GUIDANCE

Child Eligibility under Title I, Part C of the Elementary and Secondary Education Act of 1965

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Purpose of the Guidance

The purpose of this guidance is to provide information about child eligibility for the Title I, Part C Migrant Education Program. This guidance provides ED's interpretation of various statutory provisions and does not impose any requirements beyond those included in the Elementary and Secondary Education Act of 1965, as amended, ED's Migrant Education Program regulations in 34 CFR part 200, and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

This updated guidance replaces the chapter (Chapter II) on child eligibility that was part of the guidance ED issued on October 23, 2003. If you are interested in commenting on this guidance document, please send your comment to OESEGuidanceDocument@ed.gov.

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II. CHILD ELIGIBILITY

Children are eligible to receive MEP services if (1) they meet the definition of "migratory child" and "eligible children" in the statute and regulations that apply to the MEP (or met them previously and qualify for continuation of services under section 1304(e)), and if (2) the basis for their being a "migratory child" is properly recorded on a certificate of eligibility (COE). The term "migratory child" is defined in section 1309(2) of the statute and § 200.81(e) of the MEP regulations. The term "eligible children" is defined in section 1115(b)(1)(A) of the statute and the term "children" is defined in § 200.103(a) of the Title I regulations. Determining whether a child meets these definitions requires careful consideration and depends on a recruiter's assessment of information presented by a parent, spouse, or guardian responsible for the child, or by the child if the child is the migratory worker who is eligible for MEP services in his or her own right.

This chapter discusses issues of child eligibility and how SEAs may make these important determinations.

STATUTORY REQUIREMENTS:

Sections 1115(b)(1)(A) and 1309 of Title I, Part C

REGULATORY REQUIREMENTS:

34 CFR 200.81, 200.103

A. Migratory Child

A1. What is the definition of "migratory child"?

According to sections 1115(b)(1)(A) (incorporated into the MEP program by virtue of sections 1304(c)(2)) and 1309(2) of the statute and §§ 200.81(e) and 200.103(a) of the regulations, a child is a "migratory child" and is eligible for MEP services if all of the following conditions are met:

1. The child is not older than 21 years of age; *and*

2. The child is entitled to a free public education (through grade 12) under State law or is below the age of compulsory school attendance; *and*

3. The child is a migratory agricultural worker or a migratory fisher, or the child has a parent, spouse, or guardian who is a migratory agricultural worker or a migratory fisher; *and*

4. The child moved within the preceding 36 months in order to seek or obtain qualifying work, or to accompany or join the migratory agricultural worker or migratory fisher identified in paragraph 3, above, in order to seek or obtain qualifying work; *and*

5. With regard to the move identified in paragraph 4, above, the child:

    a. Has moved from one school district to another; *or*

    b. In a State that is comprised of a single school district, has moved from one administrative area to another within such district; *or*

    c. Resides in a school district of more than 15,000 square miles and migrates a distance of 20 miles or more to a temporary residence to engage in or to accompany or join a parent, spouse, or guardian who engages in a fishing activity. (This provision currently applies only to Alaska.)

Note that the terms "migratory agricultural worker," "migratory fisher," "move or moved," "in order to obtain," and "qualifying work" are defined in § 200.81 of the regulations and discussed in sections C through H of this chapter.

A2. Is there a difference between a child who is eligible to receive MEP services and one who is counted for State funding purposes?

Yes. Any child, birth through age 21, who meets the statutory definition of "migratory child" (or who is eligible for continuation of services under section 1304(e)) is eligible to receive MEP services. However, as provided in section 1303(a)(1)(A) of the statute, only migratory children ages 3 through 21 may be counted for State funding purposes.

A3. Is a child eligible for MEP services after finishing high school?

Generally, no. Under section 1309(2), a migratory child is a "child" who meets the specific eligibility requirements for the MEP. While the MEP statute does not further define who is a "child," section 1304(c)(2) incorporates by reference the requirement to carry out MEP projects consistent with the basic objectives of section 1115(b), which defines eligible children to include:

> (i) children not older than age 21 who are entitled to a free public education through grade 12, and
>
> (ii) children who are not yet at a grade level at which the local educational agency provides a free public education.

See also 34 CFR § 200.103(a).

Given paragraph (i), once a migrant child has received a high school diploma or its equivalent, the individual is generally no longer entitled under State law to a free public education through grade 12 and, therefore, is not eligible as a "child" to receive MEP services.

However, in some circumstances, it might be possible that a child who finished high school may be eligible for MEP services because, under State law, he or she may still be

entitled to a free public education through grade 12. For example, a child who received a certificate of completion or attendance but failed the State high school exit exam *might* be allowed to re-enroll in high school under State law. If so, as long as the child is not yet 22 years of age, the child remains eligible for MEP services. An SEA should consult with its own legal counsel to determine whether children who have received a certificate of completion or attendance rather than a diploma or equivalency certificate are still eligible for a free public education through grade 12 in its State.

A4. Is a child who graduated from high school in his or her native country eligible for the MEP?

It depends on State law. If the child is considered under State law to be eligible to receive a free public education through grade 12 and otherwise meets the definition of "migratory child," the child is eligible for the MEP.

A5. What is the definition of "out-of-school youth?" Are such youth eligible for MEP services?

For the purposes of the MEP, the Department considers the term "out-of-school youth" to mean youth up through age 21 who are entitled to a free public education in the State and who meet the definition of "migratory child," but who are not currently enrolled in a K-12 school. This could include students who have dropped out of school, youth who are working on a general education development credential (GED) outside of a K-12 school, and youth who are "here-to-work" only. It would not include children in preschool. Out-of-school youth who meet the definition of a "migratory child" as well as all other MEP eligibility criteria are eligible for the MEP.

A6. What is the definition of "emancipated youth"?

The Department considers emancipated youth to be children under the age of majority (in accordance with State law) who are no longer under the control of a parent or guardian and who are solely responsible for their own welfare. In order to be eligible for the MEP these youth may not be older than 21 years of age.

A7. Are emancipated youth eligible for MEP services?

Yes. Emancipated youth are eligible for the MEP so long as they meet the definition of a "migratory child" and all other MEP eligibility criteria. Out-of-school youth may or may not be "emancipated youth." See A5 of this section.

B. Guardians and Spouses

B1. May MEP eligibility be based on a guardian's status as a migratory worker?

Yes. Section 200.81(e) of the regulations specifically includes a child's move to accompany or join a guardian who is a migratory agricultural worker or a migratory fisher as a basis for a child's eligibility.

B2. Who is a "guardian" for MEP purposes?

The Department considers a guardian to be any person who stands in the place of the child's parent ("*in loco parentis*"), whether by voluntarily accepting responsibility for the child's welfare or by a court order.

B3. Is a legal document necessary to establish guardianship?

No. As long as the guardian stands in the place of the child's parent and accepts responsibility for the child's welfare, a legal document establishing the guardianship is not necessary.

B4. May a sibling act as a guardian to other siblings?

Yes. If a working sibling acknowledges responsibility for the child's welfare and stands in the place of the child's parent, the child may be eligible based on the working sibling's qualifying employment and qualifying move.

B5. Must a recruiter see a marriage certificate or other legal document in order to establish a spousal relationship when MEP eligibility is based on a spouse's status as a migratory worker?

No.

C. Migratory Workers

C1. Who is a "migratory agricultural worker"?

According to § 200.81(d) of the regulations, a "migratory agricultural worker" is a person who, in the preceding 36 months, has moved from one school district to another, or, in a State that is comprised of a single school district, from one administrative area to another, in order to obtain temporary employment or seasonal employment in agricultural work (including dairy work). Note, the regulations also define the terms "move," "in order to obtain," "temporary employment," "seasonal employment," and "agricultural work." These terms are discussed later in this chapter.

C2. Who is a "migratory fisher"?

According to § 200.81(f) of the regulations, a "migratory fisher" is a person who, in the preceding 36 months, has moved from one school district to another, or, in a State that is comprised of a single school district, from one administrative area to another, in order to obtain temporary employment or seasonal employment in fishing work. The definition also includes a person who, in the preceding 36 months, resided in a school district of more than 15,000 square miles and moved a distance of 20 miles or more to a temporary residence in order to obtain temporary employment or seasonal employment in fishing work. Note, the regulations also define the terms "move," "in order to obtain," "temporary employment," "seasonal employment," and "fishing work." These terms are discussed later in this chapter.

C3. Does an individual's visa status as an H-2A temporary agricultural worker have any impact on whether he or she may be considered a migratory child, migratory agricultural worker, or a migratory fisher?

No. The only criteria for being considered a migratory child, migratory agricultural worker, or migratory fisher are those established in § 200.81(d), (e), or (f) of the regulations.

D. Qualifying Move

D1. What is a "qualifying" move?

A qualifying move:

1. is across school district boundaries*; *and*
2. is a change from one residence to another residence; *and*
3. is made due to economic necessity; *and*
4. is made in order to obtain qualifying work; *and*
5. occurred in the preceding 36 months.

Note that the terms "move," "in order to obtain," and "qualifying work" are defined in § 200.81 of the regulations and discussed in sections D through H of this chapter.

