



**BILLING CODE: 4510-FR-P**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

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

**RIN 1205-AB90**

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

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Labor (the Department or DOL) is proposing regulatory revisions that would modernize the recruitment an employer seeking H-2A nonimmigrant agricultural workers must conduct when applying for a temporary labor certification. In particular, the Department is proposing to replace the print newspaper advertisements that its regulations currently require with electronic advertisements posted on the internet, which the Department believes will be a more effective and efficient means of disseminating information about job openings to U.S. workers. The Department is proposing to replace, rather than supplement, the newspaper requirements because it believes that exclusive electronic advertisements posted on a website appropriate for the workers likely to apply for the job opportunity in the area of intended employment would best ensure that U.S. workers learn of job opportunities.

**DATES:** Comments must be submitted, in writing, on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may send comments, identified by Docket No. ETA-2018-0002 or Regulatory Information Number (RIN) 1205-AB90, by any of the following methods:

Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments (under “Help” > “How to use Regulations.gov”).

Mail and hand delivery/courier: Submit written comments and any additional material to Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5641, Washington, DC 20210.

*Instructions:* Label all submissions with “RIN 1205-AB90.” Please submit your comments by only one method.

Please be advised that the Department will post all comments received that relate to this notice of proposed rulemaking (NPRM) on <http://www.regulations.gov> without making any change to the comments or redacting any information. The <http://www.regulations.gov> website is the Federal e-rulemaking portal, and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters remove personal information (either about themselves or others) such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses included in their comments, as such information may become easily available to the public via the <http://www.regulations.gov> website. It is the responsibility of the commenter to safeguard personal information.

Also, please note that, due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, the Department encourages the public to submit comments on <http://www.regulations.gov>.

*Docket:* To read or download comments or other material in the electronic docket, go to <http://www.regulations.gov> website (search using RIN 1205-AB90 or Docket No. ETA-2018-0002). The Department also will make all the comments it receives available for public inspection by appointment during normal business hours at the above address. If you need assistance to review the comments, the Department will provide appropriate aids, such as readers or print magnifiers. The Department will make copies of this proposed rule available, upon request, in large print and electronic file on computer disk. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternative format, contact the Office of Policy Development and Research at (202) 693-3700 (this is not a toll-free number). You may also contact Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5641, Washington, DC 20210.

*Comments under the Paperwork Reduction Act (PRA):* In addition to filing comments with ETA, persons wishing to comment on the information collection (IC) aspects of this rule may send comments to: Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-ETA, Office of Management and Budget, Room 10235, 725 17th Street, NW, Washington, DC 20503, Fax: (202) 395-6881 (this is not a toll-free number), e-mail: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). See Paperwork Reduction Act section of this proposal for particular areas of interest.

**FOR FURTHER INFORMATION CONTACT:** William W. Thompson, II, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, Box #12-200, 200 Constitution Ave NW, Washington, DC 20210, telephone (202) 513-7350 (this is not a toll-free number).

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

**SUPPLEMENTARY INFORMATION:**

**I. Background**

**A. Legal Framework**

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes the H-2A nonimmigrant visa classification for a worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services ... of a temporary or seasonal nature.” 8 U.S.C. 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. 1184(c)(1) and 1188.<sup>1</sup> Among other things, the INA requires the Secretary of Homeland Security to consult with appropriate agencies of the Government—and in particular, DOL—before approving a petition to employ H-2A nonimmigrant agricultural workers. 8 U.S.C. 1184(c)(1). To that end, the Secretary of Homeland Security may not approve a petition to employ H-2A workers unless the petitioning employer has applied to the Secretary of Labor (Secretary) for a certification that:

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

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

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

8 U.S.C. 1188(a)(1); see also 20 CFR 655.100. The Secretary has delegated his statutory responsibility to make this certification—known as a “temporary labor certification”—to the Assistant Secretary for Employment and Training. Secretary’s Order 06-2010 (October 20, 2010). And the Assistant Secretary has, in turn, delegated the authority to the Office of Foreign Labor Certification (OFLC). 20 CFR 655.101.

The INA specifies a number of conditions under which the Secretary cannot grant a temporary labor certification. 8 U.S.C. 1188(b). One such condition is where “[t]he Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.” 8 U.S.C. 1188(b)(4). The “positive recruitment” that the INA requires “is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer’s job offer.” 8 U.S.C. 1188(b)(4). An employer’s obligation to engage in this recruitment terminates “on the date the H-2A workers depart for the employer’s place of employment.” *Id.*

Since 1987, the Department has relied on regulations promulgated under the authority of the INA to review and evaluate an application for a temporary labor certification under the H-2A visa classification. 20 CFR part 655, subpart B. The last significant revisions to these regulations, which are published in 20 CFR part 655, subpart B, took effect in 2010, following notice and comment rulemaking. 75 FR 6884 (Feb. 12, 2010) (2010

Final Rule). Pursuant to these regulations, the “positive recruitment” mandated by the INA is defined as “[t]he active participation of an employer or its authorized hiring agent, performed under the auspices and direction of the OFLC, in recruiting and interviewing individuals in the area where the employer’s job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer’s job opportunity is located, in an effort to fill specific job openings with U.S. workers.” 20 CFR 655.103.

