* 20 CFR 655.45.

The Departments believe that the enhancements DOL has and continues to make to the electronic job registry will improve the existing labor market test by increasing awareness of H-2B 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 retains the option for DOL to require additional recruitment where the CO has determined that there is a likelihood there are qualified U.S. workers who will be available for the work, including where the job opportunity is located in an Area of Substantial Unemployment. *See* 20 CFR 655.46. Accordingly, even if certain U.S. workers interested in temporary nonagricultural jobs 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.

C. The Departments are Retaining the Options to Require Additional Employer-Conducted Recruitment Under § 655.46.

In developing this final rule, the Departments have given careful consideration to the responses they received in response to their request for comments regarding whether there are alternative methods of recruitment that would more broadly and effectively disseminate information about available job opportunities to U.S. workers. A number of commenters suggested other methods of recruitment, such as placing advertisements on radio stations, making use of 24/7 job hotlines, and placing advertisements in community-based or other publications that target populations who may be interested in temporary or seasonal work.

Two commenters representing worker advocacy organizations also urged the Departments to require more dissemination of H-2B job opportunities to unemployed U.S. workers through DOL-funded grantees under the Workforce Innovation and Opportunity Act and expand union notification requirements to those unions representing workers in the job opportunity on a nationwide scale. These commenters also recommended that the Departments expand the recruitment activities of the SWAs to ensure job seekers, particularly those who lack adequate access to the internet, are made aware of H-2B job opportunities. Specifically, one of these commenters suggested the Departments require the SWAs to consult with worker advocacy organizations to develop annual plans for recruiting U.S. workers on a nationwide scale targeting specific groups of unemployed U.S. workers using a variety of advertising methods.

Some commenters were not opposed to the idea of internet advertising, but suggested strengthening the requirements in the rule, maintaining that a single advertisement would not account for the broad range of positions and geographic areas where H-2B workers are employed. They urged the Departments to require employers to further tailor their recruitment. One commenter asserted that modern-day recruitment of hourly workers demanded a targeted marketing strategy such as a 24/7 job hotline and applicant tracking system. Another argued for leaving the specific methods of recruitment to the SWAs, who could develop recruitment plans suited to the needs of each locality. Another thought it “critically important” that the CO maintain flexibility to require additional advertising in certain circumstances. This commenter also recommended that, in addition to any electronic means for applying to jobs, there should also be a variety of non-electronic means, to account for the possibility that a U.S. worker will have limited or only short-term access to the internet.

The Departments appreciate the ideas and suggestions that they received on alternative forms of recruitment. DOL 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 or using commercial recruitment services—are challenging to regulate and monitor. Because the Departments do not currently have sufficient information regarding the efficacy of these proposals in recruiting U.S. workers for temporary nonagricultural employment, the Departments have decided that a generally applicable requirement for every employer to use these methods is unwarranted at this time. However, to the extent that DOL receives information indicating that one or more of these methods are effective in a particular area or among specific groups of U.S. workers, the CO retains the authority under 20 CFR 655.46 to order an employer to use that method to recruit U.S. workers.

The Departments continue to believe that this provision provides sufficient flexibility to design recruitment procedures—and the appropriate means of recruitment in those areas—on a case-by-case basis taking into account the occupation and current labor market conditions. This provision 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. The Departments’ intention in requiring additional recruitment under this provision, including in areas of substantial unemployment (ASU), is predicated on the belief that more recruitment will result in more opportunities for U.S. workers. ASUs by their nature have a higher likelihood of worker availability; DOL’s recognition of worker availability in these areas is a strong indicator that these open job opportunities may have more receptive potential populations.

Under 20 CFR 655.46 the CO has discretion to evaluate, on a case-by-case basis, the appropriate locations and methods of recruiting where there may be qualified U.S. workers available for job opportunities. The types of additional recruitment the CO may require the employer to conduct include print advertising, advertising on the employer’s or another website, and contacting community and faith-based organizations. Title 20 CFR 655.46 does not afford the CO unlimited discretion; rather, it authorizes the CO to order only the recruitment necessary to ensure an adequate test of the labor market for the employer’s job opportunity.

In determining whether and what additional recruitment is required for a position, the CO will continue to consider, among other information, information that DOL obtains from SWAs who are familiar with current labor market conditions and positioned to provide advice about the effective methods of recruiting U.S. workers for the job opportunity. The Departments acknowledge the comments they 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 DOL receives from SWAs, the CO may determine that a particular method of advertising (*e.g.*, a community-based newspaper) covering a regional area may be effective in recruiting U.S. workers for a particular position, in a specific location, during certain periods of the year, or in response to local or regional events like natural disasters, layoffs, and plant closures. 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.