*In a State that is comprised of a single school district, a move qualifies if it is from one administrative area to another within such a district. In addition, in a school district of more than 15,000 square miles, a move qualifies if it is over a distance of 20 miles or more to a temporary residence to engage in, or to accompany or join a parent, spouse, or guardian who engages in, a fishing activity.

D2. What is the definition of "move" or "moved"?

Under § 200.81(g) of the regulations, "move" or "moved" means "a change from one residence to another residence that occurs due to economic necessity."

Change of Residence and Economic Necessity

D3. What is the definition of a "residence"?

For the purposes of the MEP, the Department considers a "residence" to be a place where one lives and not just visits. In certain circumstances, boats, vehicles, tents, trailers, etc., may serve as a residence.

D4. What does it mean to "change from one residence to another residence"?

The Department considers this to mean leaving the place where one currently lives and going to a new place to live, and not just to visit. For example, the Department believes that, generally, a person who goes to a new place to seek or obtain work, or because the person cannot afford to stay in his or her current location, is leaving the place where he or she currently lives and is going to a new place to live--and thus, has "changed from one residence to another residence" (or "changed residence"). Similarly, the Department believes that a person who goes to a new place to help sick or elderly family members on an extended basis is living with those family members, and thus might meet the MEP's change of residence requirement if the person makes a return move to obtain qualifying work.

Thus, a person who leaves, on a short-term basis, the place where he or she lives to, for example, (1) visit family or friends, (2) attend a wedding or other event, (3) take a vacation, (4) have an educational or recreational experience, or (5) take care of a legal matter, would not have "changed residence" because the person did not go to the new place to live, but rather to visit. Similarly, this person would not have "changed residence" upon returning home from one of these visits. Note that, in these examples, the person also has not "moved" within the meaning of § 200.81(g) of the regulations since the move was not made "due to economic necessity." See also D5 of this chapter.

The Department strongly recommends that the recruiter document on the COE his or her reason(s) for concluding that a person "changed residence" if it appears that an independent reviewer might question that a change of residence occurred.

D5. What does it mean to move "due to economic necessity"?

The Department considers this to mean that the worker moved either because he or she could not afford to stay in the current location, or went to a new location in order to earn a living. In general, the Department believes that if the worker's move is related to work, e.g., a move to seek or obtain work, a move because of the loss of work, or a move because of the unavailability of work, the worker moved "due to economic necessity."

However, with respect to a move that is of such short duration (*e.g.*, less than a week) that an independent reviewer might question whether the move was really "due to economic necessity," the Department strongly recommends that each SEA establish a statewide written policy for determining and documenting whether and why these moves do and do not qualify for the MEP.

The Department also recommends that recruiters provide a comment on the COE if there appears to be any other reason that an independent reviewer would question whether a worker changed residence "due to economic necessity."

D6. If a worker and his or her children go on vacation and the worker engages in qualifying work during the vacation, would the children qualify for the MEP?

In general, as noted in D4 of this chapter, vacations (*e.g.*, visits to family and friends, trips for entertainment purposes, etc.) do not constitute a change of residence, much less a change of residence due to economic necessity. In these cases, the family is not moving because it cannot afford to stay and live in the current location or because it needs to go to a new location to make a living. Therefore, even if the worker engages in qualifying work, a move for vacation purposes is not a qualifying move. The Department recognizes that there might be cultural differences in how people describe the reason for their relocation and, therefore, recommends that the recruiter question the worker carefully to determine what is meant when the worker asserts that his or her family is going on or returning from a vacation during which family members worked.

D7. Is determining whether a worker changed residence due to economic necessity sufficient for determining that the worker made a qualifying move?

No. In order for a move to qualify under the MEP, all of the conditions in D1 of this chapter must be met.

"In order to obtain"

D8. What is the definition of the phrase "in order to obtain"?

Under § 200.81(c) of the regulations, the phrase "in order to obtain," when used to describe why a worker moved, means that one of the purposes of the move is *to seek or obtain* qualifying work. This does not have to be the only purpose, or even the principal purpose of the move, but it must be one of the purposes of the move.

D9. May a worker who asserts more than one purpose for moving be considered to have moved "in order to obtain" qualifying work?

Yes. A worker who asserts more than one purpose for moving, for example, to be closer to other family members or to find a better school for the children, may be considered to have moved "in order to obtain" qualifying work if the recruiter determines that one of

the purposes of the move was also to seek or obtain qualifying work. As explained in D10 of this chapter, the phrase "in order to obtain" includes determining that the worker moved to find any kind of employment, provided that the worker obtained qualifying work soon after the move.

D10. May a worker, who states that he or she moved in order to obtain (or seek) any employment and who obtained qualifying work "soon after the move," be considered to have moved "in order to obtain" qualifying work?

Under certain circumstances, yes. The Department recognizes that workers may not always express a clear intent to move and obtain qualifying work. According to § 200.81(c)(1) of the regulations, in those situations where a worker's intent is not clearly expressed, an SEA may infer that individuals who express a general intent to have moved, for example, "for work," "to obtain work," "to obtain any type of employment," or to "take any job," may be deemed to have moved with a purpose of obtaining qualifying work if he or she obtained qualifying work soon after the move. See D22 of this chapter regarding "soon after the move."

D11. May a worker who asserts that he or she moved specifically to find only non-qualifying work be considered to have moved "in order to obtain" such work if the worker obtains qualifying work soon after the move?

No. Section 1309(2) of the statute requires migratory agricultural workers and fishers, to move "in order to obtain" temporary or seasonal employment in agricultural or fishing work, that is, "in order to obtain" qualifying work. The phrase "in order to obtain" in this provision brings in the worker's purpose or intent. See, in this regard, the July 29, 2008 notice of final MEP regulations at 73 FR 44102, 44105.

The Department considers the phrase "in order to obtain" to include workers who (a) moved to obtain qualifying work and obtained that work, and (b) moved with no specific type of work in mind and obtained qualifying work soon after the move. (*Id.*, at 44106.) Therefore, if the worker who moved to obtain any work obtains qualifying work soon after the move, it is presumed that one of the purposes of the move was to seek or obtain qualifying work.

However, if the worker asserts that he or she moved with only non-qualifying work (*e.g.*, construction work) in mind, given the definition of a migratory child in section 1309(2) of the ESEA and § 200.81(c) of the Title I regulations, one may not presume that one of the purposes of the worker's move was to obtain qualifying work – even if the worker obtained qualifying work soon after the move.

D12. Must a recruiter ask a worker why he or she moved if the worker is engaged in qualifying work?

Yes. The fact that a worker moved and is engaged in qualifying work does not automatically establish that the worker moved "in order to obtain" that work. Consistent

with the MEP regulations, the recruiter must determine whether one of the purposes of the worker's move was to obtain qualifying work or any employment, or conversely that the purpose was specifically to obtain non-qualifying work.

D13. How can a recruiter determine if one of the purposes of the worker's move was to obtain qualifying work if the recruiter finds the worker is engaged in qualifying work?

Even though a worker is engaged in qualifying work, the recruiter needs to ask the worker why he or she moved. In many cases, the response will clearly indicate that one purpose of the move was to obtain qualifying work or any employment. If this is not clear from the worker's response, the recruiter should ask whether the worker would have moved if he or she knew that no work was available. If the answer is "no," then the recruiter can presume that obtaining qualifying work was one purpose of the move.

If the worker indicates that he or she was looking for a specific type of work, which would be considered non-qualifying work, *e.g.*, construction, for purposes of the MEP, the recruiter may follow up by asking whether the worker would have moved to the area to take any kind of work, in other words qualifying or non-qualifying work, if construction work was not available. If the answer is "yes," and the worker obtained qualifying work, then the recruiter can presume that obtaining qualifying work was one purpose of the move. However, if the worker continues to express that his or her specific intent was to obtain only non-qualifying work, the recruiter cannot find this worker eligible for the MEP based on this move, regardless of whether the worker is engaged in qualifying work.

D14. May a worker who did <u>not</u> obtain qualifying work soon after the move, be considered to have moved "in order to obtain" qualifying work?

Under certain circumstances, yes. A worker who did not obtain qualifying work "soon after a move" may *only* be considered to have moved "in order to obtain" qualifying work if (1) the worker states that one purpose of the move was specifically to obtain qualifying work, AND

(2) The worker has a prior history of moving to obtain qualifying work;

OR

(3) There is other credible evidence that the worker actively sought qualifying work soon after the move but, for reasons beyond the worker's control, the work was not available.

See § 200.81(c)(2) and D22 of this chapter regarding the phrase, "soon after the move."

D15. If a worker states that he or she moved to obtain *any* employment and the worker has a prior history of moves to obtain qualifying work, may this worker be considered to have moved "in order to obtain qualifying work" if the worker did not obtain qualifying work soon after the move?

No. The worker must have moved *specifically* for qualifying work, and not *any* employment, regardless of whether the worker has a prior history of moves to obtain qualifying work, or there is other credible evidence that the worker sought qualifying work. See § 200.89(c)(1) of the regulations.

D16. How may a recruiter determine whether a worker has a prior history of moving to obtain qualifying work?