The standards and procedures governing the positive recruitment of U.S. workers are set forth in sections 655.151-655.154. These regulations generally require, among other things, that an employer seeking H-2A temporary labor certification 1) place two print advertisements in a newspaper of general circulation serving the area of intended employment, § 655.151(a); 2) contact former U.S. workers who were employed in the previous year, § 655.153; and 3) recruit U.S. workers in up to three additional states designated by the Secretary as states of traditional or expected labor supply, § 655.154.

As relevant here, section 655.151(a) requires an employer seeking an H-2A temporary labor certification to place a print advertisement on two separate days, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and workers likely to apply for the job opportunity. Section 655.151(b) provides that if the employer’s job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, OFLC may direct the employer, in place of a Sunday edition, to place a print advertisement in the regularly published daily edition with the widest circulation in the area of intended employment. Both advertisements must meet the minimum content requirements set

forth in section 655.152, and the employer is required to maintain documentation of the actual newspaper advertisements in the event of an audit or other review, as required by section 655.167(c)(1)(ii).

In addition, under section 655.154, an employer must conduct positive recruitment within a multistate region of traditional or expected labor supply where an OFLC Certifying Officer (CO) finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Paragraph (c) of this section leaves the precise nature of the additional positive recruitment that an employer must conduct to the discretion of the CO. In practice, however, the Department has generally directed employers to place print advertisements in newspapers with the largest circulations in the states identified by the CO as traditional or expected labor supply states.

#### **B. Need For New Rulemaking**

The Department is proposing to modernize the recruitment that an employer must conduct under its regulations by replacing print newspaper advertisements with electronic advertisements posted on the internet. After due consideration, the Department believes that advertisements posted on the types of websites described below will reduce burden on employers and applicants, and be a more effective and efficient means of recruiting U.S. workers than the print newspaper advertisements that section 655.151 currently requires.

The Department is basing this proposal on several considerations. First, available data indicates that farmworkers in the United States very rarely, if ever, learn about job opportunities or obtain employment through print newspaper advertisements. According

to recent data available from the National Agricultural Workers Survey (NAWS), farmworkers did not identify print newspaper advertisements as a source for obtaining their current job.<sup>2</sup> This data is consistent with the Department's experience conducting audit examinations of labor certifications approved under the current rule, as well as anecdotal evidence that the Department has received from stakeholders, who report that print newspaper advertisements are not an effective method of recruiting prospective U.S. workers for agricultural job opportunities.

Second, available data also suggests that U.S. workers are now much more likely to turn to the internet to search for work than classified advertisements in print newspapers. For instance, a recent survey conducted by the Pew Research Center indicated that 79 percent of Americans research jobs online, whereas only 32 percent use "ads in print publications," and only four percent found ads in print publications to be the most useful tool in obtaining their recent employment.<sup>3</sup> This trend is likely to continue as U.S.

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<sup>2</sup> See U.S. Department of Labor, Employment and Training Administration, Findings from the National Agricultural Workers Survey (NAWS) 2013-2014: A Demographic and Employment Profile of United States Farmworkers (Research Report No. 12, Dec. 2016), available at <https://www.doleta.gov/naws> (last visited June 9, 2018).

<sup>3</sup> 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/>. See also R. Jason Faberman & Marianna Kudlyak, *What Does Online Job Search Tell Us About The Labor Market?*, ECONOMIC PERSPECTIVES, Jan. 2016, <https://www.chicagofed.org/~media/publications/economic-perspectives/2016/ep2016-1-pdf.pdf> (observing that the online job search has become the preferred method of search for nearly all types of job seekers and recent research suggests that it is the new norm for how job seekers find work); Richard Hernandez, *Online Job Search: The New Normal*, Monthly Labor Review (Bureau of Labor Statistics, U.S. Dept. of Labor, Wash. D.C.), Jan. 2017, <https://www.bls.gov/opub/mlr/2017/beyond-bls/pdf/online-job-search-the-new-normal.pdf> (reporting that the online job search is now the most popular method of job hunting).



