GUIDANCE

Education of Migratory Children under Title I, Part C of the Elementary and Secondary Education Act of 1965

SELECTED CHAPTERS REVISED
March 2017

U.S. Department of Education
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Office of Elementary and Secondary Education
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INTRODUCTION

The Migrant Education Program (MEP) is authorized by Part C of Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA). The MEP provides formula grants to State educational agencies (SEAs) to establish and improve, directly or through local operating agencies (LOAs), education programs for migratory children.

STATUTORY PURPOSES OF THE PROGRAM

The purposes of the MEP are to:

- Assist States in supporting high-quality and comprehensive educational programs and services during the school year, and, as applicable, during summer or intersession periods, that address the unique educational needs of migratory children.

- Ensure that migratory children who move among the States are not penalized in any

manner by disparities among the States in curriculum, graduation requirements, and challenging State academic standards.

- Ensure that migratory children receive full and appropriate opportunities to meet the same challenging State academic standards that all children are expected to meet.

- Help migratory children overcome educational disruption, cultural and language barriers, social isolation, various health-related problems, and other factors that inhibit their ability to succeed in school.

- Help migratory children benefit from State and local systemic reforms.

(See section 1301 of the ESEA.)

PURPOSE OF THIS GUIDANCE

This document is designed to help SEAs and LOAs use MEP funds to develop and implement supplemental educational and support services to assist migratory children. The guidance in this document replaces all prior non-regulatory guidance for the MEP. This introduction, along with Chapter II: Child Eligibility, were revised to reflect considerations of changes to the program enacted in the *Every Student Succeeds Act* (*ESSA*) of 2015, which reauthorized the *Elementary and Secondary Education Act of 1965* (*ESEA)*. With the exception of replacing Chapter II, all other chapters remain unchanged from the non-regulatory guidance document that the Department published on October 23, 2003. Any future chapter revisions will be identified in the chapter title by the date of revision.

This guidance does not impose requirements beyond those in the ESEA and other Federal statutes and regulations that apply to the MEP. It also does not create or confer any rights for or on any person. While States may wish to consider the guidance, they are free to develop their own approaches that are consistent with applicable Federal statutes and regulations. The guidance in this document is not intended to be prescriptive or exhaustive. This document is one of many resources for SEAs and LOAs to use as they determine how best to meet the needs of

migratory children in a manner consistent with the requirements of the ESEA and the MEP regulations. It is intended to be read in conjunction with the authorizing statute, applicable regulations, and the Department's guidance on other programs (such as Title I, Part A, and Title III) that are relevant to the MEP.

States are responsible for making decisions about how best to implement and operate the MEP. It is critical that staff at the SEA and local levels realize that they should not continue practices simply because they are based on long-standing policy. Looking beyond what programs have done in the past to what they can do in the future to improve teaching and learning for all children is the biggest challenge of educational reform. SEAs and LOAs are encouraged to adopt new ideas and practices (particularly those grounded in research and evidence of success) to enable migratory children to succeed in school.

USING THIS GUIDANCE

This guidance clarifies statutory or regulatory requirements, includes examples of how States may comply with these requirements, and provides information on useful resources available through the Department. *The examples provided in this document should not be viewed as the "only" or the "best" way to comply with statutory or regulatory requirements.* They are provided to help practitioners consider the range of options available and to stimulate thinking about teaching and learning in the context of local needs and resources.

Several issues addressed in this document (such as parent involvement, schoolwide programs, and standards and assessments) are discussed in greater detail in the current guidance for other programs such as Title I, Part A and Title III of the ESEA. Because the MEP guidance addressing such issues was last updated in 2003, we refer readers to the current regulations and guidance for those programs, and will make corresponding updates to the MEP guidance at a later date.

If you are interested in commenting on this guidance, please e-mail us your comments to OESE.Guidance@ed.gov or write to us at the following address:

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II. CHILD ELIGIBILITY

A child is eligible for the MEP (and thereby eligible to receive MEP services) if the child:

a. Meets the definition of "migratory child" in section 1309(3) of the ESEA,[1] and is an "eligible child" as the term is used in section 1115(c)(1)(A) of the ESEA and 34 C.F.R. § 200.103; and

b. Has the basis for the State's determination that the child is a "migratory child" properly recorded on the national Certificate of Eligibility (COE).

Information necessary to determine a child's eligibility for the MEP, and to document such eligibility on the COE, is based on an interview with the child's parent/guardian or spouse, the child (if the child is the migratory worker), or another individual who is not the child's parent/guardian or spouse (*e.g.*, an older sibling or other household member), but who has direct knowledge of the information needed by the recruiter to determine eligibility. (Recruiters are those individuals who contact migratory families, explain the MEP to them, and collect the necessary information to determine whether a child is eligible for the MEP.) While it is preferable to obtain information regarding qualifying work directly from the worker, workers' statements may be relayed by the interviewee if the worker is not available at the time of the interview.