The Department believes that the recruiter should ask the worker whether he or she has ever moved for temporary or seasonal employment in agricultural or fishing work, *i.e.*, qualifying work. The recruiter may also search the State's MEP database or the Migrant Student Information Exchange (MSIX) system (a web-based system that allows States to share education and health information on migrant children who travel from State to State) to see if the worker's child, or the child, if the child is the worker, was identified as eligible for the MEP in another part of the State or in another State.

After considering the available information, if the recruiter is satisfied that (1) one of the purposes of the worker's move was specifically to obtain qualifying work and (2) the worker has a prior history of moves to obtain qualifying work, the recruiter may deem the worker's children eligible for MEP services. The recruiter should document the basis for the decision in the comment section of the COE and, if available, attach the evidence he or she relied on for the decision.

D17. How far back may a recruiter look in considering "prior history of moves to obtain qualifying work"?

The Department does not believe that a worker's "prior history of moves to obtain qualifying work" had to have occurred within a certain time period before the most recent move, so long as the worker states that one of the purposes of his or her move was *specifically* to obtain qualifying work and not just any work, as explained in D14 and D15 of this chapter.

D18. What are examples of "other credible evidence" that a recruiter might rely on to determine that the worker actively sought qualifying work soon after a move but the work was unavailable for reasons beyond the worker's control?

Other credible evidence that a recruiter might consider includes:

- Information obtained from conversations with an employer, crew chief, employment agency, or credible third party that indicates that the worker sought the qualifying work;

- Written information from the employer, such as a copy of an employment application or a list of recent applicants;
- Information in the public domain (*e.g.*, newspaper) that confirms a flood or crop failure in the area.

After considering all of the available information, if the recruiter is satisfied that the worker *actively* sought qualifying work *soon after the move* and that the work was unavailable due to reasons beyond the worker's control, the recruiter may deem the worker eligible for MEP services. The recruiter should document the basis for the decision in the comment section of the COE, and if available, attach the evidence he or she relied on for the decision.

D19. As discussed in criteria (1) and (3) of D14, may a worker's or family member's statement about the purpose of the move serve as both (1) the statement that the worker moved specifically to obtain qualifying work and (2) the necessary "other credible evidence" that the worker actively sought the work soon after the move?

No. The Department considers the term "other credible evidence" to refer to additional information that supports the worker's or family member's statement that the worker moved in order to obtain qualifying work. Therefore, this information would need to be obtained in addition to the information about the purpose of the move provided by the worker or his or her family.

D20. What happens if a worker, who moved to obtain qualifying work or any kind of job, first takes a non-qualifying job and only afterwards obtains qualifying work?

A worker does not necessarily forfeit MEP eligibility by taking a non-qualifying job for a limited period of time, so long as the worker moved in order to obtain qualifying work or any kind of job, and then obtains qualifying work that is still "soon after the move". See D22 of this chapter.

D21. If a worker and his or her child move weeks before qualifying work is available (*e.g.*, three weeks prior to the tomato harvest) in order to secure housing, and at the time of the interview the worker does not yet have qualifying work, may the worker be considered to have moved "in order to obtain" qualifying work?

Yes. The regulatory definition of "in order to obtain" does not expressly address this situation. However, the Department believes that the recruiter may find this move to have been made "in order to obtain" the work so long as the recruiter determines that one purpose of the move was to seek or obtain qualifying work, and not just any employment – which presumably would be the case in this situation. In this situation, the recruiter should check box 4a of the COE (the section on Qualifying Move & Work), which states that "the worker moved due to economic necessity in order to obtain qualifying work and

obtained qualifying work." The recruiter should document in the COE Comments section that (1) the worker moved in advance to secure housing, (2) one purpose of the move was to secure the qualifying employment, and (3) the date that the worker is or was expected to start work. The children would be considered eligible upon the SEA's approval of the COE.

In this type of situation, consistent with § 200.81(c)(1) of the regulations, the recruiter must follow up with the worker to verify that the worker obtained qualifying work "soon after the move (see D22 of this section)." If the recruiter discovers that the worker did not obtain qualifying work "soon after the move," the recruiter must then determine, consistent with § 200.81(c)(2) of the regulations, that the worker has either a prior history of moves to obtain qualifying work or some other credible evidence that the worker actively sought qualifying work. The COE must be updated accordingly. If the recruiter cannot document a prior history or other credible evidence, this worker's children are not eligible for the MEP and must be removed from the rolls of eligible children.

"Soon After the Move"

D22. How much time may separate the date of the worker's move and the date the worker obtains qualifying work to permit an SEA to reasonably conclude that the worker obtained qualifying work "soon after the move"?

Because one of the purposes of the worker's move must be to seek or obtain qualifying work, the Department established the "soon after the move" test in the belief that the time between when the worker moves and when he or she obtains qualifying work must be small enough to reasonably presume that one of the purposes of the move was to obtain qualifying work. We think that in these circumstances, a worker generally should obtain qualifying work within 30 days of the move. However, we recognize that this period of time may vary depending on local conditions in agricultural or fishing operations or personal circumstance, which may cause the worker to delay obtaining qualifying work for a limited period of time beyond 30 days. If the recruiter believes that such circumstances exist and that he or she can still reasonably conclude that the worker obtained qualifying work "soon after the move," the Department recommends that the recruiter document in the comment section of the COE the factors that led him or her to this conclusion.

Duration and Distance

D23. Is there a minimum duration for a qualifying move?

Although the statute and regulations are silent on the duration of a qualifying move, a migratory worker must stay in a new place long enough to show that the worker "moved," *i.e.*, changed residence due to economic necessity, and that one of the purposes of the move was to seek or obtain qualifying work, or any kind of work so long as the worker obtained qualifying work soon after the move. Recruiters should carefully examine and evaluate relevant factors, such as whether the worker obtained, or could

have obtained, a place to live that would allow the worker and the migratory child to remain in the new location long enough for the worker to engage in qualifying work or whether the move to work was a one-time act or a series of short moves to work in order to augment the family's income. If the worker sought but did not obtain qualifying work soon after the move (or at all), the recruiter should determine whether the worker meets the requirements for moving "in order to obtain" qualifying work, as described in D14-D21 of this chapter. With respect to moves of such short duration (*e.g.*, less than a week) that an independent reviewer might question whether the move was "due to economic necessity," the Department strongly recommends that the SEA establish a written policy for determining and documenting when and why these moves qualify for the MEP.

D24. Is there a minimum distance requirement for a qualifying move?

No. The only requirement is that the move be across school district boundaries. In a State that is comprised of a single school district (*e.g.*, Hawaii), the move must be across the established boundaries of intra-district administrative areas. In a State where school districts are more than 15,000 square miles (*e.g.*, Alaska), the move must be either across established school district boundaries or, a distance of 20 miles or more to a temporary residence to engage in temporary or seasonal fishing work. See § 200.81(d), (e), and (f) of the regulations.

D25. Has a worker who travels back and forth between a residence and an agricultural or fishing job within the same day made a qualifying move?

No. Such a worker is a "day-haul" worker whose travel is a non-qualifying commute, not a qualifying migration involving a change of residence.

<u>Moves by Boat</u>

D26. Are there special issues that affect only the moves of migratory fishers who travel by boat?

No. These workers' moves must be across school district boundaries (*i.e.*, from one school district to another), whether the moves are by water or by land. As with any other MEP eligibility determination, the SEA must maintain documentation of school district boundaries as they extend into the water. In addition, all other eligibility criteria must be met.

D27. Has a fisher who travels by boat and docks in a new school district made a qualifying move?

It depends. A fisher who travels by boat to a new school district, or travels 20 miles or more in Alaska, must stay in the new place long enough to show that the worker "moved," *i.e.*, changed residence due to economic necessity, and that one of the purposes of the move was to seek or obtain qualifying work (or any kind of work, so long as the worker obtained qualified work soon after the move). See D23 of this chapter regarding

moves of short duration. The Department recommends that recruiters obtain sufficient information about this type of trip to document in the COE that the move meets these requirements.

Stopover Sites

D28. What are stopover sites?

Stopover sites are rest centers where migrant families who are in transit stop for a night or two before moving on to another locale.

D29. May SEAs *serve* eligible migrant families who stay at a stopover site?

Yes.

D30. May SEAs *count* the eligible migrant children they serve at stopover sites for funding purposes?

It depends. An SEA may count eligible migrant children who have already established residency in the State prior to staying at the stopover site. (See D3 of this section for an explanation of the term "residence" as it pertains to the MEP.) However, an SEA may not count migrant children who have stopped at the stopover site but have not established residency in the State – the move was not made to obtain qualifying work at the stopover site. Moreover, simply stopping in the State for a rest period does not establish residency. In these cases, the SEA must wait for the migrant family to complete the qualifying move and establish residency in the State before it may count the children.

International Moves

D31. May a worker's move to the United States from another country qualify for the MEP?

Yes. A worker's move from another country to the U.S. may qualify if one of the purposes for the move was to seek or obtain qualifying work. For example, orchard growers in the Northeast hire contract workers from Guatemala to pick crops for a short period of time. Assuming all other eligibility criteria are met, the children of these workers would qualify because one of the purposes of the move to the U.S. was to obtain qualifying work. The workers are not disqualified if they have other reasons for moving to the U.S., even permanent relocation, so long as one of the purposes of the move is to obtain qualifying work and the other conditions are met.