workers gain increased and more convenient access to the internet via smartphones and other digital devices,<sup>4</sup> and print newspaper circulation continues to decline.<sup>5</sup>

Consequently, classified advertisements in print editions are becoming a less effective means of notifying U.S. workers about available job opportunities.<sup>6</sup> In recognition of this fact, many newspapers now offer online classified employment listings using multi-platform content providers, and popular online job search websites power the job boards of thousands of newspaper sites, providing a lower cost recruiting option for employers and job seekers alike.<sup>7</sup>

Finally, electronic advertisements offer employers a less expensive, more convenient means of broadly disseminating information about their job opportunities to potential U.S. workers. Many job search websites offer standard advertising packages for free or at significantly lower marginal costs than the standard print newspaper

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<sup>4</sup> In 2018, 89 percent of American adults used the internet, and 77 percent of American adults owned a smartphone, up from just 35 percent in 2011. See Internet/Broadband Fact Sheet, PEW RESEARCH CENTER, Feb. 5, 2018, <http://www.pewinternet.org/fact-sheet/internet-broadband/>; *Mobile Fact Sheet*, PEW RESEARCH CENTER, Feb. 5, 2018, <http://www.pewinternet.org/fact-sheet/mobile/>.

<sup>5</sup> By 2014, fewer than 15 percent of Americans received a daily newspaper. 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>.

<sup>6</sup> According to the Pew Research Center, the total circulation of U.S. daily newspapers (print and digital combined) in 2017 was approximately 31 million, down 38 percent from more than 50 million in 2007. Pew Research Center, June 13, 2018, <http://www.journalism.org/fact-sheet/newspapers/> Newspapers Fact Sheet. Conversely, job search websites today are attracting a far larger pool of potential applicants to find jobs. For example, the top 15 job search websites alone attract nearly 200 million unique visitors each month to search for employment.

<sup>7</sup> See Christine Del Castillo, *Does Anyone Advertise Jobs in Newspapers Anymore?*, WORKABLE, May 19, 2016, <https://resources.workable.com/blog/newspaper-job-ads>.

advertisement, and advertisements can be posted on these sites for longer periods than a typical print newspaper advertisement remains in circulation, providing greater exposure of the employer's job opportunity to U.S. workers at no additional cost to the employer. Moreover, unlike print advertisements, which are subject to publishing deadlines that can delay exposure of the job opportunity to U.S. workers, an electronic advertisement can be posted within minutes or hours of submission to the website.

In light of the foregoing, the Department is proposing to revise the recruitment that an employer must conduct under section 655.151 to replace print newspaper advertisements with the electronic advertisements posted on the internet described below. The Department is also proposing minor amendments to sections 655.167 and 655.225 to conform those sections to the proposed elimination of print newspaper advertisements.

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

### **A. Revise Section 655.151 to Replace Newspaper Advertisements with Electronic Advertisements**

The Department is proposing to revise section 655.151(a) to replace the requirement that an employer place print newspaper advertisements with a requirement that the employer advertise its job opportunity on a website that is widely viewed and appropriate for use by workers who are likely to apply for the job opportunity in the area of intended employment. The Department proposes to remove the word "occupation" from the text in order to address a possible redundancy in the language. This proposed drafting change is stylistic only, and the Department intends to effect no substantive change by it.

The proposed rule would not mandate that an employer post its advertisement on a specific website. Rather, proposed section 655.151(a) would allow an employer to place

an advertisement on any of a variety of websites that are widely viewed and appropriate for use by workers who are likely to apply for the job opportunity in the area of intended employment, including websites operated by state or local agricultural associations, job search websites that advertise agricultural job opportunities, and other classified advertisement websites with sections focused on local jobs.

The Department anticipates that advertisements posted on the types of websites described above will provide greater exposure of agricultural job opportunities to U.S. workers than the print newspaper advertisements that section 655.151 currently requires, because they can be more easily accessed by U.S. workers across a much larger geographic area and for a longer period. The Department included websites operated by state or local agricultural associations as an example of an appropriate website because some state farm bureaus, commissions, and cooperatives provide services that help agricultural employers recruit farm labor for seasonal work, and the Department believes these organizations can be a valuable asset in advertising and coordinating farm labor demands across employers and leveraging social media to connect employers with potential workers in the state or local area.