Each person reviewing the information contained on the COE, from the recruiter to the SEA designated reviewer(s), must have confidence in the eligibility determination. Through the lens of recruiters' and reviewers' knowledge and experience, the information provided by the interviewee should generally be sufficient to determine eligibility. However, States may require additional documentation to substantiate the information provided by the interviewee if they believe such information is necessary to confirm eligibility for the MEP.

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

A NOTE ON ESSA AND CHILD ELIGIBLITY UNDER THE MEP

The Department has updated Chapter II of the Non-Regulatory Guidance for the MEP to reflect changes made to the authorizing statute—Title I, Part C of the ESEA – by the ESSA. New statutory provisions under the ESSA for the MEP will take effect for Fiscal Year (FY) 2017 grants awarded to SEAs on July 1, 2017. All MEP-specific statutory provisions in Title I, Part C of the ESEA, as amended by the ESSA, including the program definitions affecting child eligibility, will also be effective on July 1, 2017.

[1] Throughout this chapter, unless otherwise indicated, citations to the ESEA refer to the ESEA, as amended by the ESSA.

Chapter II: Child Eligibility
[Non-Regulatory Guidance — March 2017]

Changes to the ESEA have two principal implications for eligibility determinations made by SEAs and their recruiters.

1. Changes to Who Is a Migratory Child

ESSA's inclusion in section 1309 of the ESEA of a revised definition of *migratory child*, and new definitions of the terms *migratory agricultural worker*, *migratory fisher* and *qualifying*

move, largely reflect definitions in regulations the Department issued in July 2008 under the ESEA, as amended by the No Child Left Behind Act of 2001 (NCLB) (34 C.F.R. § 200.81).

ESSA did make statutory changes in ways that SEAs and their recruiters are to determine the eligibility of migratory children, but these changes should make SEA eligibility determinations much clearer and easier to document. Principally, ESSA eliminates intent of a move as a factor affecting eligibility, and changes somewhat how eligibility determinations are made for workers who moved but did not engage in qualifying work.

- Elimination of 'Intent' as an Eligibility Criterion.

The ESEA, as reauthorized prior to the ESSA, defined a migratory child as one *"who is, or whose parent or spouse is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who, in the preceding 36 months, in order to obtain, or accompany such parent or spouse, in order to obtain, temporary or seasonal employment in agricultural or fishing work—has moved from one school district to another…"* This long-standing definition established, as an eligibility criterion, the intent of the worker in making a move—a factor that, in practice, has proven very difficult for SEAs to document and confirm. ESSA has eliminated this criterion. Now, the worker must only have moved due to economic necessity from one residence to another and from one school district to another (subject to specific exceptions for school districts of more than 15,000 square miles or States of a single school district), and have either (1) engaged in new qualifying work soon after the move, or (2) if the worker did not engage in new qualifying work soon after the move, actively sought such employment and had a history of moves for qualifying work. See C1, C2 and C4 of this guidance.

- Workers Who Moved and Did Not Engage in Qualifying Work.

For those parents/guardians and spouses of migratory children who moved and did not engage in qualifying work soon after the move, and for children who would qualify as migratory workers on their own, the statutory definitions of *migratory agricultural worker* and *migratory fisher* in section 1309 of the ESEA contain criteria that are similar to, but not the same as, criteria contained in the definition of the phrase *in order to obtain* in 34 C.F.R. §200.81(d). The definitions in section 1309 of the ESEA permit one who has moved and not engaged in qualifying work soon after the move to be considered a migratory agricultural worker or migratory fisher if the individual actively sought such employment AND has a history of moves for temporary or seasonal agricultural or fishing employment. By contrast, the definition of *in order to obtain* in 34 C.F.R. §200.81(d)—which is no longer applicable because that phrase does not appear in the reauthorized statute—provides that the individual had to have stated that one of

the purposes of the most recent move was to obtain such qualifying employment, and either (1) have a prior history of moves to obtain qualifying employment, OR (2) there is other credible evidence that the worker actively sought such employment soon after the move but, for reasons beyond his or her control, the work was unavailable. See C8 - C18 of this guidance.

2. Use of the Approved Certificate of Eligibility

Provided it has by then been approved for use by the U.S. Office of Management and Budget (OMB), consistent with 34 C.F.R. § 200.89(c) all SEAs must begin using the new revised national COE for all MEP eligibility determinations made on or after July 1, 2017. Any COE reviewed by SEA-designated reviewer(s) on or after July 1, 2017, must only be approved by such reviewers if the child(ren) listed on the COE meet program eligibility criteria under ESEA, as amended by the ESSA.

A migratory child whom an SEA determined to be eligible for the MEP prior to July 1, 2017, based on use of the prior version of the national COE, *i.e.*, the version prepared under the ESEA, as amended by NCLB, remains eligible to receive MEP services for 36 months from his or her most recent qualifying arrival date (QAD), until he or she reaches age 22, or until he or she is no longer eligible for a free public education through grade 12 in that State—whichever occurs first.

STATUTORY REQUIREMENTS:

Sections 1115(b) and (c), 1304(c)(2), and 1309 of the ESEA.