D32. Is a move from the United States to another country a qualifying move?

No. The MEP was established to benefit families who perform qualifying work in the United States. Therefore, the Department does not view the MEP statute as authorizing moves to another country to engage in temporary or seasonal employment in agricultural

or fishing work to be considered qualifying moves. However, if a worker's move to another country is a "change of residence," the worker's move back to a school district in the U.S. might be a qualifying move.

D33. If a worker and his or her children make a non-qualifying move to the U.S. from another country, may the children be considered eligible for the MEP based on a subsequent qualifying move?

Yes.

E. Qualifying Arrival Date (QAD) and Move "to Join" Issues

E1. When does a child's eligibility for MEP services begin?

A child may be identified as a "migratory child" when the child and the worker complete the qualifying move. This is often referred to as the qualifying arrival date, or QAD, for purposes of the COE. However, a child is only eligible for MEP services once the SEA has determined that the child meets all eligibility criteria outlined in A1 of this chapter.

E2. Must a child move at the same time as the worker to be eligible for the MEP?

No; however, both the worker and child must make the move. Section 1309(2) of the ESEA provides that if the child is not the qualifying worker, the child must move to "accompany" the worker who moved in order to obtain or seek qualifying work. The regulations expand the term "accompany" to include a child who moves separately to "join" a parent, spouse, or guardian. That is, under the definition of "migratory child" in § 200.81(e) of the regulations, a child who is not a migratory agricultural worker or migratory fisher qualifies if the child accompanies or "joins" a parent, spouse, or guardian who is a migratory agricultural worker or migratory fisher who moves in order to obtain qualifying work. The Department considers this provision to mean that the child's move may either precede or follow the worker's move. For example, the child may move before the worker in order to start the school year on time, or the worker may move before the child in order to secure housing. In either case, the fact that the child and his or her parent, spouse, or guardian do not move at the same time does not nullify the child's eligibility for the MEP.

E3. What is the QAD when a child moves before or after the worker?

In situations where the child and worker do not move at the same time, the Department considers the QAD to be the day that the child and worker complete the move to be together. That is, if the child's move precedes the worker's move, the QAD is the date that the worker arrived. If the child's move follows the worker's move, the QAD is the date the child arrived.

E4. How much time may separate the worker's move from a child's move "to join" a worker?

The time limit depends on the circumstances. The Department believes that, as a best and safe practice, the child's move should generally occur within no more than 12 months of the worker's move to obtain qualifying work, and that after one year it is difficult to link the child's move to the worker's move to obtain qualifying work. Nonetheless, there may be unusual circumstances that prevent a child from moving within 12 months of the worker's move. In these cases, the Department recommends that an SEA document in the comment section of the COE the basis for determining that the child moved to "accompany" a worker after such a prolonged period of time between the two moves.

F. Qualifying Work

F1. What is "qualifying work"?

Under § 200.81(i) of the regulations, "qualifying work" means temporary employment or seasonal employment in agricultural work or fishing work.

G. Agricultural Work or Fishing Work

Agricultural Work

G1. What is the definition of "agricultural work" for purposes of the MEP?

"Agricultural work" is:

1. the production or initial processing of crops, dairy products, poultry, or livestock; as well as

   the cultivation or harvesting of trees,

   that is—

2. performed for wages or personal subsistence.

See § 200.81(a).

G2. What does "production" mean?

The Department considers agricultural production to mean work on farms, ranches, dairies, orchards, nurseries, and greenhouses engaged in the growing and harvesting of crops, plants, or vines and the keeping, grazing, or feeding of livestock or livestock products for sale. The term also includes, among other things, the production of bulbs, flower seeds, vegetable seeds, and specialty operations such as sod farms, mushroom cellars, and cranberry bogs.

G3. What is a crop?

The Department considers a crop to be a plant that is harvested for use by people or by livestock.

G4. What are examples of agricultural work related to the production of crops?

The production of crops involves work such as preparing land or greenhouse beds, planting, seeding, watering, fertilizing, staking, pruning, thinning, weeding, transplanting, applying pesticides, harvesting, picking, and gathering.

G5. Is work such as gathering decorative greens considered agricultural work?

Yes. The Department considers the term "plants" to include decorative greens or ferns grown for the purpose of floral arrangements, wreaths, etc. Therefore, the collection of these plants can be considered agricultural work. For the purposes of the MEP, the collection of these greens for recreation or personal use would not be considered agricultural work.

G6. What is livestock?

The term "livestock" refers to any animal produced or kept primarily for breeding or slaughter purposes, including, but not limited to, beef and dairy cattle, hogs, sheep, goats, and horses. For purposes of the MEP, livestock does not include animals that are raised for sport, recreation, research, service, or pets. The Department does not consider the term "livestock" to include animals hunted or captured in the wild.

G7. What are examples of agricultural work related to the production of livestock?

The Department considers the production of livestock to involve raising and taking care of animals described in the previous question. Such work includes, but is not limited to: herding; handling; feeding; watering; milking; caring for; branding; tagging, and assisting in the raising of livestock.

G8. Are animals such as deer, elk, and bison raised on farms considered "livestock"?

Yes, so long as these animals, sometimes referred to as specialty or alternative livestock, are raised for breeding or slaughter purposes and not for sport or recreation.

Cultivation or Harvesting of Trees

G9. What does "cultivation" mean in the context of trees?

In the context of trees, "cultivation" refers to work that promotes the growth of trees.

G10. What are examples of work that can be considered the cultivation of trees?

For the purposes of the MEP, examples of work that can be considered the cultivation of trees include, but are not limited to: soil preparation; plowing or fertilizing land; sorting seedlings; planting seedlings; transplanting; staking; watering; removing diseased or undesirable trees; applying insecticides; shearing tops and limbs; and tending, pruning, or trimming trees.

G11. What does "harvesting" mean in the context of trees?

For the purposes of the MEP, "harvesting" refers to the act of gathering or taking of the trees.

G12. What are examples of work that can be considered the harvesting of trees?

The Department considers the harvesting of trees to include work such as topping, felling, and skidding.

G13. What types of work are not considered part of the cultivation or harvesting of trees"?

The Department believes that the following activities are *not* part of the cultivation or harvesting of trees: clearing trees in preparation for construction; trimming trees around electric power lines; and cutting logs for firewood.

G14. Does transporting trees from a harvesting site to a processor (sawmill) qualify as agricultural work?

No. Transporting trees is not agricultural work for purposes of the MEP because it occurs after the cultivation and harvesting of trees.

G15. Is processing trees considered agricultural work?

No. According to § 200.81(a) of the regulations, only the cultivation or harvesting of trees is considered agricultural work. Processing trees occurs after the cultivation and harvesting.

<u>Fishing Work</u>

G16. What is the definition of "fishing work" for purposes of the MEP?

"Fishing work" is:

1. the catching or initial processing of fish or shellfish; as well as

   the raising or harvesting of fish or shellfish at fish farms,

that is--

2. performed for wages or personal subsistence.

See § 200.81(b).

G17. What is a "fish farm"?

For purposes of the MEP, the Department considers a fish farm to be a tract of water, such as a pond, a floating net pen, a tank, or a raceway reserved for the raising or harvesting of fish or shellfish. Large fish farms sometimes cultivate fish in the sea, relatively close to shore. The fish are artificially cultivated, rather than caught, as they would be in "fishing." Fish species raised on fish farms include, but are not limited to, catfish, salmon, cod, carp, eels, oysters, and clams.

G18. What are examples of work on a fish farm that would qualify as fishing work?

For the purposes of the MEP, examples of work on a fish farm that would qualify as "fishing work" include, but are not limited to, raising, feeding, grading, collecting, and sorting of fish, removing dead or dying fish from tanks or pens, and constructing nets, long-lines, and cages.

G19. Is the act of catching fish or shellfish for recreational or sport purposes "fishing work"?

No. These activities are not performed for wages or personal subsistence.

Initial Processing

G20. What does "initial processing" mean?

The Department considers "initial processing" to be work that (1) is beyond the production stage of agricultural work and (2) precedes the transformation of the raw product into something more refined. It means working with a raw agricultural or fishing product.

G21. What are examples of "initial processing" work in the poultry and livestock industries?

For the purposes of the MEP, examples of "initial processing" work in the poultry and livestock industries include, but are not limited to: stunning; slaughtering; skinning; eviscerating; splitting carcasses; hanging; cutting; trimming; deboning; and enclosing the raw product in a container.

G22. What are examples of "initial processing" work in the crop industry?

For the purposes of the MEP, examples of "initial processing" work in the crop industry include, but are not limited to: cleaning; weighing; cutting; grading; peeling; sorting; freezing, and enclosing the raw product in a container.

G23. What are examples of "initial processing" work in the fishing industry?

For the purposes of the MEP, examples of "initial processing" work in the fishing industry include, but are not limited to: scaling; cutting; dressing; and enclosing the raw product in a container.

G24. When does "initial processing" end?

The Department considers a product no longer to be in the stage of "initial processing" once the transformation of the raw product into something more refined begins. The Department believes that work up to, but not including, the start of the transformation process is agricultural or fishing work for purposes of the MEP. However, work such as placing raw chicken breasts into the oven for cooking, adding starter cultures to milk to make cheese, or applying necessary ingredients to a raw pork belly to begin the curing process is the beginning of the transformation process and therefore is not agricultural or fishing work for purposes of the MEP.