The Department invites comments on whether it should establish qualifying criteria (e.g. minimum number of unique visitors per month) or more specifically define the types of websites that would fulfill the requirement in proposed section 655.151, and whether the regulation should explicitly exclude advertisements placed on websites of agricultural associations that serve as agents or sole or joint employers of H-2A workers, as defined in section 655.103. The Department also solicits comments on whether, instead of eliminating print newspaper advertisements, it should instead offer electronic

advertisements as an alternative means of satisfying the existing advertising requirement in section 655.151. The Department is not proposing this option, given the data and trends discussed in Section I.B., which suggest that electronic advertisements will be more effective in disseminating information about available job opportunities to the American workforce. The Department invites comments on whether there are agricultural employers that lack the technology or internet access necessary to place the electronic advertisements described in the proposed rule, and if so, how the Department should determine whether such employers have met their obligation to engage in positive recruitment of U.S. workers. For instance, the Department could leave current recruitment requirements in place as an option for such employers. The Department solicits comments on whether there are alternative methods that would more broadly and effectively disseminate information about available job opportunities to U.S. agricultural workers.

Proposed section 655.151(b) specifies that an employer's advertisement must be clearly visible on the website's homepage or be easily retrievable using the search tools on the website. Any advertisement that is not clearly visible on the website's homepage must be easily retrievable. The Department will consider an advertisement to be easily retrievable if it can be quickly accessed using a prominently displayed link on the website's homepage or the search tools and filters that are prominently displayed on the website's homepage. Each navigation choice or interaction that a job seeker has with the website should take him or her closer to the job opportunity being advertised, and applicants should be able to quickly locate job vacancies using a number of search criteria, such as occupation, job or position title, geographic location, pay range, and

keywords in the job description. The employer must use commonly understood terms and keywords to describe its job opportunity when placing the advertisement, so that U.S. workers who are likely to apply for the position will retrieve the advertisement when using the website's search function.

Proposed section 655.151(b) would also require an employer to post the electronic advertisement for a period of no less than 14 consecutive calendar days. Unlike the print newspaper advertisements that an employer must place under the current rule, which are typically published once, many websites offer standard advertising packages that allow an employer to place an advertisement for a weekly period or up to 30 calendar days for free or at a significantly lower marginal cost than a standard print newspaper advertisement. Accordingly, the Department anticipates that the consecutive fourteen-day posting period in proposed section 655.151(b) will attract more U.S. workers to job opportunities than the print newspaper advertisements that section 655.151 currently requires, because an employer's job opportunity will be easily accessible to U.S. workers for a longer period than a print newspaper advertisement, at no additional cost to the employer.

Further, in order to ensure that the job opportunity described in the advertisement is readily available to U.S. workers, proposed section 655.151(b) would also require that the advertisement be publicly accessible at no cost to an applicant. To meet this requirement, the website on which the advertisement is placed cannot require U.S. workers to establish personal accounts or make payments of any kind to view the advertisement. The website must also be functionally compatible with the latest commercial web browser platforms and easily viewable on mobile smartphones and similar portable devices. Moreover, like

the current rule, proposed section 655.42(b) would require that the advertisement comply with the minimum content requirements set forth in section 655.41.

In order to ensure that an employer retains the evidence necessary to demonstrate compliance with proposed section 655.151(a) and (b), proposed section 655.151(c) would require an employer to print and retain screen shots of the webpages on which its advertisement appears and screen shots of the webpages establishing the path used to access the advertisement. Although the proposed rule does not require employers to submit this documentation to the CO with their recruitment reports, an employer must nevertheless retain this documentation in accordance with section 655.167 and provide it to the Department in the event of an audit or other review.

The proposed section 655.151(d) includes a transition provision that would permit an employer submitting an *Application for Temporary Employment Certification* with a date of need prior to October 1, 2019 to elect between placing (a) an electronic advertisement in accordance with the requirements in the proposed rule, or (b) two newspaper advertisements in accordance with existing requirements. Because the Department is proposing to have this rule take effect immediately upon publication of the final rule, the Department is including this transition period to provide flexibility to employers that seek additional time to understand and comply with the proposed regulatory revisions, while simultaneously permitting employers that wish to place electronic advertisements immediately upon the effective date of the final rule the ability to do so. The transition provision is intended to better ensure, among other things, that employers who have purchased newspaper advertising space in advance do not lose the benefit of such purchase.

However, the option to elect between the placement of newspaper and electronic advertisements would apply only to those applications with a start date of need prior to October 1, 2019. All employers submitting an *Application for Temporary Employment Certification* with a start date of need after the transition period ends (*i.e.*, employers with dates of need beginning on or after October 1, 2019) would be required to place an advertisement in accordance with the proposed revisions to section 655.151(a)-(c).