NOTE: As it did in the predecessor statute, section 1304(c)(2) of the ESEA requires each SEA desiring to receive an MEP award to provide an assurance that it will implement its MEP program and projects in a manner consistent with the objectives of section 1115(b) and (d) of the ESEA. While the definition of "eligible children" applicable to Title I, Part A targeted assistance programs had previously been in section 1115(b) of the ESEA, this definition can now be found in section 1115(c). However, the provision for targeted assistance programs in section 1115(b)(2) requires the provision of services to participating students who have been identified as part of the "eligible population" under paragraph (c). Since this is one of the objectives of paragraph (b), the ESEA continues to bring that same definition into the MEP's definition of a migratory child, whose objectives are to permit services to children not older than age 21 who are entitled to a free public education through grade 12, and preschool children who are not yet at a grade level at which the local educational agency (LEA) or State provides a free public education.

REGULATORY REQUIREMENTS:

34 C.F.R. 200.81, 200.103, and 200.89(c)

NOTE: For the three terms defined in both the statute and program regulations ("migratory child," "migratory agricultural worker," and "migratory fisher"), the statutory definition in the ESEA, as amended by ESSA takes precedence. In addition, the term "in order to obtain," as defined in 34 C.F.R. § 200.81(d), is no longer applicable because the term was part of the

definition of "migratory child" in the previous version of the statute (ESEA, as amended by NCLB), but has been removed from the program definitions in the current statute (ESEA, as amended by ESSA).

A. Migratory Child

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

According to sections 1115(c)(1)(A) (incorporated into the MEP by sections 1304(c)(2), 1115(b), and 1309(3) of the ESEA, and 34 C.F.R. § 200.103(a)), a child is a "migratory child" if the following conditions are met:

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

2.
   a. The child is entitled to a free public education (through grade 12) under State law, *or*

   b. The child is not yet at a grade level at which the LEA provides a free public education, *and*

3. The child made a qualifying move in the preceding 36 months as a migratory agricultural worker or a migratory fisher, or did so with, or to join a parent/guardian or spouse who is a migratory agricultural worker or a migratory fisher; *and*

4. With regard to the qualifying move identified in paragraph 3, above, the child moved due to economic necessity from one residence to another residence, and—

   a. 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.

See also the discussion of "qualifying move" in Section D of this chapter. Note that the terms "migratory agricultural worker," "migratory fisher," and "qualifying move" are defined in section 1309 of the ESEA, and discussed in Sections C through H of this chapter.

A2. May States count every child who is eligible for the MEP, regardless of age, for State MEP funding purposes?

No. As provided in section 1303(a)(1)(A) of the statute, only those eligible migratory children ages 3 through 21 may be counted for State MEP funding purposes.

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

Generally, no. Under section 1309(3), a migratory child is a "child" who meets the specific

eligibility requirements for the MEP. According to section 1115(c)(1)(A) (incorporated into the MEP's definition of a migratory child by sections 1304(c)(2) and 1115(b)) of the ESEA, and 34 C.F.R. § 200.103(a)), eligible children include children—

1. Not older than age 21 who are entitled to a free public education through grade 12,

and 2. Who are not yet at a grade level at which the LEA provides a free public

education

Thus, once a migratory 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 a child who finished high school might still be eligible for the MEP because, under State law, he or she may still be entitled to a free public education through grade 12. For example, a State might permit a child who received a certificate of completion or attendance but failed the State high school exit exam to re-enroll in high school. If so, as long as the individual 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.

Please note that additional provisions apply for children with disabilities. Under the Individuals with Disabilities Education Act (IDEA) and applicable regulations in 34 CFR §300.102(a)(3)(iv), an educational development credential for example, is not considered a regular high school diploma that would end a child's entitlement to a free appropriate public education (FAPE), so long as the child otherwise continues to be eligible for services. For a child identified as a child with a disability under the IDEA, special education and related services may continue through age 21 (to the student's 22nd birthday), depending on State law or practice, or until the child graduates with a regular high school diploma, consistent with the IDEA. See Chapter V of this guidance for additional information on serving migratory children with disabilities.

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 a "migratory child," the child is eligible for the MEP.

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

MEP?

For the purposes of the MEP, the Department considers the term "out-of-school youth" to mean children through age 21 who are entitled to a free public education in the State and who meet the definition of a "migratory child," but who are not currently enrolled in a K-12 institution. This term could include students who have dropped out of school, youth who are working on a high school equivalency diploma (HSED) outside of a K-12 institution, and youth who are "here-to work" only. It would not include children in preschool, nor does it include temporary absences (*e.g.*, summer/intersession, suspension, or illness). Enrollment in school is not a condition affecting eligibility for the MEP. Therefore, out-of-school youth who meet the definition of a "migratory child" are eligible for the MEP.

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

The Department considers emancipated youth to be children who have not yet reached adult age (in accordance with State law) who are no longer under the control of a parent/guardian and who are solely responsible for their own welfare.