G25. What work is <u>not</u> considered production or initial processing?

Work such as cooking; baking; curing; fermenting; dehydrating; breading; marinating; and mixing of ingredients involves transforming a raw product into a more refined product. Therefore, the Department does not consider this work to be production or initial processing. In addition, the Department does not consider the following work to be production or processing: placing labels on boxes of refined products; selling an agricultural or fishing product; landscaping; managing a farm or processing plant; providing accounting, bookkeeping, or clerical services; providing babysitting or childcare services for farmworkers; or working at a bakery or restaurant. With regard to work such as repairing or maintaining equipment used for production or processing, or cleaning or sterilizing farm machinery or processing equipment, the Department does not consider individuals whose *profession* is to do this work, or who were hired solely to perform this work, to be performing agricultural work.

G26. Is hauling a product on a farm, ranch or other facility considered agricultural work?

Yes. The Department considers hauling a product <u>on</u> a farm, ranch, or other facility an integral part of production or initial processing and therefore, is agricultural work. However, it does not consider transporting a product to a market, wholesaler, or processing plant to be production or initial processing. "Shipping and trucking" is work that is often carried out by a third-party retailer, wholesaler, or contractor paid to

transport various products. Therefore, the service these companies or contractors provide is "shipping" or "trucking" and not production or initial processing.

G27. May a worker who performs both qualifying and non-qualifying work still be eligible for the MEP?

Yes. A worker is only required to meet the definition of a migratory agricultural worker or migratory fisher as defined in § 200.81(d) and (f) of the regulations. The fact that the worker performs non-qualifying work in addition to qualifying work has no bearing on his or her eligibility for the MEP.

Wages and Personal Subsistence

G28. What does "personal subsistence" mean?

As used in the definitions of agricultural work and fishing work in § 200.81(a) and (b) of the regulations, and as defined in § 200.81(h) of the regulations, "personal subsistence" means that the worker and the worker's family, as a matter of economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, or livestock they produce or the fish they catch.

G29. May a worker who is "self-employed" qualify as a migratory agricultural worker or migratory fisher?

Yes, in some circumstances. In general, the Department considers migratory agricultural workers and fishers to be either employed for wages or performing work for personal subsistence. However, while some workers, such as those who glean leftover crops from fields or fishers who own their own boats, might consider themselves "self employed," for purposes of MEP eligibility the Department considers the provisions regarding personal subsistence to mean that the money such workers earn from the sale of the product is equivalent to "wages" (and to the extent that gleaners consume the food they gather as a substantial portion of their food intake, "performed for personal subsistence").

H. Temporary and Seasonal Employment

H1. What is seasonal employment?

According to § 200.81(j) of the regulations, seasonal employment is employment that occurs only during a certain period of the year because of the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

H2. How does the phrase "cycles of nature" pertain to seasonal employment?

For purposes of the MEP, the phrase "cycles of nature" is used to describe the basis for why certain types of employment in agricultural or fishing work only occur during certain, limited periods in the year. The length of "seasonal" employment is based on the

distinct period of time associated with the cultivation and harvesting cycles of the agricultural or fishing work, and is not employment that is continuous or carried on throughout the year.

H3. How long may seasonal employment last?

The definition of seasonal employment in § 200.81(j) of the regulations states that it is employment that occurs only during a certain period of the year and may not be continuous or carried on throughout the year. Therefore, like temporary employment, seasonal employment may not last longer than 12 months.

H4. How may an SEA determine that a worker's job is "seasonal employment"?

A worker's employment is seasonal if:

1. it occurs during a certain period of the year; and

2. it is not continuous or carried on throughout the year

H5. What is temporary employment?

According to § 200.81(k) of the regulations, temporary employment means "employment that lasts for a limited period of time, usually a few months, but no longer than 12 months."

H6. How may an SEA determine that a worker's job is "temporary employment"?

Section 200.81(k) of the regulations identifies three ways in which an SEA may determine that employment is temporary:

a. Employer Statement - The employer states that the worker was hired for a limited time frame, not to exceed 12 months;

b. Worker Statement - The worker states that he or she does not intend to remain in that employment indefinitely (*i.e.*, the worker's employment will not last longer than 12 months);

c. State Determination - The SEA has determined on some other reasonable basis that the employment will not last longer than 12 months.

H7. Is a worker who was hired to perform a series of different jobs, which together lead to the worker being employed by the same employer for more than 12 months, employed on a temporary or seasonal basis?

No. Workers who are hired to work for more than 12 months by the same employer regardless of how many different jobs they perform are not employed on a temporary or seasonal basis as defined in 200.81(j) and (k) of the MEP regulations.

H8. What is an example of a statement from an employer that indicates that the employment is temporary?

An example of a statement from an employer who harvests ferns for the floral industry might be: "employer _____ (name) stated that she will hire the worker only for the months of February through May to accommodate the increase in floral gifting around Valentine's Day, Easter, and Mother's Day." In this example, the employer stated that she is hiring the worker for a short period of time that will not exceed 12 months.

H9. What is an example of a statement from a worker that indicates that the employment is temporary?

An example of a worker's statement might be: "the worker stated that he plans to leave the job after seven months in order to return to his home with his family." Similar to the employer's statement, the worker's statement indicates that he will only remain in the job for a short period of time that will not exceed 12 months.

H10. When would an SEA rely on its own determination that a worker's employment is temporary?

In general, the Department believes that a determination about the temporary nature of a worker's employment is best obtained through a recruiter's interview with the worker or employer. However, § 200.81(k) of the regulations authorizes an SEA to make its own determination that employment is temporary so long as the SEA has some other reasonable basis for determining that the employment will not last more than 12 months.

For employment that appears constant and available year round, § 200.81(k) of the regulations permits an SEA to conclude that the employment is "temporary" for purposes of the MEP only if it determines and documents that, given the nature of the work, of those agricultural and fishing workers whose children the SEA determined to be eligible using some other reasonable basis, virtually none remained employed by the same employer more than 12 months. For more information about how to determine and document that virtually no workers remained employed by the same employer for more than 12 months, please see section I of this chapter.

H11. What are examples of "other reasonable bas[e]s" that an SEA might consider when determining that employment will not last longer than 12 months?

Examples of information that an SEA might consider include:

1. A recent survey of workers (e.g., an attrition rate study—see I8 through I19 of this chapter), by worksite, whom the SEA previously determined to be employed temporarily.
2. A recent survey of workers (e.g., an attrition rate study—see I8 through I19 of this chapter) from another State that documents the temporary nature of employment at a similar worksite.
3. A relevant and timely literature review that supports the temporary nature of employment at a similar worksite(s) and that can be considered for the worksite in question.

The SEA should maintain appropriate documentation to support the basis for its determination. In the case of examples 2 and 3 above, this documentation should include the basis for finding that the worksite in the State is similar to those discussed in another State's documentation or in the literature review.

As mentioned in H10, an SEA that relies on some other reasonable basis to determine the temporary nature of employment that appears constant and available year round must later confirm its conclusion by documenting that virtually none of the agricultural or fishing workers whose children were determined to be eligible, based on its determination of temporary employment, were still employed by the same employer for more than 12 months. See Section I of this chapter for more information.

H12. What are examples of information that would not be considered "reasonable" for purposes of determining that employment will not last more than 12 months?

The Department does not consider information such as the following to be reasonable for purposes of determining that employment will not last more than 12 months:

1. Anecdotal information about a worksite or industry, for example, the working conditions are such that a worker is unlikely to remain employed for more than 12 months.
2. Newspaper ads announcing a job opening on a farm or at a worksite. The fact that an employer plans to hire new workers by announcing job openings is not necessarily a signal that employment at a worksite is to be temporary. Specificity about the nature of the jobs to be filled, *e.g.*, whether the work is agricultural or fishing and the employment is temporary or seasonal, would be needed.

3. After February 28, 2010, "industrial surveys" as described in the Department's 2003 Non-Regulatory Guidance or other studies of turnover within job categories. See I7 of this chapter.

The Department does not believe that this type of information is sufficiently reliable for determining whether a worker's employment is likely to last less than 12 months.

H13. Must the SEA stop serving children whose parent or guardian remains employed by the same employer after 12 months even though the worker was originally employed on a temporary basis?

In general, an SEA may continue serving these children and keep them on its rolls for the duration of their 36-month eligibility period. MEP eligibility is determined at the time of the interview and is based on the worker's (or employer's) stated intention at the time of the move, or on the SEA's evidence of an "other reasonable basis" for determining the work may be considered to be temporary.

The Department would expect a situation in which the worker continues to be employed after 12 months to be a rare occurrence and not the norm for workers who are recruited on this basis. However, if a significant number or percentage of workers recruited on this basis remains employed at a particular worksite beyond 12 months, either in the same job or in another job at the same worksite, the Department believes the SEA should examine the reasons why workers are remaining employed. In some cases, the reasons may be justifiable. For example, if the economy took a turn for the worse, employees who intended to leave their employment much earlier did not do so because other jobs were not available. On the other hand, the recruiter might have made an incorrect eligibility determination because he or she did not understand the MEP definition of temporary employment. There even could be reasons to suspect fraud. In both of these latter situations, children's eligibility should be terminated immediately if the SEA determines that the original eligibility determinations were erroneous.

