



**DEPARTMENT OF HOMELAND SECURITY**

**RIN 1615-AC63**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

**Office of the Secretary**

**29 CFR Part 18**

**Wage and Hour Division**

**29 CFR Part 503**

**[DOL Docket No. DOL-2020-0019]**

**RIN 1290-AA43**

**Discretionary Review by the Secretary of Labor**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security and the Department of Labor (DOL) are jointly issuing this notice of proposed rulemaking to seek public comments on a proposal to extend DOL's recently established system of discretionary Secretary of Labor review to H-2B temporary labor certification cases (H-2B cases) pending before or decided by the Department of Labor's Board of Alien Labor Certification Appeals and to make technical, conforming changes to regulations governing the timing and finality of those decisions and of decisions from the Department of Labor's Administrative Review Board in H-2B cases.

**DATES:** The Departments invite interested persons to submit comments on the proposed rule. To ensure consideration, comments must be in writing and must be received by [INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may send comments, identified by Regulatory Identification Number (RIN) **1290-AA43**, electronically only, consistent with the following instructions. Submit comments, read background documents, and read comments received through the Federal eRulemaking Portal at <http://www.regulations.gov>. To locate this rulemaking, use docket number DOL-2020-0019 or key words such as “Office of Administrative Law Judges” or “Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.” Instructions for submitting comments are found on the [www.regulations.gov](http://www.regulations.gov) website. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking. Please be advised that comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Therefore, the Departments recommend that commenters safeguard their personal information by not including social security numbers, personal addresses, telephone numbers, and email addresses in comments. It is the responsibility of the commenters to safeguard their information.

If you need assistance to review the comments of the rulemaking, the Department will consider providing the comments and the proposed rule in other formats upon request. For assistance to review the comments or obtain the direct final rule in an alternate format, contact Mr. Todd Smyth, General Counsel, U.S. Department of Labor, at (513) 684-3252.

**FOR FURTHER INFORMATION CONTACT:** Todd Smyth, General Counsel, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW, Washington, DC 20001-8002; telephone (513) 684-3252. Individuals with hearing or speech impairments may access the telephone number above by TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:** This preamble is divided into five sections: Section I describes the process of rulemaking using a direct final rule with a companion proposed rule; Section II provides general background information on the proposed rulemaking; Section III summarizes the proposed regulatory text; Section IV covers the administrative requirements for this proposed rulemaking; and Section V provides additional information and instructions to those wishing to comment on the rule.

This proposed rule is not expected to be an Executive Order 13771 regulatory action because it is not significant under Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this as not a major rule as defined by 5 U.S.C. 804(2).

#### **I. Proposed Rule Published Concurrently with Companion Direct Final Rule**

The Department of Homeland Security (DHS) and Department of Labor (DOL) (collectively, the Departments) are simultaneously publishing with this proposed rule an identical “direct final” rule elsewhere in this issue of the Federal Register, with an identical change to the regulatory text. In direct final rulemaking, an agency publishes a final rule with a statement that the rule will go into effect unless the agency receives significant adverse comments within a specified period. If the agency receives no significant adverse comments in response to the direct final rule (DFR), the DFR goes into effect. If the agency receives significant adverse comments, the agency withdraws the direct final rule and treats such comments as submissions in response to the proposed rule. The proposed rule provides the procedural framework to finalize the proposed regulatory changes through a final rule. Agencies typically use direct final rulemaking when they anticipate a rule will be non-controversial.

The Departments have determined that this rule is suitable for direct final rulemaking. The proposed revision to DOL’s internal adjudicatory processes would implement the mechanism by which the Secretary of Labor can review H-2B cases pending before or decided by the Board of Alien Labor Certification Appeals (BALCA) and decisions of the Administrative