A7. Are emancipated youth eligible for the MEP?

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

B. Guardians and Spouses

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

Yes. The definition of "migratory child" in section 1309(3) of the ESEA refers to a child who moves with, or moves to join, a parent or spouse who is a migratory agricultural worker or migratory fisher. Section 8101(38) of the ESEA defines "parent" as a legal guardian or other person standing *in loco parentis* (*i.e.*, in place of the parent), such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare. This non-regulatory guidance and the national COE use the term "parent/guardian" to include guardian within this statutory definition of parent.

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 that 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"?

Under section 1309(2) of the ESEA, a "migratory agricultural worker" is a person who, in the preceding 36 months, made a qualifying move and, after doing so, engaged in new temporary or seasonal employment or personal subsistence in agriculture (which may be dairy work or the initial processing of raw agricultural products).

Section 1309(2) provides that an individual who did not engage in such new employment soon after a qualifying move may still be considered a "migratory agricultural worker" if he or she meets both of the following criteria:

1. The individual actively sought such new employment; *and*

2. The individual has a recent history of moves for temporary or seasonal agricultural employment.

Note, section 1309(5) of the ESEA defines the term "qualifying move" and 34 C.F.R. § 200.81 defines the terms "move," "temporary employment," "seasonal employment," and "personal subsistence." These terms are discussed later in this chapter, along with the terms "soon after the move," "actively sought," and "recent history." 34 C.F.R. § 200.81(a) also defines the term "agricultural work" and, for purposes of this chapter, this definition establishes the kinds of work that comprises "employment … in agriculture" and "agricultural employment," in addition to "dairy work" and "initial processing of raw agricultural products" that a migratory agricultural worker may also perform.

C2. Who is a "migratory fisher"?

Under section 1309(4) of the ESEA, a "migratory fisher" is a person who, in the preceding 36 months, made a qualifying move, and after doing so, engaged in new temporary or seasonal employment or personal subsistence in fishing.

Section 1309(4) provides that an individual who did not engage in such new employment soon after a qualifying move may still be considered a "migratory fisher" if he or she meets both of the following criteria:

1. The individual actively sought such new employment; *and*

2. The individual has a recent history of moves for temporary or seasonal fishing employment.

Note, section 1309(5) of the ESEA defines the term "qualifying move" and 34 C.F.R. § 200.81 defines the terms "move," "temporary employment," "seasonal employment," and "personal subsistence." These terms are discussed later in this chapter, along with the terms "soon after the move," "actively sought," and "recent history." 34 C.F.R. § 200.81(c) also defines the term "fishing work" and, for purposes of this chapter, this definition establishes the kinds of work that comprises "employment … in fishing" and "fishing employment."

Qualifying Work

C3. What is "qualifying work"?

For purposes of this chapter, we use the term "qualifying work" as shorthand for temporary or seasonal employment or personal subsistence in agriculture or fishing. Under 34 C.F.R. § 200.81(n), "qualifying work" means temporary employment or seasonal employment or personal subsistence in agriculture or fishing.

See Sections F and G of this chapter for further guidance on agricultural work, fishing work, temporary employment, and seasonal employment.

Purpose of the Worker's Move

C4. Must the SEA determine whether the worker moved in order to obtain qualifying work?

No. As amended, the ESEA no longer requires that a worker needed to move "in order to obtain" qualifying work. The new statutory definitions enable individuals to be considered migratory agricultural workers, and migratory fishers without the need for recruiters or States to determine the intent, or purpose(s) of the worker's move.

"Soon After the Move"

C5. The definitions of migratory agricultural worker and migratory fisher refer to engagement in new qualifying work "soon after the move." What does "soon after the move" mean?

For purposes of the MEP, the Department recommends that "soon after the move" be within 60 days of the worker's move. As noted in C1, the ESSA establishes that whether one may be considered a migratory agricultural worker or fisher depends whether the individual "*engaged"* in qualifying work soon after the move. We believe that a 60-day window allows for extenuating circumstances which would delay an individual's engagement in new qualifying work immediately after a qualifying move (*e.g.*, local conditions in agricultural or fishing operations, illness or other personal circumstances), while still providing a reasonable temporal connection between the move and the worker's engagement in qualifying work.

While States may interpret the wording "soon after" to mean more or less than 60 days, each State should establish a written standard that all recruiters are to apply, and which the State can rely upon in the event of an audit or investigation questioning the reasonableness of the State's policy. Consistent with the COE's instructions, recruiters must note in the Comments section of the COE why they determined an individual to be a migratory agricultural worker or migratory fisher, if the individual engaged in new qualifying work more than 60 days after the individual's qualifying move.

C6. If an individual engaged in new qualifying work after a qualifying move, but not "soon after" the move due to circumstances beyond the individual's control (*e.g.*, work is not available due to extreme weather changes, illness), may the individual be considered a migratory agricultural worker or migratory fisher based on that move if he or she lacks a recent history of moves for qualifying work?