Thus, the reasons workers remain employed for more than 12 months will determine whether and what action the SEA needs to take.

H14. If a worker planned to work at an agricultural or fishing worksite permanently, can the worker be recruited for the MEP if the recruiter finds out later that the worker did not remain employed more than 12 months?

In general, no. A worker who moved to seek permanent employment did not move "in order to obtain temporary or seasonal employment in agricultural or fishing work" as required by the statute.

However, if the SEA has determined and documented that employment at the worksite, despite appearing to be constant and available year-round, is temporary in accordance

with 200.81(k) of the regulations, the worker can be considered eligible for the MEP (assuming that all other eligibility criteria are met). See Section I of this chapter.

H15. Should jobs that occur only at certain times of the year because of a holiday or event be considered as temporary employment or seasonal employment?

Jobs that occur only at certain times of the year because of a holiday or event (*e.g.*, Thanksgiving, Christmas, etc.) should be considered temporary employment because the time of year that the work is performed is not dependent on the cycles of nature, but rather the holiday or event.

I. Employment That Appears Constant and Available Year-Round

I1. Is an SEA always required to determine whether employment that appears constant and available year-round may be considered temporary?

No. An SEA is required to determine whether employment that is constant and available year-round may be considered temporary only if it intends to qualify the children of workers employed in these types of jobs.

I2. May SEAs consider employment that appears to be constant and available year-round to be temporary employment?

Yes. The Department recognizes that some agricultural and fishing jobs, for example certain jobs at processing plants or dairy farms, may appear to be constant and available year-round, but, perhaps because of the nature of the work, workers typically do not stay long at these jobs. In cases of employment that appears to be constant and available year-round, recruiters can base their determination that the employment is temporary on:

1. the worker's or the employer's statement that even though the work appears to be constant and available year- round, he or she intends to remain no longer than 12 months, or
2. the SEA's determination that even though the work appears to be constant and available year-round, the SEA has determined and documented, in accordance with § 200.81(k) of the regulations, that the employment is temporary.

I3. How does an SEA determine and document that certain employment that appears to be constant and available year-round is temporary employment for purposes of the MEP?

Consistent with § 200.81(k) of the regulations, an SEA determines the temporary nature of employment that appears to be constant and available year-round by:

Step 1: establishing its basis for reasonably concluding that particular employment that appears to be constant and available year-round can

be considered temporary. (See H11 and H12 of this chapter regarding "reasonable bases" for determining temporary employment.)

AND

Step 2: later confirming the basis of this conclusion by documenting that virtually none of the migratory agricultural or fishing workers whose children were determined to be eligible, based on the SEA's determination of the temporary nature of such employment, remained employed by the same employer for more than 12 months. One way an SEA might confirm the basis of its subsequent conclusion is through an "attrition rate study." See I1 – I7, which apply to the requirements for documenting the temporary nature of work that appears to be constant and available year-round, and I8 – I21, which address attrition rate studies.

I4. May an SEA continue to rely on the documentation it used consistent with prior regulations and prior non-regulatory guidance to determine the temporary nature of employment that appears constant and available year round?

No. For a limited time, the July 29, 2008, regulations allowed the SEA to rely on documentation consistent with prior regulations and prior guidance (*e.g.*, "industrial surveys) when determining the temporary nature of employment that appears constant and available year round. However, this allowance ended on February 28, 2010 (*i.e.*, 18 months from the effective date of the July 2008 regulations). To continue to find whether agricultural and fishing workers employed in what appears to be constant and year-round employment are, in fact, engaged in temporary employment, § 200.81(k) requires that by February 28, 2010, the SEA establish and implement procedures for determining which *employers,* whose agricultural and fishing workers it previously determined were employed temporarily, meet the definition of temporary employment established in the July 29, 2008 regulations.

In other words, the SEA must have determined by February 28, 2010, which employers, who offer employment that the SEA previously considered to be temporary based on its prior documentation, met the "virtually no workers remained employed by the same employer for more than 12 months" threshold. For employers (or their worksites – see I10 of this chapter) for which the SEA has made this determination, the SEA may continue to qualify the children of workers employed in agricultural or fishing work at these worksites on the basis of its new documentation. But, for employers (or their worksites) that did not meet the "virtually no workers remained employed…" threshold, the SEA must stop recruiting the children of agricultural and fishing workers at these worksites on the basis of the SEA's prior documentation that work that appears constant and available year-round is temporary. The SEA also must terminate eligibility of any children who were determined to be eligible on or after February 28, 2010, on the basis of

the SEA's prior determination that work that appears constant and available year-round is temporary. See also I20 of this chapter.

I5. What is the purpose of determining that "virtually no workers remained employed by the same employer more than 12 months"?

The purpose is to determine which employers, whose workers' employment appears to be constant and available year-round, may be considered to offer "temporary employment" for purposes of MEP eligibility. This determination only affects whether an SEA may continue, going forward, to consider employment for a particular employer to be temporary based on the *SEA's documentation* (*i.e.*, employment may still be determined temporary based on the worker's or employer's statement that the employment will not last longer than 12 months). See reference to SEA documentation in § 200.81(k) of the regulations.

I6. How often must an SEA test the reasonableness of its temporary determinations for work that appears to be constant and available year-round?

Determinations made on the basis of criteria in the July 29, 2008, regulations must be made at least once every three years. See § 200.81(k). (By February 28, 2010, each SEA must have tested the reasonableness of determinations made according to the 2003 MEP Non-Regulatory Guidance or some other reasonable process that was used prior to the issuance of the July 29, 2008 regulations.)

I7. After February 28, 2010, may an SEA continue to rely on (1) "industrial surveys" as discussed in the 2003 MEP Non-Regulatory Guidance, or (2) some other process that measures employee turnover that SEAs adopted prior to the issuance of the July 2008 regulations, as reasonable documentation of the temporary nature of employment that appears to be constant and available year-round?

No. See § 200.81(k) of the regulations.

The 2003 MEP Non-Regulatory Guidance permitted an SEA to consider certain jobs temporary based on the turnover rate of workers within particular job categories. However, surveys that measure the turnover rate of workers in and out of a particular job do not account for situations in which workers continue to remain employed by the same employer in a succession of jobs. These types of surveys do not measure the temporary nature of a worker's employment, but rather only the turnover within a particular job category. Thus, these types of surveys are not valid measures of "temporary employment" as defined in § 200.81(k) of the regulations. Instead, the SEA should consider conducting an "attrition rate study" to document the temporary nature of employment that appears to be constant and available year-round.

Attrition Rate Study

I8. What is an attrition rate study?

An attrition rate study is one way that an SEA can confirm its basis for reasonably concluding, despite the appearance that employment at a worksite is constant and available year-round, that virtually no migratory agricultural or fishing workers remained employed by the same employer for more than 12 months. For those worksites where the results of the attrition rate study reveal that virtually no migratory agricultural or fishing workers remained employed for more than 12 months, the SEA can continue to conclude that workers who perform agricultural or fishing work at those worksites are employed temporarily. (See Step 2 of I3 of this section.)

In this kind of study, an "attrition rate" means the percent of all migratory agricultural or fishing workers at a particular worksite (1) who were previously identified as eligible for the MEP, and (2) whose employment appears to be constant and available year-round, but who do not remain employed at that worksite more than 12 months.

I9. What attrition rate would permit an SEA to conclude that "virtually no workers remained employed by that employer more than 12 months"?

The Department has adopted a presumption that an attrition rate of at least 90% for any given worksite satisfies the requirement that virtually none of the migratory agricultural or fishing workers hired remained employed at that worksite for more than 12 months – and, therefore, the employment may be considered temporary.

For worksites of five or fewer migratory workers who perform agricultural or fishing work that appears to be constant and available year-round (e.g., small dairy farms), calculating an attrition rate of 90% is impossible. Therefore, the Department considers the termination of employment for four out of five workers to be equivalent to "virtually no workers remained employed by the same employer more than 12 months." Similarly, the Department considers worksites with three out of four workers, and two out of three workers, leaving within 12 months or less to be equivalent to "virtually no workers remained employed by the same employer more than 12 months."

I10. If an SEA is documenting the temporary nature of employment that appears to be constant and available year-round, does it make its temporary determination by employer or by worksite?

An SEA that wants to document the temporary nature of employment that appears to be constant and available year-round is only required to make this determination by employer. Specifically, § 200.81(k) requires an SEA, for employment that appears to be constant and available year-round, to document that virtually no agricultural or fishing workers, whose children the SEA previously identified as eligible for the MEP, "remained employed by the same employer more than 12 months" (emphasis added).

However, in cases where the employer has several worksites, the Department recommends that the SEA consider going further, and conduct its study by each of the employer's worksites. Conducting an attrition rate study by worksite allows an SEA to continue qualifying the children of agricultural or fishing workers who are employed at worksites that have a 90% or higher attrition rate even though the attrition rate for the employer (which combines all of the worksites) might be less than 90%. In this situation, if the SEA only conducted its attrition rate by employer, it would no longer be able to qualify the children of agricultural or fishing workers employed by this employer, because the employer's overall attrition rate is not 90% or higher.