Review Board (ARB)—a power the Secretary already possesses with respect to other cases pending before or decided by BALCA under DOL’s recent final rule, *Rules Concerning Discretionary Review by the Secretary*, 85 FR 30608 (May 20, 2020), and, with respect to ARB decisions in H-2B cases, reflects a power he already possesses pursuant to the Secretary of Labor’s Order 01-2020, *Delegation of Authority and Assignment of Responsibility to the Administrative Review Board*, 85 FR 13186 (Mar. 6, 2020). This proposed rule is a rule of agency management and personnel and is entirely a procedural change to how officers within DOL exercise delegated authority on behalf of the Secretary of Labor; therefore, the Departments are not required to engage in a notice and comment process to issue this rule. *See* 5 U.S.C. 553(a)(2), (b)(A). Further, discretionary review by an agency head over adjudicatory decisions exists in many other executive branch agencies, including the Department of Justice, the Department of the Interior, and the Department of Education. The proposed rule is thus consistent with well-known and well-established models of internal agency review both at DOL and at other agencies.

The comment period for this proposed rule runs concurrently with the comment period for the direct final rule. Any comments received in response to this proposed rule will also be considered comments regarding the direct final rule and vice versa. For purposes of this rulemaking, a significant adverse comment is one that addresses (1) why the rule is inappropriate, including challenges to the rule’s underlying premise or approach; or (2) why the rule will be ineffective or unacceptable without a change. In determining whether a significant adverse comment counsels in favor of withdrawal of the direct final rule, the Departments will consider whether the comment raises an issue serious enough to warrant a substantive response. A comment recommending an addition to the rule will not be considered significant and adverse unless the comment explains how the direct final rule would be ineffective or unacceptable without the addition.

The Departments request comments on all issues related to this rule, including economic or other regulatory impacts of this rule on the public.

## **II. Background and Joint Issuance for this Rulemaking**

BALCA has authority over appeals from the decisions of the Employment and Training Administration's adjudication of foreign labor certification applications. It was created by regulation to exercise delegated authority on behalf of the Secretary of Labor. Its existence is neither compelled nor governed by statute, and it is entrusted with the power to issue final agency decisions in the name of the Secretary of Labor. Earlier this year, DOL issued regulations establishing a mechanism by which the Secretary of Labor can exercise review of decisions issued by BALCA on his behalf in the H-2A, CW-1, and PERM programs. This rule will apply the same mechanism for review over decisions issued by BALCA in the H-2B program.

To ensure that the Secretary of Labor has the ability to properly supervise and direct the actions of the Department he supervises, earlier this year the Secretary also established a system of discretionary secretarial review over the decisions of the ARB. *See* Secretary of Labor's Order No. 01-2020. DOL's authority to effect this reform, as well as the related rulemaking undertaken earlier this year to establish discretionary review over decisions of and appeals before BALCA, derives from 5 U.S.C. 301, which authorizes the heads of agencies to regulate the internal operations of their departments; 5 U.S.C. 305, which provides for continuing review of agency operations; and the Secretary of Labor's authority to administer the statutes and programs at issue in ARB and BALCA proceedings, including the H-2B temporary-labor-certification and enforcement programs provided for in DHS and DOL's 2015 joint rules. In combination, these authorities establish many of the powers of DOL within the Office of the Secretary, and give the Secretary of Labor wide latitude to delegate those powers to his subordinates on the terms he deems appropriate. Thus, the Secretary of Labor has the power to delegate his authority to appropriately supervise the adjudicatory process within DOL, and has similarly exercised that same authority to assert his decision-making prerogatives by modifying the terms on which the

members of the ARB and BALCA exercise his delegated authority. The Departments propose to do so through this rulemaking with respect to H-2B cases pending before or decided by BALCA.

This proposal, like those actions undertaken earlier this year, preserves the existing structures by which DOL processes adjudications while giving the Secretary of Labor the option, in his sole discretion, to initiate review directly. As with DOL's existing mechanisms of secretarial review, under this reform the Secretary will rely on BALCA to assist him in identifying cases where secretarial review may be warranted. Also consistent with current practices at DOL and other agencies, the Departments do not anticipate that the power of secretarial review over H-2B cases will be used often. The Departments similarly anticipate that secretarial review—while completely within the Secretary of Labor's discretion as the principal officer accountable for DOL's activities—will typically be reserved for matters of significant importance. Finally, DOL will ensure that the secretarial review process will continue to be accomplished in a manner that complies with any applicable legal requirements.