No. Under the definitions of "migratory agricultural worker" and "migratory fisher" in section 1309(2) and (4) of the ESEA, an individual who, for whatever reason, does not engage in new qualifying work soon after a qualifying move may only be considered a migratory agricultural worker or migratory fisher worker if that individual has both:

1. Actively sought new qualifying work; and
2. A recent history of moves for qualifying work.

There may be very legitimate reasons why an individual did not engage in temporary or seasonal employment or personal subsistence in agriculture or fishing soon after a move. However, to be considered a migratory agricultural worker or migratory fisher, the individual must have actively sought such work during this period and has a recent history of moves for qualifying work. See also C8 – C16, below.

C7. What happens if a worker first takes a non-qualifying job and only afterwards engages in qualifying work?

A worker who takes a non-qualifying job for a limited period of time after a move may still be considered a migratory agricultural worker or migratory fisher based on that move, so long as the

worker either engages in new qualifying work that is still "soon after the move" or meets the alternative requirements addressed in C1 and C2, above, and C8-C18, below.

Individuals Who Do Not Engage in New Qualifying Work Soon After a Qualifying Move

C8. If an individual did not engage in personal subsistence (as defined in 34 CFR § 200.81(m)) in agriculture or fishing soon after a qualifying move, may such an individual be considered a migratory agricultural worker or migratory fisher?

Yes. The Department interprets the definitions of migratory agricultural worker and migratory fisher in section 1309(2) and (4) of the ESEA to also apply to individuals who did not engage in personal subsistence in agriculture or fishing soon after a qualifying move. In order to be considered a migratory agricultural worker or migratory fisher, such individuals must have actively sought personal subsistence in agriculture or fishing, and have a recent history of moves for personal subsistence in agriculture or fishing.

C9. If an individual is identified soon after a qualifying move, and indicates that he or she expects to engage in new qualifying work soon, but has not yet done so, may a recruiter immediately consider the individual to be a migratory agricultural worker or migratory fisher based on that move?

It depends. The recruiter may immediately do so only if he or she has already begun to actively seek new qualifying work and has a recent history of moves for qualifying work. Otherwise, the individual has not yet met the definition of a migratory agricultural worker or migratory fisher. The individual would become such a worker once he or she engaged in new qualifying work "soon after the move."

C10. What does the phrase "actively sought" mean in reference to qualifying work?

While an individual may actively seek employment in a variety of ways, the phrase "actively sought" implies the need to take positive actions to seek such work. For example, the individual (or someone on his or her behalf) may have: applied for qualifying work at a particular agricultural or fishing job site, applied at a center that coordinates available temporary or seasonal employment, applied for such employment before moving, or have moved reasonably believing, based on newspaper ads or word of mouth, that such work would be available after the move.

The Department believes that the process of actively seeking new qualifying work should happen within 60 days of the move, or however the State defines "soon after the move." If the individual sought the work before making the move, the recruiter should have good reason to believe that the worker had truly actively sought the work prior to moving.

C11. How may a recruiter determine that the worker actively sought qualifying work soon after a move?

Recruiters may rely on the worker's statement regarding his or her attempts to obtain new qualifying work (see examples in C10, above). Consistent with the COE instructions, recruiters must note in the Comments section of the COE when and how the individual actively sought qualifying work. The information, which would include the worker's statement together with any additional information the recruiter chooses to add based on his or her knowledge of the area and type of work available, should provide sufficient information to allow COE reviewers and others to assess the reasonableness of the recruiter's eligibility determination.

C12. Is it necessary for a recruiter to determine why the individual who actively sought qualifying work was unable to obtain or engage in such employment?

No. The ESEA does not require any explanation of why the desired qualifying work was not secured. The new ESEA definitions of "migratory agricultural worker" and "migratory fisher" include an individual who actively sought qualifying work after a move and has a recent history of moves for temporary or seasonal agricultural or fishing employment.

C13. What does it mean to have a recent history of moves for qualifying work?

The Department interprets the phrase "recent history of moves for" qualifying work to mean a recent history of moves that resulted in temporary or seasonal agricultural or fishing employment (*i.e.*, qualifying work).

Based on the Department's interpretation of this second eligibility criterion (*i.e.*, where an individual has not engaged in qualifying work "soon after a qualifying move"), only those individuals who in the recent past have moved and then been employed on a temporary or seasonal basis in agriculture or fishing would be considered a "migratory agricultural worker" or "migratory fisher."

C14. Would an individual actively seeking qualifying work for the first time be able to use a recent history of moves to qualify for the program if those moves were made with, or to join, a parent/guardian or spouse who was the migratory worker?

Yes, if those prior moves of a parent/guardian or spouse resulted in qualifying work. In this case, the Department believes the individual has made those moves "for temporary or seasonal agricultural or fishing employment."

C15. How may a recruiter determine whether a worker has a recent history of moving for

qualifying work?