Note, given the possible benefit of conducting an attrition rate study by employer's worksite, the remainder of the discussion about attrition rate studies uses this perspective.

I11. How would an SEA conduct an attrition rate study?

The Department suggests following these steps:

1. Generate a list of migratory agricultural and fishing workers whose children are currently qualified as eligible under temporary employment.
2. Separate COEs for these workers into two categories: Category A – determinations of temporary employment based on the worker's or employer's statement that the job was temporary or the worker would not remain employed longer than 12 months; and Category B – determinations of temporary employment based on employment that appeared constant and available year-round, but which the SEA determined to be temporary. Note, COEs classified as Category A should not be factored into the attrition rate study or calculation since the purpose of the study is to confirm whether the SEA's determination is correct. COEs classified as Category B will represent the pool of workers whose employment appears constant and available year round but that the SEA has determined to be temporary.
3. Further separate the COEs for Category B by worksite if this has not been done already.
4. Contact each of these workers (or the workers' employer) to determine or verify:
    a. whether the worker is still employed at the same worksite listed on the COE;
    b. when the worker started working at that worksite;
    c. when the worker stopped working at the worksite (if the worker has stopped working at the worksite); and
    d. whether the worker's employment was terminated and resumed at any time during the 12 months.
5. Use the information from the results of the interviews to determine which of the Category B workers were employed at the same worksite for 12 months or less.

6. Calculate the percent of agricultural and fishing workers by worksite that the SEA can verify as being employed at that worksite for 12 months or less. See I12, immediately below, for information about calculating the attrition rate.

I12. How can an SEA calculate an attrition rate?

Attrition rates can be calculated as follows:

(1) Determine the total number of agricultural and fishing workers at each worksite whose children were qualified as eligible according to the SEA's determination of temporary employment for employment that appears to be constant and available year-round; *i.e.*, steps 1 through 3 in I11, immediately above. Consider this number to be "Y".

(2) Determine the number of agricultural and fishing workers by worksite identified in Step 1 who were employed for 12 months or less; *i.e.*, step 4 and 5 in I11, immediately above. Consider this number to be "X".

(3) Divide "X" by "Y" and multiply this number ("Z") by 100 to give you the attrition rate for each worksite in a percentage.

Attrition Rate formula:

X / Y = Z ⟶ Z x 100 = Attrition rate (%)

The following example demonstrates how the formula works:

Worksite USA

(X) Total number of agricultural workers from worksite USA that were employed for 12 months or less	(Y) Total number of agricultural workers at worksite USA whose children are qualified as eligible according to the SEA's prior determination of temporary employment that appears to be constant and available year-round
32	120

Calculation:

X / Y = Z ⟶ Z x 100 = Attrition Rate (%)

32 / 120 = 0.266 ⟶ 0.266 x 100 =27% (round to the nearest tenth)

In this example, only 27% of agricultural workers at worksite USA were no longer employed after 12 months (i.e., 73% of workers were employed longer than 12 months). Despite the fact that workers at worksite USA were previously determined to be eligible for the MEP, agricultural or fishing work at worksite USA can no longer be considered temporary employment. This is because the SEA could not determine that "virtually no workers remained employed by [worksite USA] more than 12 months," as required by § 200.81(k) of the regulations. Therefore, the SEA must stop recruiting workers at worksite USA based on the SEA's own determination of temporary employment. Workers at the site may still be determined to be migratory workers if the determination of temporary employment is based on the worker's or employer's statement. See I21 of this chapter.

I13. How would an SEA select the workers for its attrition rate study?

An SEA may use any approach that is reasonable to select workers for participation in its attrition rate study.[1] Below are two suggested approaches. In both examples, the SEA should only include in its sample migratory agricultural workers and fishers whose children (or the children themselves if they were the workers) were previously determined to be eligible based on the SEA's prior determination that the worker's constant and available year-round employment was actually temporary. In other words, these samples would not include the children of workers whose employment was determined to be temporary based on the worker's statement or the employer's statement.

1. This approach relies on workers whose children were identified as eligible for the MEP during a specified 12-month time period. Depending on the 12-month time period that the SEA selects, this option will allow the SEA to determine the temporary nature of employment at a particular worksite as quickly as the SEA can conduct the interviews with the workers and analyze the data. To select workers[2] using this approach, the SEA should generate a list of workers whose children were identified as eligible for the MEP during a specified 12-month time period (*e.g.*, between September 1, 2008, and August 31, 2009). The SEA should select a time period that is sufficiently recent to ensure the most accurate data. However, to complete the attrition rate study as quickly as possible, it might want to ensure that at least 12 months have passed from the date the last child in the study was determined eligible. For example, if the last child in a September 1, 2008 through August 31, 2009 12-month list was determined eligible on August 31, 2009, the worker has until August 31, 2010, to leave his or her job before the SEA can determine whether

[1] This guidance does not address requirements for statistically valid samples. SEAs should consult their own statistical experts if they choose to sample rather than interview the entire population.
[2] Again, as used in these two approaches, the term "workers" should include only migratory agricultural workers and fishers whose children (or the children themselves if they are the workers) were previously determined to be eligible based on the State's prior determination that the workers' employment was temporary.

the worker was employed at the same worksite for longer than 12 months. Thus, the overall timeframe for the attrition rate study would end on August 31, 2010. (That is, the period of analysis for this sampling approach will be no longer than 24 months.)

2. This approach selects workers whose children were identified as eligible for the MEP at a specific date in time. Depending on the date that the SEA chooses, it might have to wait as long as 12 months to complete its attrition rate study. To select workers using this approach, the SEA should generate a list of all workers whose children were eligible for the MEP at a specific date in time, for example, September 1, 2009. (Note: given a child's 36-month period of eligibility, children with qualifying arrival dates as early as September 2, 2006, will be included on this list.) When using this approach, the SEA should select a specific date in time that is sufficiently recent to ensure the most accurate data, but it should keep in mind that, depending on the date chosen, the SEA may have to wait as many as 12 months for the results of its attrition rate study. For example, if the SEA generates a list of children who were eligible on September 1, 2009, the sample could include children whose qualifying arrival date was as recent as August 31, 2009, and whose parent began his or her employment on that same date. In this situation, the worker has until August 31, 2010, to leave his or her job before the SEA can determine whether the worker was employed at the same worksite for longer than 12 months.

These are just two approaches an SEA can use to select its workers to test whether employment that appears constant and available year-round can reasonably be considered temporary employment. The approach an SEA uses will depend on the amount of time the SEA has to complete its attrition rate study and what data the SEA has about such employment: *e.g.*, the number of years the SEA has been collecting needed data, and the specific data the SEA has been collecting.

I14. Is an attrition rate study the only vehicle SEAs may use to determine and document the temporary nature of work that appears to be constant and available year-round?

No. An attrition rate study is one way an SEA might determine and document that of those agricultural and fishing workers whose children were previously determined to be eligible based on the SEA's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months. Any SEA that adopts an alternate process should ensure that its process adequately determines that "virtually no workers remained employed…more than 12 months" and should document its basis for reasonably making this conclusion.

I15. Should an SEA include in its attrition rate study workers whose temporary employment determination was based on the worker's statement or the employer's statement?

No. As we noted in step 2 of I11 of this chapter, the SEA should not include in its attrition rate study workers whose temporary employment determination was based on the worker's statement or the employer's statement. The purpose of the study is to determine whether employment that appears to be constant and year round is, in fact, temporary. In these cases, either the worker or the employer has already determined that the employment will not last longer than 12 months.

I16. Should an SEA include in its attrition rate study workers who sought, but did not obtain, temporary employment in agricultural or fishing work?

No. In this situation, the worker never obtained the employment, therefore, the SEA cannot determine the length of time the worker was employed.

However, if the SEA knows that a specific worker obtained qualifying work after his or her children were recruited in to the MEP, the SEA should include the worker in the study and subsequently determine the length of time he or she was employed.

I17. What should an SEA do if, when conducting its attrition rate study, it cannot locate a worker whom it previously determined was employed temporarily based on its own determination?

In situations where the SEA cannot locate a worker whom it previously determined was employed temporarily based on the SEA's determination, the SEA should contact the employer for information about the worker's length of employment. The SEA should only presume that the worker was not employed more than 12 months if the SEA can document that (1) the worker is no longer employed by the employer listed on the COE and (2) the worker was not employed by that employer for more than 12 months.

If the SEA is unable to verify a worker's length of employment by asking the employer, then the SEA may follow up with the children's school district to see if the worker's children are still enrolled and, if so, to obtain the worker's most up-to-date contact information. The SEA could also check its State database or MSIX to determine if either of these resources has current information on the worker. If the SEA obtains more current contact information, it should again try to speak with the worker to determine that (1) the worker is no longer employed by the employer listed on the COE, and (2) the worker was not employed by that employer for more than 12 months. The Department strongly recommends that the SEA establish a process for recruiters to follow when verifying whether a worker is no longer employed at a worksite.

If the SEA can document that (1) the worker is no longer employed by the employer listed on the COE and (2) the worker was not employed by that employer for more than

12 months, it should include the worker in both the X and Y variables described in question I12 of this section. If the SEA cannot confidently document both of these criteria, then it should not include the worker in either variable.