D. Other Technical Amendments Related to the Final Rule

This final rule also makes technical amendments to several regulatory provisions to ensure they conform with the substantive changes to the recruitment process discussed above. First, the rule amends 20 CFR 655.19(e)(1), 655.40(b), and 655.41(a) by replacing references to 20 CFR 655.42 with references to 20 CFR 655.43 to reflect the Departments' decision to eliminate the requirement for all employers to place print newspaper advertisements. For the same purpose, the final rule amends 20 CFR 655.56 by eliminating paragraph (c)(2)(ii), which references 20 CFR 655.42, and redesignating paragraphs (c)(2)(iii), (iv), and (v) as paragraphs (c)(2)(ii), (iii), and (iv), respectively. The final rule also amends 20 CFR 655.71 by removing the reference to "newspapers and other publications" to clarify that the CO has the discretion to order advertising in sources like newspapers and other publications, but 20 CFR 655.71(c) does not require the CO to order advertising in these sources.

Finally, the final rule also makes a minor technical revision to WHD regulations at 29 CFR part 503 to ensure they conform with the substantive changes to the recruitment process

discussed above. Specifically, the final rule eliminates 29 CFR 503.17(c)(2)(ii), which includes reference to 20 CFR 655.41 and 655.42, and redesignates paragraphs (c)(2)(iii), (iv), and (v) as (c)(2)(ii), (iii), and (iv), respectively.

E. Out of Scope Comments on the Proposed Rule

The Departments received comments on several issues that were unrelated to their proposal to modernize the recruitment that an employer must conduct under the regulations by replacing print newspaper advertisements with electronic advertisements posted on the internet. The Departments recognize and appreciate the value of these comments and suggestions. However, they are outside the scope of this rulemaking and the Departments cannot adopt them without additional regulatory—and in some cases Congressional—action.

II. 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. *See* 58 FR 51735 (Oct. 4, 1993). 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-2B 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 § 655.42 to remove the newspaper advertising requirement, and the revision of § 655.56 to eliminate document retention requirements associated with print newspaper advertisements.

1. Discussion of Comments

In response to the NPRM, which instituted an online advertising requirement in place of the current print advertising requirement, some commenters took issue with the Departments' assumption that the cost savings of the proposed rule outweighed its costs. One commenter stated that the analysis did not attempt to estimate what burdens the proposed rule or any alternative rules considered would impose on U.S. workers, relative to the current rule, in terms

of their ability to search for and locate available jobs. Another commenter suggested that the Departments' 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 same commenter believed the proposed rule's use of advertising rates for the largest newspapers in the five states with the most H-2B temporary labor certifications inflated the NPRM's estimated costs. The commenter stated that the proposed rule's analysis did not specify the criteria used for developing the cost estimates and was not representative of the smaller newspapers employers may use to meet print advertising requirements, noting that print advertising costs vary based on a number of factors (*e.g.*, advertisement size, number of lines, and geographic location). Additionally, the commenter asserted that the analysis inflated cost estimates because it failed to account for the fact that the advertising fee charged by many newspapers includes both digital and print advertising. Finally, the commenter asserted the analysis failed to account for the costs of compliance with the proposed rule for employers and the costs associated with DOL enforcement of the rule.

The proposed rule based the cost estimates for two newspaper advertisements on advertising costs from newspapers with the widest circulation in the five states where H-2B 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-2B prevalent states. The estimate of \$1,606.16 represents, on average, a reasonable estimate of cost savings of removing print newspaper requirements. As for the costs associated with online job posting, the Departments agree with the commenter's concern that DOL may have underestimated the cost of online advertising. As explained elsewhere in this preamble, the Departments have concluded that, to reduce this cost and burden, expand the reach of each ad, and leverage DOL's existing

technology and infrastructure, it is appropriate for DOL rather than employers to place H-2B electronic advertisements. The final rule replaces the print newspaper-advertising requirement with employers' job opportunities posted on a DOL-maintained website, SeasonalJobs.dol.gov, thus eliminating the cost to employers. Additionally, the enhancements DOL has and continues to make to SeasonalJobs.dol.gov are designed to further the Departments' goal to promote greater public awareness of and access to H-2B job opportunities in order to increase the likelihood that U.S. workers interested in nonagricultural opportunities, as well as intermediaries providing services to those workers, receive timely notice of H-2B 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-2B program and outweighed by the Departments' statutory obligation to ensure that able, willing, and qualified U.S. workers are not available. As explained above, DOL has also estimated the cost savings from eliminating the document retention requirement. In terms of cost impacts on job seekers, the costs of searching and applying for a job electronically are less than the cost associated with searching and applying for a job through a newspaper recruitment advertisement.¹¹