#### **B. Retain Section 655.154's Requirement for Positive Recruitment**

As previously discussed, employers seeking H-2A temporary labor certification are statutorily required to engage in positive recruitment of U.S. workers in multistate regions of traditional or expected labor supply. Under section 655.154(c), when a job opportunity is located in an area served by traditional or expected labor supply states, the CO will designate no more than three states for each area of intended employment listed on the employer's application and describe the additional positive recruitment steps that the employer must conduct. In determining the specific recruitment steps that an employer must conduct, the CO must consider "the normal recruitment efforts of non H-2A agricultural employers of comparable or smaller size in the area of intended employment, and the kind and degree of recruitment efforts which the potential H 2A employer made to obtain foreign workers." Section 655.154(b). The Department's standard practice has been to require an employer to place print advertisements in newspapers serving the traditional or expected labor supply states designated by the CO, see 75 FR at 6930; however, given the data and trends discussed in Section I.B., the Department does not intend to continue this practice. While the Department continues to believe that the CO must evaluate the appropriate locations and methods of recruiting

U.S. workers in traditional or expected labor supply states on a case-by-case basis, where the CO determines that an electronic advertisement placed under proposed section 655.151 is a sufficient means of recruiting U.S. workers in the traditional or expected labor supply states identified for the employer's job opportunity, this advertisement will likely fulfill the positive recruitment required by section 655.154.

### **C. DOL-Assisted Advertising**

The Department has taken initial steps toward creating an online platform to assist employers in complying with the requirements for electronic advertising under this proposed rule. Pending the outcome of this rulemaking, the Department intends to leverage the latest advertising technologies by establishing a mechanism to make advertising data available to popular job-search websites. Specifically, the Department is evaluating the development of a centralized platform to automate the electronic advertising of approved H-2A job opportunities. The Department anticipates that, once fully developed and implemented, this electronic advertising platform would maintain a standard set of data on each job opportunity that can be integrated with a wide array of job search website technologies. Through this platform, DOL would make available to job-search websites real-time access to the information that employers provide about their job opportunities subject to agreement to abide by terms of service. The companies that operate job-search websites would execute standard protocols to pull new H-2A jobs from the online platform in real time for advertising to U.S. workers. DOL is not proposing to mandate the use of the new electronic advertising platform but instead would make participation voluntary for H-2A employers.



If developed as currently envisioned, the Department expects that employers would provide information about their job opportunities, as part of their H-2A applications for temporary labor certifications, and indicate their intention to use the electronic advertising platform. Employers that elect to use this platform would have information about their job opportunities transmitted by the Department to companies offering to provide advertising services, which in turn would advertise these jobs on the companies' job-search websites.

The Department believes that facilitating employers' use of technology is in the best interest of employers and U.S. workers. Because information about the job opportunity would already be provided at the time of filing the H-2A application for a temporary labor certification and transmitted by the Department to companies operating these job search websites, the burden associated with placing separate electronic advertisements would be significantly reduced. The goal is to reduce burdens on the regulated community, while ensuring that the maximum number of U.S. workers learn about job opportunities. Having DOL maintain a publicly available list of the companies offering this advertising service, would give U.S. workers and other organizations that provide employment placement services a greater degree of certainty regarding where these temporary or seasonal jobs will be advertised and available for U.S. workers to apply. Employers that elect to use the new platform would satisfy the advertising requirement in § 655.151. Finally, offering this platform to employers would ensure more uniform compliance with advertising requirements.

The Department is not soliciting comments on this electronic advertising platform at this time, but will inform the public about the advertising platform's completion through notices in the Federal Register.

#### **D. Other Minor Changes for Conformity**

The Department is proposing minor revisions to two other sections to conform with the proposed changes to section 655.151. First, the Department is proposing to make a technical amendment to section 655.167(c)(1)(ii), which specifies document retention requirements, to delete a reference to print advertisements in professional, trade, or ethnic publications, and to correct the text's cross-reference to another regulatory provision. Currently, the regulation directs employers to retain "advertising as specified in § 655.152." But the reference to "655.152" is incorrect, as that provision provides the content requirements. The advertising requirement is specified in § 655.151. Accordingly, the text should properly read "advertising as specified in § 655.151."

Second, the Department is proposing to amend 655.225(d), which specifies the post-acceptance requirements for positions engaged in the herding or production of livestock on the range, to delete the reference to "a newspaper of general circulation serving the area of intended employment," in order to conform with the proposed change to the advertisements required by section 655.151.