I18. When calculating attrition rates, how should an SEA take into account a migratory agricultural or fishing worker who changed jobs but is still employed at the same worksite?

The fact that a worker changed jobs is irrelevant. A worker who changes jobs at a worksite should be included, in an attrition rate study, in the same manner as all other workers—by considering whether he or she remained employed at the worksite for 12 months or less.

I19. What should an SEA do if it determines that employment at a particular worksite does not meet the "virtually no workers remained employed…more than 12 months" threshold? Must the SEA stop serving, and remove from its rolls, those children whom it recruited in good faith?

If the SEA determines that employment at a worksite does not meet this threshold, it must stop recruiting the children of workers at these worksites on the basis of the SEA's own documentation that the employment at the worksite is temporary, because it has found otherwise. However, the SEA may continue to qualify the children of workers at these worksites if the determination of temporary employment is based on the worker's or the employer's statement that the work is to be temporary and the worker will not remain employed longer than 12 months, the child would still be eligible for the MEP (assuming all other eligibility criteria are met).

Children who were recruited by the SEA (1) on a reasonable basis (i.e., in good faith) that the employment that appeared constant and year-round could be considered temporary (see H11 of this chapter and the corresponding references), and (2) before the SEA completed its attrition rate study, remain eligible for the duration of their 36-month eligibility period starting with their last qualifying move.

I20. Once the SEA has determined which worksites meet the "virtually no workers remained employed by the same employer more than 12 months" threshold, can it find all children of agricultural or fishing workers at those sites to be eligible for the MEP?

Yes, provided that the children meet all other MEP eligibility requirements. The purpose of determining which worksites meet the "virtually no workers remained employed…more than 12 months" threshold is to permit anyone who works in agricultural or fishing work at these worksites to be considered employed on a temporary basis, regardless of any employer or worker statement that the work is intended to be permanent, and thus to permit their children to be considered migrant so long as all other MEP eligibility criteria are met.

I21. If an SEA has determined that employment at a particular worksite is not "temporary employment" (based on the SEA's documentation), but the worker indicates that he or she intended to remain employed at that site less than 12 months, can the SEA qualify the child so long as all other eligibility criteria are met?

Yes. As we noted in I19 of this chapter, an SEA may rely on a worker's statement to determine that employment is temporary even if the SEA's documentation demonstrates that the constant and available year-round employment is not "temporary". In this case, it is the worker's statement about his or her intention that makes the employment temporary.

J. Other Changes to MEP Eligibility

J1. Does the migratory worker's temporary or seasonal agricultural or fishing employment have to be a "principal means of livelihood"?

No. The MEP regulations published on July 29, 2008, removed the prior requirement that one's agricultural or fishing work needs to be a principal means of livelihood.

J2. Does the fact that a worker and child moved to relocate permanently affect the child's eligibility for the MEP?

No. The July 29, 2008 regulations define "move" or "moved" as it pertains to the MEP as a change from one residence to another residence that occurs due to economic necessity. Under this definition, the fact that a worker moved to permanently relocate does not matter so long as (1) another purpose of the worker's move was to obtain either qualifying work or any employment (not to include a move specifically for non-qualifying work), (2) the worker obtained qualifying work soon after the move, and (3) all other conditions of a qualifying move were met.

J3. Must the SEA consider whether an "initial commercial sale" has occurred in order to determine if the agricultural or fishing work can be considered qualifying?

No. The new regulations also removed the phrase "initial commercial sale" from the definition of agricultural work and fishing work. SEAs are no longer required to determine whether an "initial commercial sale" has occurred in order to determine if the work can be considered agricultural work or fishing work for purposes of the MEP.

K. Documenting Eligibility

K1. What responsibility does an SEA have to document eligibility determinations?

An SEA must document eligibility determinations in order to comply with § 76.731 of EDGAR, which provides that "[a] State and a subgrantee shall keep records to show its compliance with program requirements." As the MEP statute and regulations provide that only eligible migrant children (*i.e.*, those who meet the definitions contained in section 1309(2) of the MEP statute and § 200.81 of the MEP regulations) may be counted for and served by the MEP, each SEA must maintain documentation to confirm the eligibility of each child whom the SEA considers to be eligible for the program. In this regard, § 200.89(c) of the regulations requires an SEA and its local operating agencies to use the Certificate of Eligibility (COE) form established by the Secretary to document the State's determination of the eligibility of migratory children. (For more information about ID&R quality control requirements, see Chapter III titled Identification, Recruitment, and Quality Control.)

K2. What does the COE established by the Secretary require?

The COE established by the Secretary (the "national COE") consists of required data elements and required data sections necessary for documenting a child's eligibility for the MEP. A third part, for State-requested or required information, is optional. Each State's COE may look different, but every State's COE must include all of the required data elements and the required data sections contained in the national COE.

K3. What are the required data *elements* of the national COE?

The required data elements of the national COE are organized as Family Data and Child Data. The Family Data are as follows: Male Parent/Guardian Last Name, Male Parent/Guardian First Name, Female Parent/Guardian Last Name, Female Parent/Guardian First Name, Current Address, City, State, Zip Code, and Telephone. The Child Data are as follows: Last Name 1, Last Name 2, Suffix, First Name, Middle Name, Sex, Birth Date, Multiple Birth Flag (or MB), Birth Date Verification Code (or Code), and Residency Date.

K4. What are the required data *sections* for the national COE?

The required data sections mandated by the national COE are as follows: Qualifying Move & Work Section, Comment Section, Parent/Guardian/Worker/Spouse Signature Section, and Eligibility Certification Section. The content of these sections must remain unaltered, with limited exceptions. Certain formatting changes are allowable.

K5. May an SEA include its own State-requested or State-required information on the national COE?

Yes. As mentioned in K2 of this chapter, an SEA may include State-requested or State-required information on the national COE, within certain parameters. An SEA may only include its own information to the extent space is available on the single page in which the required data elements and the required data sections are included. However, an SEA may include its own information on additional pages that are to be attached to the single eligibility page. And, in general, an SEA may not collect any State-required or State-requested information inside any of the required data sections on the national COE. The Department has made limited exceptions to this last standard. For more information about exceptions for State-requested or State-required information, please see the national COE instructions at http://www2.ed.gov/programs/mep/legislation.html.

K6. Where can an SEA find more information about the national COE requirements?

Detailed information about the national COE, including how to complete a COE and specifics about how a State may design its COE to be in compliance with the July 2008 regulatory requirements, is available on the Department's website at http://www2.ed.gov/programs/mep/legislation.html or by calling the Department's Office of Migrant Education at (202) 260-1164.

K7. Must each SEA maintain a COE on all children eligible for the MEP?

Yes. Every child who the SEA determines is eligible for the MEP must have the basis for his or her eligibility recorded on the national COE. Children within the same family may be recorded on one COE so long as all of the children have the same eligibility information.

K8. When should a recruiter complete a new COE?

In order to ensure that children remain eligible to be counted and served by the MEP as long as is appropriate, recruiters should complete a new COE every time a child makes a new qualifying move.

K9. Must the parent or guardian sign the national COE?

Except for a few limited exceptions, yes. (See the instructions for completing the national COE at http://www2.ed.gov/programs/mep/legislation.html for more information about these exceptions.) By signing the national COE, the parent or guardian confirms that the information he or she provided is accurate and identifies who provided the information so that the SEA can verify information contained on the COE at a later date, if necessary.

K10. Must the recruiter sign the national COE?

Yes. The recruiter's signature on the national COE certifies that: (1) the children are eligible for the MEP, and (2) the information upon which the recruiter based the eligibility determination is correct to the best of his or her knowledge. Moreover, under § 200.89(c) and (d), the Department requires this signature on the national COE as an element of a reasonable system of quality control.

K11. Must someone else review the information on the national COE?

Yes. As part of a sound system of quality control, § 200.89(d)(4) of the MEP regulations (as revised on July 29, 2008) requires that the system of quality control that an SEA establishes must include "[a]n examination by qualified individuals at the SEA or local operating agency level of each COE to verify that the written documentation is sufficient and that, based on the recorded data, the child is eligible for MEP services." Therefore, the SEA may designate someone at the State, regional, or local level to assume this responsibility. This person must sign and date the national COE to indicate that this level of review has occurred. (For more information about ID&R quality control requirements, see 34 CFR 200.89.)

K12. May an SEA base its determination of a child's eligibility on a qualifying move that occurred in another State within the past 36 months?

Yes. It is possible that a child and his or her family will make a qualifying move, for example, to State A and then make a subsequent non-qualifying move to State B. So long as State B identifies the child within 36 months of the qualifying move, it may enroll the child in the MEP on the basis of the qualifying move to State A for the remainder of the 36 months. In doing so, State B makes its own independent determination that the child is eligible based on the earlier qualifying move as well as completes its own State's COE. SEAs are encouraged to coordinate with the State in which the qualifying move occurred to confirm the qualifying information.

K13. May a recruiter accept automatically another State's COE as evidence of a child's eligibility for the MEP?

No. Each State is responsible for making its own eligibility determination for the children it enrolls in the MEP. However, the Department encourages States to share information and to utilize each other's information to assist in making eligibility determinations.