Four commenters asserted that the analysis did not consider the effect the rule would have on the newspaper industry, though three of these commenters acknowledged that the proposed rule estimated that lost revenue would equal \$9.45 million. While this rule may have

¹¹ The Departments acknowledge that some job seekers may not have access to the internet. For this group of job seekers, it may not necessarily be less costly to search and apply for a job online. However, the Departments believe that the number of job seekers without internet access is a small portion of the population.

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.¹²

2. Subject-by-Subject Analysis

The Departments' analysis below considers the expected impacts of the following aspects of the final rule against the baseline (*i.e.*, the 2015 Interim Final Rule (80 FR 24042 (Apr. 29, 2015))): (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.

(a) Eliminating the Use of Print Newspaper Advertisements

This final rule modernizes H-2B recruitment by rescinding the regulation at 20 CFR 655.42 imposing the requirement for print newspaper advertisements, and amending the regulation at 20 CFR 655.41(a) to delete reference to the content of print advertisements. In conjunction with this rule, DOL 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.

To estimate the cost savings to employers that would result from this final rule, the Departments multiplied the average number of H-2B labor certifications issued each fiscal year

¹² The total estimated advertising revenue for the newspaper industry in 2018 was \$14.3 billion (<https://www.journalism.org/fact-sheet/newspapers/>)

by the average cost to an employer of placing a print advertisement. First, the Departments used program data for FYs 2015-2017 to estimate that DOL approves, on average, 5,879 H-2B labor certifications each fiscal year.¹³ To estimate the average cost of a print ad, the Departments identified the top five states where prospective H-2B employers received temporary labor certifications,¹⁴ and 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 § 655.41. Based on this data, the Departments estimated that, on average, it costs an employer \$803.08 to place a single advertisement (one day) complying with § 655.41's content requirements.

Thus, placing the advertisement on two separate days, as required by § 655.42, costs an employer, on average, twice as much, or \$1,606 (\$803 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 § 655.42 currently requires that one of the advertising days be a Sunday, the Departments did not identify a significant difference in cost between advertisements placed on Sundays and weekdays. Therefore, the Departments did not distinguish between these two costs when calculating total advertising cost savings.

¹³ The average is based on 5,106 H-2B certifications in FY 2015; 5,933 certifications in FY 2016; and 6,599 certifications in FY 2017. See <https://www.foreignlaborcert.doleta.gov/performance/data.cfm>.

¹⁴ The top five states where employers seek to place H-2B workers are Colorado, Florida, Louisiana, Texas, and Virginia.

To estimate the annual newspaper advertising costs that employers will avoid under the final rule, the Departments multiplied the estimated annual number of H-2B temporary labor certifications (5,879) by the average newspaper advertising cost of \$1,606. This yielded annual cost savings of \$9.44 million. The annualized cost savings over the 10-year period is \$9.44 at both discount rates of 3 and 7 percent. The Departments believe that the cost to DOL of upgrading its database and posting an employer's job opportunity on its website would be *de minimis* on an annual basis.

(b) Eliminating Document Retention Requirements

The final rule amends § 655.56 to eliminate the document retention requirement at § 655.56(c)(2)(ii) associated with print newspaper advertisements. To estimate the cost savings from this revision, the Departments calculated the average cost for each employer to retain print advertisements records for each H-2B certification. To do so, the Departments multiplied each employer's per-certification staff time by its per-certification staff cost. The Departments estimate that it takes a human resources (HR) specialist, on average, two minutes to store (print and file) proof of print advertisement. The Departments used the median hourly wage rate of an HR specialist at a nonagricultural business (\$31.84)¹⁵ then adjusted the base wage rate using a loaded wage factor (1.63)¹⁶ to account for fringe benefits and overhead. The Departments then multiplied the resulting wage rate by the staff time (two minutes), which yielded a cost of \$1.73

¹⁵ Wage derived from Bureau of Labor Statistics median hourly wage for HR Specialists (occupational code 13-1071), May 2017.