The Departments appreciate the expeditious nature of BALCA proceedings involving temporary labor certifications and, as with the existing system of review, do not anticipate that secretarial review over H-2B cases will significantly disrupt or otherwise impede the way such cases are currently processed. As noted above, the Departments expect that secretarial review over BALCA's H-2B decisions will likely not be exercised often. Further, BALCA decisions will remain the Secretary of Labor's final administrative decision unless the Secretary himself assumes jurisdiction over the case. For example, once BALCA issues a decision that grants a labor certification or remands for further processing, the private party in the case will be able to proceed immediately to the next step of the application process. The private party will be delayed in doing so only if the Secretary of Labor later decides to undertake review. Moreover, as it does now, 29 CFR 18.95 will continue to limit any potential uncertainty that may exist because of the possibility of secretarial review by placing strict time limits on when the Secretary of Labor will have the option of assuming jurisdiction over a case.

As noted in the DOL's prior rulemaking establishing secretarial review over other BALCA cases, 85 FR 30608, the Departments have determined that it is appropriate to issue jointly this rule regarding the Secretary of Labor's review authority over H-2B cases under 29 CFR 18.95. This determination follows conflicting court decisions concerning DOL's authority to issue legislative rules on its own to carry out its duties in the H-2B program. Although the Departments each have authority to issue rules implementing their respective duties in the H-2B program, including rules providing for secretarial review, the Departments are proposing to make the amendments to the applicable regulations jointly to ensure that there can be no question about the authority underlying such amendments. This approach is consistent with the joint rulemaking governing the Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 FR 24042 (Apr. 29, 2015) (codified at 8 CFR part 214, 20 CFR part 655, and 29 CFR part 503).

### **III. Discussion of Changes**

This rule proposes revisions to 29 CFR part 18 by modifying the conditions under which an H-2B decision of BALCA becomes the final decision of DOL and by extending to H-2B cases the process by which the Secretary of Labor may exercise discretionary review over cases pending before or decided by the BALCA. Technical amendments are also made to 20 CFR part 655, subpart A to harmonize the manner in which BALCA issues decisions on behalf of the Secretary with the system of discretionary review established in 29 CFR part 18. Additionally, this rule proposes to modify or remove the reference to "final" decisions of the ARB in 20 CFR 655.73(g)(6) and 29 CFR 503.55 to reflect that the finality of ARB decisions is governed by Secretary of Labor's Order 01-2020.

### **IV. Administrative Requirements of the Proposed Rulemaking**

*Executive Orders 12866, Regulatory Planning and Review, and 13563, Improving Regulation and Regulatory Review*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866. The Departments, in coordination with the Office of Management and Budget (OMB), determined that this proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866 because the rule will not have an annual effect on the economy of \$100 million or more; will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; and will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Furthermore, the rule does not raise a novel legal or policy issue arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

Accordingly, OMB has waived review.

*Regulatory Flexibility Act of 1980*

Because no notice of proposed rulemaking is required for this rule under section 553 of the Administrative Procedure Act, the regulatory flexibility analysis requirements of the Regulatory Flexibility Act, 5 U.S.C. 603, 604, do not apply to this rule. *See* 5 U.S.C. 603(a), 604(a).

*Paperwork Reduction Act*

The Departments have determined that this proposed rule is not subject to the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, as this rulemaking does not involve any collections of information. *See* 5 CFR 1320.3(c).

*Unfunded Mandates Reform Act of 1995 and Executive Order 13132, Federalism*

The Departments have reviewed this proposed rule in accordance with the requirements of Executive Order 13132 and the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*, and have found no potential or 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. As there is no Federal mandate contained herein that could result in increased expenditures by state, local, and tribal governments, or by the private sector, the Departments have not prepared a budgetary impact statement.

*Executive Order 13175, Consultation and Coordination with Indian Tribal Governments*

The Departments have reviewed this proposed rule in accordance with Executive Order 13175 and has determined that it does not have “tribal implications.” The proposed rule does not “have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

*Signature*

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the *Federal Register*.

