



## DEPARTMENT OF LABOR

### Employment and Training Administration

#### 20 CFR Parts 653 and 655

#### Wage and Hour Division

#### 29 CFR Part 501

[DOL Docket No. ETA-2009--0004]

### Temporary Agricultural Employment of H-2A Aliens in the United States; Ratification of Department's Actions

**AGENCY:** Employment and Training Administration and Wage and Hour Division, Department of Labor

**ACTION:** Ratification.

**SUMMARY:** The Department of Labor is publishing notification of the Assistant Secretary for Employment and Training's and the Administrator of the Wage and Hour Division's ratification of the rule published February 10, 2010, titled *Temporary Agricultural Employment of H-2A Aliens in the United States*.

**DATES:** This ratification was signed on January 7, 2025.

#### FOR FURTHER INFORMATION CONTACT:

For further information regarding 20 CFR part 655, contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number).

For further information regarding 29 CFR part 501, contact Daniel Navarrete, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via Teletypewriter (TTY)/ Telecommunications Device for the Deaf (TDD) by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On September 4, 2009, the Department of Labor (“DOL” or “Department”) issued a notice of proposed rulemaking (“NPRM”) in the Federal Register (“FR”) to amend its regulations regarding the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. *See Temporary Agricultural Employment of H–2A Aliens in the United States*, 74 FR 45906 (Sept. 4, 2009) (“NPRM”). The NPRM was open for public comment for 45 days until October 5, 2009. *See Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010) (“Final Rule”).

On February 12, 2010, DOL published a final rule in the FR that adopted much of the regulatory text proposed in the NPRM, with some important changes. *See Final Rule*, 75 FR at 6884. The Final Rule included improvements to the application processing procedures, worker protections, and program integrity measures. The Final Rule went into effect on March 15, 2010.

Since publication of the Final Rule, a question has been raised in litigation concerning whether a separate rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in the Non-Range Occupations in the United States*, 88 FR 12760 (Feb. 28, 2023), was approved by the Attorney General in consultation with the Secretary of Labor and the Secretary of Agriculture. 8 U.S.C. 1188, Statutory Note.<sup>1</sup> Further, on November 25, 2024,

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<sup>1</sup> Although this provision vests approval authority in the “Attorney General,” the Secretary of Homeland Security now may exercise this authority. *See* 6 U.S.C. 202(3)–(4), 251, 271(b), 291, 551(d)(2), 557; 8 U.S.C. 1103(c) (2000).

the Secretary of Homeland Security, in consultation with the Secretary of Labor and Secretary of Agriculture, approved the Final Rule.

To resolve any possible uncertainty with respect to the Final Rule, the Department, through its Assistant Secretary for Employment and Training and its Administrator of the Wage and Hour Division, is ratifying the Final Rule. Under established case law, an agency may, through ratification, “purge[] any residual taint or prejudice left over from” a potential defect in a prior governmental action.<sup>2</sup> The Department is issuing this ratification out of an abundance of caution, and this ratification is not a statement that the Final Rule is invalid absent this ratification.

## **II. Ratification**

By virtue of the authority vested in the Secretary of Labor by law, including by the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 *et seq.* (“INA”), and as delegated to the Assistant Secretary for Employment and Training, 75 FR 66268, and the Administrator of the Wage and Hour Division, 75 FR 55352, we are affirming and ratifying a prior action by Jane Oates, Assistant Secretary for Employment and Training, and Nancy Leppink, Deputy Administrator of the Wage and Hour Division. On February 12, 2010, the Employment and Training Administration and the Wage and Hour Division published in the FR the Final Rule codifying amendments to the Department’s regulations regarding the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. 75 FR 6884 (Feb. 12, 2010).

The Final Rule was signed by Assistant Secretary Oates and Deputy Administrator Leppink. We have full and complete knowledge of the Final Rule action taken by former Assistant Secretary Oates and former Deputy Administrator Leppink. Subsequent to the Secretary of Homeland Security’s documented approval of the Final Rule dated November 25,

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<sup>2</sup> *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019).

2024, in consultation with the Secretary of Labor and Secretary of Agriculture, and out of an abundance of caution and to avoid any doubt as to its validity, we have independently evaluated the Final Rule and the basis for adopting it. We have determined that the amendments to the regulations in the Final Rule are consistent with the Secretary of Labor's statutory responsibility to certify that there are insufficient able, willing, and qualified U.S. workers available to perform the needed work and that the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. We have also determined that the changes adopted in the Final Rule strike an appropriate balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages of workers in the United States similarly employed by improving the H-2A application and temporary labor certification process, strengthening protections for workers, and enhancing program integrity measures. We also agree with the Department's certification that the Final Rule does not have a significant economic impact on a substantial number of small entities. *See* Final Rule, 75 FR at 6953.

Therefore, pursuant to our authorities as the Assistant Secretary for Employment and Training and the Administrator of the Wage and Hour Division, and based on our independent review of the action and the reasons for taking it, we hereby affirm and ratify the Final Rule, as of January 7, 2025, including all regulatory analysis certifications contained therein. This action is taken without prejudice to any right to litigate the validity of the Final Rule as approved and published on February 12, 2010. Nothing in this action is intended to suggest any legal defect or infirmity in the approval or publication of the Final Rule.

**José Javier Rodríguez,**  
Assistant Secretary, Employment and Training Administration, Labor.

**Jessica Looman,**  
Administrator, Wage and Hour Division, Labor.  
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