Recruiters may rely on the worker's statement regarding his or her history of moves for qualifying work. The recruiter should ask whether the worker has ever moved before and request information on the dates of the moves, and whether the worker, or his or her parent/guardian or spouse, engaged in qualifying work after those moves. Consistent with the

COE instructions, the recruiter must note this information in the Comments section of the COE. The information, which would include the worker's statement together with any additional information the recruiter chooses to add, should provide sufficient information to allow COE reviewers and third parties to assess the reasonableness of the recruiter's eligibility determination.

C16. How far back may a recruiter look in considering a "recent history of moves" for qualifying work?

The Department believes that that the period of one's "recent history" should not exceed 36 months prior to the date of the recruiter's interview. We believe it is difficult to reasonably consider a period longer than 36 months to be "recent," and think it makes sense to view the period of time within which a recent history of moves must occur as the same period in which a qualifying move must occur under the ESEA for an individual to be considered a "migratory agricultural worker" or "migratory fisher" under section 1309(2) and (4) of the ESEA.

While each State may establish a different period that it considers to be reasonable, if it chooses a period other than 36 months it should establish a written standard and rationale that all recruiters are to apply, and upon which the State can rely in the event of an audit or investigation questioning the reasonableness of the State's policy.

C17. How many moves would be considered "a recent history of moves"?

Given the plural form of the word "moves," an individual must have made at least two moves for qualifying work within the time period the State establishes in which the "recent history of moves" must have occurred.

C18. Must the individual's recent history of moves for qualifying work have been moves from one school district to another?

No. The statute uses the phrase "recent history of moves," but does not state that these moves must be "qualifying moves," *i.e.,* moves from one school district to another (except in special circumstances, See D1 of this chapter, below. Therefore, an individual's recent history of moves for qualifying work does not have to be from one school district to another. However, any such historic move must meet the definition of a "move" under 34 C.F.R. § 200.81(j), which requires a change from one residence to another residence that occurs due to economic necessity.

D. "Qualifying Move"

D1. What is a "qualifying move"?

Under section 1309(5) of the ESEA, a qualifying move is:

1. made due to economic necessity; *and*

2. from one residence to another residence; *and*

3. from one school district to another school district.*

*In a State that is comprised of a single school district, a move qualifies if it is from one administrative area to another within the 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.

Change of Residence and Economic Necessity

D2. What is a "residence"?

There is no statutory or regulatory definition of a residence for purposes of the MEP. However, the Department views a "residence" as a place where one lives and not just visits. In certain circumstances, boats, vehicles, tents, trailers, etc., may serve as a residence.

Consistent with the COE instructions, the Department recommends that recruiters provide a comment on the COE if there appears to be any other reason that an independent reviewer would question whether the child or worker's move was from one residence to another residence.

D3. What does it mean to move "due to economic necessity"?

The Department considers this to mean that the child and the worker (if the child is not the worker) move because they could not afford to stay in the current location. The MEP is premised on the Federal government's understanding that migratory children have unique needs in view of their mobility, and generally are in low-income families. However, the statutory requirement that a qualifying move be made due to economic necessity clarifies that, under ESEA, economic necessity is integral to a move that makes a child a "migratory" child.

Thus, a person who leaves from 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 due to economic necessity" because the person did not go to the new place because of financial need. Similarly, this person would not have "changed residence due to an economic necessity" upon returning home from one of these visits. See also D4 of this chapter.

Consistent with the COE instructions, the Department recommends that recruiters provide a comment on the COE if there appears to be any reason that an independent reviewer would

question whether the child or worker moved due to economic necessity.

D4. 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?

As noted in D3 of this chapter we do not see how a move for a vacation (*e.g.*, a visit to family and friends, a trip for entertainment purposes, etc.) can constitute a move 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 any other reason based on economic need). Therefore, even if the worker

engages in qualifying work, that work did not follow a "qualifying move" as the term is defined in section 1304(5) of the ESEA.

The Department recognizes that there might be cultural and language differences in how people describe the reason for their trips and moves from a residence. We therefore recommend 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.

Duration and Distance

D5. 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 and a migratory child must stay in a new place long enough to show that the worker and child "moved," *i.e.*, changed residence due to economic necessity. Recruiters should carefully examine and evaluate relevant factors, such as 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. With respect to moves of such short duration (*e.g.*, less than a week) that an independent reviewer might question whether the move was a change in residence or "due to economic necessity," the Department recommends that the SEA establish a written policy for determining and documenting when and why these moves qualify for the MEP. Consistent with the COE instructions, the Department also recommends that recruiters explain in the Comments section of the COE why they believe that a move of very short duration would be considered a qualifying move.

D6. Is there a minimum distance requirement for a qualifying move?

In accordance with section 1309(5)(B) of the ESEA, the only minimum-distance requirement governing a qualifying move is for a move of at least 20 miles to a temporary residence within a school district of more than 15,000 square miles (*e.g.*, in Alaska). In all other situations, the move must simply be from one school district to another, or, in a State that is comprised of a single school district (*e.g.*, Hawaii, Puerto Rico, the District of Columbia), be across the established boundaries of the district's administrative areas.