¹⁶ 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.

per certification. As explained above, the Departments estimate that DOL issues, on average, 5,879 H-2B labor certifications each fiscal year. By multiplying the estimated annual number of certifications by the cost per certification (\$1.73), the Departments estimated an annual cost savings of \$10,171. The annualized cost savings over the 10-year period is \$10,171 at both discounts rates of 3 percent and 7 percent.

(c) Time to Review and Understand the Rule

During the first year after this rule takes effect, employers seeking H-2B workers will need time to learn about the new requirements. The Departments assume that many employers participating in the H-2B program will learn about the requirements of the new rule from an industry newsletter or bulletin. The Departments estimate that an employer will require approximately 10 minutes to understand the rule change, as this final rule addresses only the job-advertising and document retention requirements for employers seeking H-2B workers, and eliminates those requirements without replacing them with new ones.

The requirement to review and understand the rule represents a cost to employers participating in the H-2B program only in the first year of the rule. The Departments estimate 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 Departments estimated a wage rate by multiplying the median hourly wage of an HR specialist at a nonagricultural business (\$31.84) by the loaded wage rate (1.63) to account for fringe benefits and overhead. The Departments then multiplied the resulting wage rate by the required staff time (10 minutes), which yielded a cost of \$8.65 per

employer. The Departments estimated the total cost of reading and reviewing the rule by multiplying \$8.64 by the average annual number of employers participating in the H-2B program over FY 2015-2017 (5,326).¹⁷ This calculation results in a cost of \$46,069 in the first year the rule is in effect. The annualized cost over the 10-year period is \$5,243 and \$6,130 at the discount rates of 3 percent and 7 percent, respectively.

3. Summary of Impacts

The Departments estimate the total first-year cost of the final rule to be \$46,069. This cost results from the time required to read and review the final rule for the average annual number of unique H-2B employer applicants (based on FY 2015-2017 data). The Departments estimate total first-year cost savings of \$9.45 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 \$9.41 million.

Generally, annual cost savings are expected to be \$9.45 million in every year following the first. The 10-year discounted net cost savings of the rule range from \$80.59 million to \$66.35 million (with 3 percent and 7 percent discount rates, respectively). The annualized net cost savings of the final rule is \$9.45 at both the 3 percent and 7 percent discount rates. When the Departments use a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost savings of this final rule are \$7.57 million at a discount rate of 7 percent.

B. Regulatory Flexibility Act

¹⁷ The average is based on 4,764 unique H-2B employer applicants in FY 2015; 5,296 employers in FY 2016; and 5,917 employers in FY 2017.

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 direct effects¹⁸ 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.

This final rule may impact small businesses that request H-2B temporary labor certification. The Departments assume that the average number of H-2B certifications requested by any small business per year would be one. The Departments estimate that small businesses would incur a one-time cost of \$8.65 to familiarize themselves with the rule and would incur annual cost savings of \$1,606 associated with advertising online rather than in print newspapers. In addition, the Departments estimate that a small business would incur annual cost savings of \$1.63 related to the elimination of the document retention requirement. Over a 10-year analysis period, the net annualized cost savings for a small business would be \$1,719 at a 7-percent discount rate.

¹⁸ Because this rule does not directly regulate newspapers, the rule's potential effects on newspaper revenue are outside the scope of this specific analysis. The Departments note, however, that these effects are discussed above.

The Departments reviewed the impacts of the proposed rule for two North American Industry Classification System (NAICS) Codes that frequently request H-2B certification: NAICS 561730: Landscaping Services, and NAICS 721110: Hotels (except Casino Hotels) and Motels. The Small Business Administration estimates that revenue for a small business with NAICS Code 561730 is \$7.5 million and for NAICS Code 721110 is \$32.5 million.¹⁹ The impact of the final rule would be less than 1 percent of annual revenue for the smallest businesses in these industries with an employment size fewer than five (\$197,491 for NAICS 561730 and \$321,239 for NAICS 721110).²⁰ Based on this determination, the Departments certify that this final rule will not have a significant economic impact on a substantial number of small entities.

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.

¹⁹ 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.

²⁰ U.S. Census, *2012 SUSB Annual Data Tables by Establishment Industry*, <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html>.

See 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this final rule to OMB and obtained approval using emergency clearance procedures outlined at 5 CFR 1320.13.