**V. Notice and Comment**

A. APA Requirements for Notice and Comment

This proposed rule addresses matters of internal agency management and personnel, as well as matters of agency organization, practice and procedure, and consequently are exempt from the notice and public comments requirements of the Administrative Procedure Act. *See* 5 U.S.C. 553(a)(2), (b)(A). Nevertheless, the Departments wish to provide the public an opportunity to submit comments.

## B. Publication of Comments

Please be advised that the Departments will generally post all comments without making any change to the comments, including any personal information provided. The [www.regulations.gov](http://www.regulations.gov) website is the Federal e-rulemaking portal, and all comments received will be available and accessible to the public on this website. Therefore, the Departments recommend that commenters safeguard their personal information by not including social security numbers, personal addresses, telephone numbers, or email addresses in comments. It is the responsibility of the commenter to safeguard his or her information.

## C. Access to Docket

In addition to all comments received by the Departments being accessible on [www.regulations.gov](http://www.regulations.gov), the Departments will make all the comments available for public inspection during normal business hours at the office listed in the **ADDRESSES** section above. If you need assistance to review the comments, the Departments will provide you with appropriate aids such as readers or print magnifiers. The Departments will make copies of the proposed rule available, upon request, in large print or electronic file on portable digital media. The Departments will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments or obtain the proposed rule in an alternate format, contact Todd Smyth, General Counsel, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW, Washington, DC 20001-8002; telephone (513) 684-3252.

Individuals with hearing or speech impairments may access the telephone number above by TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

### **List of Subjects**

#### *20 CFR Part 655*

Administrative practice and procedure, Labor certification processes for temporary employment.

#### *29 CFR Part 18*

Administrative practice and procedure, Labor.

Administrative practice and procedure, Obligations, Enforcement, Immigration and Nationality Act, Temporary alien non-agricultural workers.

For the reasons discussed in the joint preamble, part 655 of title 20 of the Code of Federal Regulations and parts 18 and 503 of title 29 of the Code of Federal Regulations are proposed to be amended as follows:

**DEPARTMENT OF LABOR**

**Title 20: Employees' Benefits**

**Employment and Training Administration**

**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), (p), 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), (p), 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. In § 655.61, revise paragraph (e) to read as follows:

**§ 655.61 Administrative review.**

\* \* \* \* \*

(e) *Review.* The BALCA must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95:

- (1) Affirm the CO’s determination; or
- (2) Reverse or modify the CO’s determination; or
- (3) Remand to the CO for further action.

\* \* \* \* \*

3. In § 655.72, revise paragraph (b)(3) to read as follows:

**§ 655.72 Revocation.**

\* \* \* \* \*

(b) \* \* \*

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the Administrator, OFLC after the review of rebuttal evidence, according to the appeal procedures of § 655.61.

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4. In § 655.73, revise paragraph (g)(6) to read as follows:

**§ 655.73 Debarment.**

\* \* \* \* \*

(g) \* \* \*

(6) *ARB decision.* The ARB’s decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

\* \* \* \* \*

**Title 29: Labor**

**Office of the Secretary of Labor**

**PART 18—RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE  
HEARINGS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES**

5. The authority citation for part 18 continues to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 551–553; 5 U.S.C. 571 note; E.O. 12778; 57 FR 7292.

6. In § 18.95, revise paragraph (b)(1) to read as follows:

**§ 18.95 Review of decision and review by the Secretary.**

\* \* \* \* \*

(b) \* \* \*

(1) In any case for which administrative review is sought or handled in accordance with 20 CFR 655.61, 655.171(a), or 655.461, at any point from when the BALCA receives a request for review until the passage of 10 business days after the date on which BALCA has issued its decision.

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**Title 29: Labor**

**Wage and Hour Division**

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

7. 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.

8. Revise § 503.55 to read as follows:

**§503.55 Decision of the Administrative Review Board.**

The ARB's decision will be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

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Eugene Scalia,

Secretary of Labor

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Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of  
Homeland Security

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