### **III. Administrative Information**

#### **A. Administrative Procedure Act**

The Department proposes to claim an exception under 5 U.S.C. 553(d)(1) from the 30-day delayed effective date requirement on the basis that this rule relieves the restriction against online advertising of jobs for which an employer seeks to hire H-2A

workers. The final rule would relieve regulated parties of the requirement that they only place paper advertisements in newspapers of general circulation in the area of intended employment. During the transition period, which would apply to all employers who file an *Application for Temporary Employment Certification* with a date of need prior to October 1, 2019, the rule would allow employers to select between placing two paper newspaper advertisements or placing an online advertisement. After the transition period ends, the rule would altogether replace the newspaper advertising requirement with online advertising, which is anticipated to be more cost-effective and flexible for employers, as well as a more effective way of reaching U.S. workers who may be able, willing, and qualified for the employers' job opportunities. The online advertising would also provide flexibility for U.S. workers who are job seekers to identify and apply for the job opportunities for which employers seek to hire H-2A workers. The Department anticipates that allowing employers additional time to transition away from advertising by newspaper over an approximately six-month period after the rule's publication would provide needed flexibility, and thus provide employers with notice and time to conform their business practices to the new rule. Therefore, this rule would take effect immediately upon publication of the final rule.

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

Under Executive Order (E.O.) 12866, the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs determines whether a regulatory

action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Sec. 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 proposed 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.

E.O. 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. This proposed rule is expected to be an E.O. 13771 deregulatory

action because the cost savings to H-2A employers associated with the rule are larger than the costs. The estimated cost savings associated with this regulatory action are derived from the proposed revision to section 655.151(a), which would replace print newspaper advertisements with electronic advertisements posted on the internet.

### **1. Subject-by-Subject Analysis**

The Department's analysis below considers the expected impacts of the following aspects of the proposed rule against the baseline (i.e., the 2010 Final Rule): (a) the replacement of newspaper advertisements with electronic advertisements, and (b) the time it takes the regulated community to read and review the rule.

#### **a. Electronic Advertisements**

The Department is proposing to modernize the positive recruitment that an employer must conduct under its regulations by eliminating the use of print newspaper advertisements and replacing it with electronic advertisements posted on the internet, which will make the job opportunity more broadly available to U.S. workers. Specifically, the Department is proposing to revise section 655.151(a) to replace print newspaper advertisements requirements with a requirement for an electronic advertisement posted 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. As discussed in section I.B. of this NPRM, the basis for this proposal is rooted in the Department's determination that electronic advertisements will be a more effective and efficient means of recruiting U.S. workers than the print newspaper advertisements that its regulations currently require.

i. Cost Savings

To estimate the cost savings to employers that would result from the proposed rule, the Department first calculated the average number of H-2A temporary labor certifications approved in Fiscal Year (FY) based on data from FY 2015–2017, which yielded an annual average of 9,796.<sup>8</sup> Next, the Department identified the top five states in which prospective H-2A employers received temporary labor certifications, and it researched the cost of placing a newspaper advertisement in the most populous city in

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

each of these states (for several newspapers, including large and local papers) that would satisfy the content requirements set forth in section 655.152.<sup>9</sup> The Department then averaged the data it obtained to estimate the average cost of complying with section 655.151. Based on these data, the Department determined that the average cost of placing the newspaper advertisements required by section 655.151 is \$672 (or \$336 for each advertisement).

As mentioned above, the Department believes, based on preliminary research, employers can choose to advertise using online job search websites 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.<sup>10</sup> Although section 655.151 currently requires employers to advertise on two consecutive days, one of which must be a Sunday, the Department did not identify a significant difference in cost between advertisements placed on Sundays and weekdays, so the Department did not distinguish between these two costs when calculating total advertising cost savings. To estimate the annual cost savings of newspaper advertising costs that employers will avoid under the proposed rule, the Department multiplied the average annual number of approved H-2A temporary labor certifications (9,796) by the average newspaper advertising cost of \$672. This yielded an average annual cost savings of \$6.58 million.

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<sup>9</sup> The top 5 states in which employers seek to place H-2A workers are California, Florida, Georgia, North Carolina, and Washington.

<sup>10</sup> The Department has data on three commonly used job-search websites that allow employers to advertise free of charge.

b. Time to Understand Rule

During the first year that this rule would be in effect, employers seeking H-2A workers would need time to learn about the new requirements. The Department assumes that many employers participating in the H-2A program would learn about the requirements of the new rule from an industry newsletter or bulletin. The Department assumes that the amount of time required to understand the rule change to be 10 minutes. The proposed rule addresses only the job advertising requirements for employers seeking H-2A workers.

i. Costs

This requirement represents a cost to employers participating in the H-2A program in the first year of the rule. The Department estimates this cost by multiplying the time required to read and review the new rule (10 minutes) by the median hourly wage of a human resources manager at an agricultural business (\$31.84),<sup>11</sup> multiplied by a factor of two (2) to account for fringe benefits and overhead, which yields a cost of \$10.61 per employer. The Department estimates the total cost of reading and reviewing the rule by multiplying \$10.61 by the average number of employers participating in the H-2A program over FY 2015–2017 (6,676). This calculation results in a cost of \$70,855 in the first year.