This final rule modernizes and improves the labor market test that DOL uses to assess whether 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; and (2) expanding and enhancing the Department's electronic job registry. More specifically, this final rule eliminates the general requirement for a prospective H-2B 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 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. Rather, as explained in detail in this final rule, DOL will advertise the employer's job opportunity on the employer's behalf on SeasonalJobs.dol.gov, an expanded and improved version of DOL's existing H-2B job registry website.

During the NPRM stage of this rule, DOL requested the creation of a new OMB Control Number 1205-0534 to account for the time burden and cost associated with the online recruitment process. However, upon further consideration and in light of the revised requirements in the final rule, it is appropriate, instead, to revise the existing OMB Control Number 1205-0509 to account for the burden and costs associated with requiring online ads only, and for the transfer of this burden from employers to DOL. DOL is seeking OMB's approval under PRA emergency procedures to revise 1205-0509 to accommodate this change.

The information collection requirements associated with OMB Control Number 1205-0509, are revised under this final rule as follows. This burden breakdown only reflects the updated burden with regard to the advertisement requirement:

Agency: DOL-ETA.

Type of Information Collection: Currently approved.

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

Agency Form Number: ETA 9142B, instructions and accompanying appendixes.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 5,879.

Average Responses per Year per Respondent: 2.

Total Estimated Number of Responses: 11,758.

Average Time per Response: 7 minutes per application.

Total Estimated Annual Time Burden: 0 hours. (Employers will not be burdened with the advertisement requirements.)

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.

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 Departments have not prepared a statement under the Act.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This final rule would not be 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). The Office of Information and Regulatory Affairs has found that this final rule is not likely 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 would 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 Order 13175, Indian Tribal Governments

This final rule does not have “tribal implications” because it would 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 would 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 would 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 final rule is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This final rule 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 has not been identified to 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 was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. It was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. It meets the applicable standards provided in section 3 of Executive Order 12988.

List of Subjects

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.

29 CFR Part 503

Administrative practice and procedure, Employment, Foreign Workers, Housing, Housing standards, Immigration, Labor, Nonimmigrant workers, Penalties, Transportation, Wages.

Accordingly, part 655 of title 20 and part 503 of title 29 of the Code of Federal Regulations are amended as follows:

Title 20 -- EMPLOYEES' BENEFITS

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; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

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).

Subpart E issued under 48 U.S.C. 1806.

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 § 655.19 by revising paragraph (e)(1) to read as follows:

§655.19 Job contractor filing requirements.

* * * * *

(e)(1) Either the job contractor or its employer-client may place the required job order and conduct recruitment as described in §§ 655.16 and 655.43 through 655.46. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the NPC with the *Application for Temporary Employment Certification*, ETA Form 9142B.

* * * * *

3. Amend § 655.40 by revising paragraph (b) to read as follows:

§655.40 Employer-conducted recruitment.

* * * * *

(b) *Employer-conducted recruitment period.* Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.43 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.

* * * * *

4. Amend § 655.41 by revising paragraph (a) to read as follows:

§ 655.41 Advertising requirements.

(a) All recruitment conducted under §§ 655.43 through 655.46 must contain terms and conditions of employment that are not less favorable than those offered to the H-2B workers and, at a minimum, must comply with the assurances applicable to job orders as set forth in § 655.18(a).

* * * * *

§ 655.42 [Removed and Reserved]

5. Remove and reserve § 655.42.

§ 655.56 [Amended]

6. Amend § 655.56 by removing paragraph (c)(2)(ii) and redesignating paragraphs (c)(2)(iii), (iv), and (v) as paragraphs (c)(2)(ii), (iii), and (iv), respectively.

7. Amend § 655.71 by revising paragraph (c)(2) to read as follows:

§655.71 CO-ordered assisted recruitment.

* * * * *

(c) * * *

(2) Designating the sources where the employer must recruit for U.S. workers and directing the employer to place the advertisement(s) in such sources;

* * * * *

Title 29 -- LABOR

**PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY
NONIMMIGRANT NON-AGRICULTURAL WORKERS DESCRIBED IN THE
IMMIGRATION AND NATIONALITY ACT**

8. The authority citation for part 503 continues to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184; 8 CFR 214.2(h); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114-74 at §701.2.

§ 503.17 [Amended]

9. Amend § 503.17 by removing paragraph (c)(2)(ii) and redesignating paragraphs (c)(2)(iii), (iv), and (v) as paragraphs (c)(2)(ii), (iii), and (iv), respectively.

Kevin K. McAleenan,
Acting Secretary of Homeland Security.

Eugene Scalia,
Secretary *of*
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Labor.