D7. 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.

Moves by Boat

D8. Are there special issues that affect only the moves of migratory fishers who travel by boat?

No. These workers' moves must be from one school district to another (with specific exceptions for States comprised of a single school district or moves within a district of more than 15,000

square miles), whether the moves are accomplished 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.

D9. Has a fisher who travels by boat and docks in another school district made a qualifying move?

It depends. A fisher who travels by boat to another school district (with specific exceptions for States comprised of a single school district or moves within a district of more than 15,000 square miles) must have stayed in the new place long enough to confirm that the worker "moved," *i.e.*, changed residence, and that this move was due to economic necessity. See D5 of this chapter regarding moves of short duration.

Stopover Sites

D10. 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.

D11. May SEAs *serve* eligible migrant children who stay at a stopover site?

Yes.

D12. May SEAs *count* the eligible migrant children they serve at stopover sites for State 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 D2 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 – simply stopping in the State for a rest period does not establish residency.

International Moves

D13. May an individual's move to the United States from another country qualify for the MEP?

Yes. The only criteria for being considered a migratory child, migratory agricultural worker, or migratory fisher are those established in sections 1115(c) and 1309 of the ESEA, and in applicable regulations in 34 C.F.R. §§ 200.81, 200.89(c) and 200.103. The law does not establish additional criteria based on the individual's country of origin.

D14. 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 sections 1115(c) and 1309 of the ESEA, and in applicable regulations in 34 C.F.R. §§ 200.81, 200.89(c), and 200.103.

D15. 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 interpret the MEP statute as authorizing moves to another country as qualifying moves. However, if an individual's move to another country is a "change of residence," the individual's move back to a school district in the U.S. might be a qualifying move.

E. Qualifying Arrival Date (QAD) and Move "to Join" Issues E1.

When does a child's eligibility for the MEP begin?

A child may be identified as a "migratory child" when the child and the worker (if the child is not the worker) complete qualifying moves. This is often referred to as the qualifying arrival date, or QAD, for purposes of the COE. However, a child is only eligible to be counted and served as an eligible migratory child after the SEA has determined that (1) the child meets all MEP eligibility criteria (see definition of "migratory child" in A1 of this chapter), including that the worker (if the child is not the worker) meets the definition of a "migratory agricultural worker" or "migratory fisher" (see C1 and C2 of this chapter), and (2) such information has been properly recorded on a COE.

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

No. Section 1309(3) of the ESEA provides that if the child is not the migratory agricultural worker or migratory fisher, the child must move "with, or to join" a parent/guardian or spouse

who is a migratory agricultural worker or fisher. 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/guardian or spouse do not move at the same time does not nullify the child's eligibility for the MEP. Consistent with the COE instructions, the Department requires an explanation in the Comment section of the COE if the child preceded the worker, or joined the worker at a later date.

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 12 months of the worker's move, and that after one year it is difficult to link the child's move to the worker's move. Nonetheless, there may be unusual circumstances that prevent a child from moving within 12 months of the worker's move, or vice versa. In these cases, consistent with the COE instructions, the Department recommends that an SEA document in the Comment section of the COE the basis for determining that the child moved to "join" a worker after such a prolonged period of time between the two moves, or that the worker moved to join the child after a similarly prolonged period.

F. Agricultural Work or Fishing Work

Agricultural Work

F1. What is the definition of "agricultural work" for purposes of the MEP? "Agricultural work" is:

1. the production or initial processing of raw agricultural products, such as crops, poultry, or livestock; dairy work; as well as the cultivation or harvesting of trees, that is—

2. performed for wages or personal subsistence.

See section 1309(2) of the ESEA and 34 C.F.R. § 200.81(a).

F2. 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.

F3. What is a crop?

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

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F4. 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.

F5. 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.

F6. 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 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.

F7. 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; caring for; branding; tagging, and assisting in the raising of

livestock.

F8. 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

F9. What does "cultivation" mean in the context of trees?

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

F10. 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.

F11. 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. **F12. 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.

F13. 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.

F14. 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.

F15. Is initial processing of trees considered agricultural work?

Yes. Because trees are a raw agricultural product, the initial processing of trees is considered agricultural work.

Fishing Work

F16. 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 34 C.F.R. § 200.81(c).

F17. 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, tilapia, salmon, cod, carp, eels, oysters, and clams.

F18. 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 and cages.

F19. 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

F20. 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.

F21. 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.

F22. 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.

F23. 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; freezing; dressing; and enclosing the raw product in a container.

F24. 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.

F25. 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.

F26. 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.

F27. 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 section 1309(2) and (4) of the ESEA. Provided that the move was a qualifying move under section 1304(5) of the ESEA, 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

F28. What does "personal subsistence" mean?

As used in the definitions of agricultural work and fishing work in 34 C.F.R. § 200.81(a) and (c), and as defined in 34 C.F.R. § 200.81(m), "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.

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F29. May a worker who is "self-employed" qualify as a migratory agricultural worker or migratory fisher?