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<sup>11</sup> Wage derived from Bureau of Labor Statistics median hourly wage for HR Specialists (occupation code 13-1071), May 2017.



DOL acknowledges, however, that there are some potentially limited situations – particularly in rural communities – where the upfront costs associated with accessing the internet and learning how to post such advertisements may result in notable opportunity costs for employers. DOL believes that very few employers do not have access to the internet. For those employers that do not currently have internet access, DOL estimates that it will take two hours to access the internet (which may include transportation to the nearest library), research the websites and pick one to use, establish an account on that website, learn how to post a job on the website, and establish an email account. In addition, employers would need to make additional trips to check for responses from U.S. workers. For employers with access to the internet who are not familiar with posting such advertisements online, there will be some up-front costs associated with the time it takes to research job advertisement sites, establish an account, and learn how to post a job on the website.

Because of the uncertainties, we are unable to provide an estimate of the number of employers who do not have access to the internet, or those who have access to the internet but are unfamiliar with posting jobs online, and would incur these additional costs to post advertisements online. DOL seeks comment from the public on the likely magnitude and incidence of these costs. However, online advertisements for H-2A employment would increase the visibility of job openings to potential U.S. workers and increase the number of workers that would be able to access these jobs. This benefit would significantly outweigh any cost potentially incurred by the negligible number of employers that might be affected by the transition from print newspaper advertisements to online job postings. The Department therefore believes that the net societal benefit of

implementing this rule would be maximized if all H-2A employers are required to utilize online advertisements. As such this rule constitutes as a deregulatory action.

## **2. Summary of Impacts**

The Department estimates the total first-year costs of the proposed rule to be \$70,855. This cost results from the time required to read and review the proposed rule. This cost is incurred by employers seeking H-2A workers subject to proposed 655.151(a). The Department estimates first-year cost savings of \$6.58 million. This cost savings results from replacing the requirement that employers place print newspaper advertisements with a requirement that employers place internet advertisements. Net first-year cost savings amount to \$6.51 million. This estimated cost savings excludes any increase in costs to employers without current access to the internet and any up-front costs incurred by those unfamiliar with posting job advertisements online who need to establish accounts, and invest time in learning how to post online.

Generally, annual cost savings are expected to be \$6.58 million in all years following the first year due to the lack of monetized costs regarding the time required to read and review the proposed rule. The 10-year discounted net cost savings of the proposed rule range from \$46.15 million to \$56.06 million (with 7- and 3-percent discount rates, respectively). The annualized net cost savings of the proposed rule is \$6.57 million (with 3- and 7-percent discount rates). When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost savings of this proposed rule are \$6.57 million at a discount rate of 7 percent (excluding any up-front familiarization costs or increased costs to employers without access to the internet).

## **C. Regulatory Flexibility Act**

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

This proposed rule may impact small businesses that request H-2A temporary labor certifications. The Department assumed that the average number of H-2A temporary labor certifications requested by any small business per year would be one. The Department estimates that small businesses would incur a one-time cost of \$10.61 to familiarize themselves with the rule and would incur annual cost savings of \$672 associated with advertising online rather than in print newspapers. Over a 10-year period, the net annualized cost savings for a small business would be \$672 at a 7-percent discount rate.

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

NAICS 111998: All Other Miscellaneous Crop Farming. The Small Business Administration (SBA) estimates that revenue for a small business with NAICS Code 115115 is \$15 million and for NAICS Code 111998 is \$750,000.<sup>12</sup> The impact of the proposed rule would be less than 1 percent of annual revenue for the small businesses in these industries with the employment size fewer than 5 (\$710,717 for NAICS 115115 and \$430,835 for NAICS 11).<sup>13</sup> Based on this determination, the Department certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

#### **D. Paperwork Reduction Act**

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

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<sup>12</sup> U.S. Small Business Administration. (2017). *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*. Retrieved from: [https://www.naics.com/wp-content/uploads/2017/10/SBA\\_Size\\_Standards\\_Table.pdf](https://www.naics.com/wp-content/uploads/2017/10/SBA_Size_Standards_Table.pdf).

<sup>13</sup> U.S. Census, *2012 SUSB Annual Data Tables by Establishment Industry*, <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html>.