Generally, no. The Department believes that, in general, if a worker is self-employed in a business that operates, or is available, on a year-round basis (*e.g.*, workers who own their own farm, crop-dust planes, or combines), that worker would not move and engage in *new employment* that is seasonal or temporary as required by the definition of migratory agricultural worker or migratory fisher in sections 1309(2) and (5) of the ESEA. We note that the definitions of these two terms provide that the worker's *employment* be seasonal or temporary, not that the agricultural work or fishing work that is performed be seasonal or temporary.

However, while some workers, such as those who glean leftover crops from fields or fish for their own consumption, might consider themselves "self-employed," for purposes of MEP eligibility the Department considers qualifying work performed for personal subsistence to mean that to the extent that gleaners and fishers consume the food they gather as a substantial portion of their food intake, they are engaged in personal subsistence in agricultural work or fishing.

G. Temporary and Seasonal Employment

G1. What is seasonal employment?

According to 34 C.F.R. § 200.81(o) 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.

G2. 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.

G3. How long may seasonal employment last?

The definition of seasonal employment in 34 C.F.R. § 200.81(o) 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.

G4. 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 because of the cycles of nature; and 30

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

34 C.F.R. § 200.81(o).

G5. What is temporary employment?

According to 34 C.F.R. § 200.81(p), temporary employment means "employment that lasts for a limited period of time, usually a few months, but no longer than 12 months."

G6. How may an SEA determine that a worker's job is "temporary employment"?

34 C.F.R. § 200.81(p) 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.

G7. 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 "engaged in new temporary or seasonal employment" as provided in the definitions of migratory agricultural worker and migratory fisher in section 1309(2) and (4) of the ESEA. See also 34 C.F.R. § 200.81(o) and (p).

G8. 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.

G9. 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.

G10. 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, 34 C.F.R. § 200.81(p) 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 is constant and available year-round, 34 C.F.R. § 200.81(p) 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 on reasonable bases that SEAs may use to determine that employment is temporary, including how SEAs may make and document such determinations for employment that is constant and available year-round, please see the forthcoming revision to Chapter III: Identification and Recruitment, of this guidance.

G11. Must the SEA stop serving children whose parent/guardian or spouse (or the children themselves, if they are the workers) 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 as migratory children for the duration of their 36-month eligibility period. MEP eligibility is determined at the time the SEA-designated reviewer approves the COE and is based on the worker's (or employer's) statement of the temporary nature of the employment at the time of the interview, 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.

G12. 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.

H. Documenting Eligibility

H1. What responsibility does an SEA have to document eligibility determinations?

An SEA must document eligibility determinations in order to comply with section 76.731 of the Education Department General Administrative Regulations (EDGAR) (34 C.F.R. § 76.731), which provides that "[a] State and a subgrantee shall keep records to show its compliance with program requirements." As the MEP statute and regulations permit only eligible migrant children (*i.e.*, those who meet the definitions contained in section 1309 of the MEP statute and applicable provisions of 34 C.F.R. § 200.81) to 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, 34 C.F.R. § 200.89(c) requires an SEA and its local operating agencies to use the COE form established by the Secretary to document the State's determination of the eligibility of migratory children. (For more information about identification and recruitment (ID&R) quality control requirements, see *Chapter III: Identification & Recruitment.*)

H2. 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.

H3. 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: Parent/Guardian 1 Last Name, Parent/Guardian 1 First Name, Parent/Guardian 2 Last Name, Parent/Guardian 2 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.

H4. What are the required data *sections* for the national COE?

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

H5. May an SEA include its own State-requested or State-required information on the national COE?

Yes. As mentioned in H2 of this chapter, an SEA may include State-requested or State-required information on the national COE, within certain parameters. 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.

H6. 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 program 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.

H7. 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.

H8. When should a recruiter complete a new COE for a child?

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 they have determined that a child has made a new move that would re-qualify the child as a migratory child under the MEP.

H9. Must the interviewee 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 interviewee 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.

H10. 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 34 C.F.R. § 200.89(c) and (d), the Department requires this signature on the national COE as an element of a reasonable system of quality control.

H11. Must someone else, other than the recruiter, review the information on the national COE?

Yes. As part of a sound system of quality control, 34 C.F.R. § 200.89(d)(4) 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 C.F.R. 200.89.)

H12. 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 move, for example, to State A under which the child meets the MEP eligibility criteria, and then make a subsequent move to State B under which the child does not meet those criteria. So long as State B identifies the child as a migratory child on the basis of the move to State A within 36 months of that move, it may enroll the child in the MEP 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, and completes its own State's COE. We encourage SEAs to coordinate with the State to which or in which the qualifying move occurred in order to confirm the qualifying information that the State's own recruiters had received.

H13. 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. We encourage recruiters and States to utilize the Migrant Student Information Exchange (MSIX) as one source of information in making eligibility determinations— *e.g.*, to view the child's record or communicate with colleagues in other States— thereby facilitating a child's participation in the MEP.