More specifically, this rule proposes to replace print newspaper advertisements with an advertisement posted on a website that is widely viewed and appropriate for use by U.S. workers who are likely to apply for the job opportunity in the area of intended employment. The proposed rule would require that this advertisement be clearly visible on the website's homepage or be easily retrievable through the website, posted for a period of no less than 14 consecutive calendar days, publicly accessible to U.S. workers at no cost using the latest browser technologies and mobile devices, and satisfy the advertising content requirements set forth in § 655.152. Under the proposed rule and in accordance with 20 CFR 655.167(c)(1)(ii), an employer would be required to retain documentation demonstrating that it posted an electronic advertisement in compliance with the requirements in the proposed rule, including screen shots of the webpage on which the advertisement appears and screen shots of the webpages establishing the path that U.S. workers must follow to access the advertisement. The employer must be prepared to produce all information and records contained in this information collection for the Department or other federal agencies in the event of an audit examination, investigation, or other enforcement proceedings in the H-2A program. The Department is using technology to reduce burden by replacing newspaper advertisements with electronic advertisements. The information collection requirements associated with this rule are summarized as follows:

*Agency:* DOL-ETA.

*Type of Information Collection:* New.

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

*Agency Form Number:* None.

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

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

*Average Responses per Year per Respondent:* 2.

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

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

*Total Estimated Annual Time Burden:* 1,142 hours.

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

#### **E. 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 NPRM, if finalized, does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation, and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and the Department has not prepared a statement under the Act.

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

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

**G. Executive Order 13132: Federalism**

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

**H. Executive Order 13175, Indian Tribal Governments**

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

**I. The Treasury and General Government Appropriations Act of 1999:**

**Assessment of Federal Regulations and Policies on Families**

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

**J. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks**

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

**K. Environmental Impact Assessment**

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

**L. Executive Order 13211, Energy Supply**

This NPRM, if finalized, has not been identified to have impacts on energy supply. Accordingly, Executive Order 13211 requires no further Agency action or analysis.

**M. Executive Order 12630, Constitutionally Protected Property Rights**

This NPRM, if finalized, 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.

**N. Executive Order 12988, Civil Justice Reform Analysis**



This NPRM, if finalized, was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. This proposed rule 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. The Department has determined that this proposed rule meets the applicable standards provided in section 3 of Executive Order 12988.

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

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

■ For the reasons stated in this document, 20 CFR part 655 is proposed to be amended as follows:

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

■ 1. The authority citation for part 655 is revised to read as follows:

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

Subpart A issued under 8 CFR 214.2(h).

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

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

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

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

- 2. Revise § 655.151 to read as follows:

**§ 655.151 Advertising in the area of intended employment.**

(a) *Where to conduct recruitment.* The employer must place an advertisement for the job opportunity on at least one website that is widely viewed and appropriate for use by U.S. workers who are likely to apply for the job opportunity in the area of intended employment.

(b) *Nature of the recruitment.* The advertisement must be clearly visible on the website's homepage or be easily retrievable through the website, posted for a period of no less than 14 consecutive calendar days, publicly accessible to U.S. workers at no cost using the latest browser technologies and mobile devices, and satisfy the requirements set forth in § 655.152.

(c) *Proof of recruitment.* An employer must retain documentation in accordance with § 655.167(c)(1)(ii) that demonstrates compliance with paragraphs (a) and (b) of this

section. Such documentation must include screen shots of the webpage on which the advertisement appears and screen shots of the webpages establishing the path that U.S. workers must follow to access the advertisement.

(d) *Transition period for applications with dates of need prior to October 1, 2019.* (1) All employers submitting an *Application for Temporary Employment Certification* with a date of need on or after October 1, 2019 must place and retain documentation of an electronic advertisement in accordance with paragraphs (a) through (c) of this section.

(2) An employer submitting an *Application for Temporary Employment Certification* with a date of need prior to October 1, 2019 may elect to place two newspaper advertisements in compliance with the requirements in paragraphs (d)(2)(i) and (ii) of this section, in lieu of placing and retaining documentation of the electronic advertisement required by paragraphs (a) through (c) of this section.

(i) The employer must place an advertisement (in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (d)(2)(ii) of this section), in a newspaper of general circulation serving the area of intended employment and is appropriate to the occupation and the workers likely to apply for the job opportunity.

Newspaper advertisements must satisfy the requirements set forth in § 655.152.

(ii) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

■ 3. Amend § 655.167 by revising paragraph (c)(1)(ii) to read as follows:

**§655.167 Document retention requirements.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(ii) Advertising as specified in § 655.151;

\* \* \* \* \*

■ 4. Amend § 655.225 by revising paragraph (d) to read as follows:

**§655.225 Post-acceptance requirements for herding and range livestock.**

\* \* \* \* \*

(d) The employer will not be required to place an advertisement as required in §655.151.

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Molly E. Conway,

Acting Assistant Secretary for Employment and Training, Labor.

**BILLING CODE 4510-FP-P**

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