

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2015 H-2B Interim Final Rule FAQs

**Round 4: Job Order and Application Filing and Processing, including
Emergency Procedures**

H-2B Registration

1. My date of need is after October 1, 2015. Do I need an H-2B Registration before I can file my application?

In accordance with 20 CFR 655.11(j), the Department's Office of Foreign Labor Certification will announce in the Federal Register a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications. If an H-2B application is being submitted before such transition procedures are published, the employer need not apply for an H-2B Registration but must include a statement of temporary need with its Application for Temporary Employment Certification, ETA Form 9142B and be prepared to document its seasonal, peakload, intermittent or one-time temporary need through supporting documents.

Prevailing Wage Determination

2. I have a date of need after October 1, 2015. Do I need to obtain a prevailing wage determination before filing my H-2B application?

Yes. An employer with a start date of need on or after October 1, 2015 must submit an *Application for Prevailing Wage Determination*, ETA Form 9141 before submitting a job order to the State Workforce Agency, to the Department's National Prevailing Wage Center electronically through the iCERT Visa Portal System (<https://icert.doleta.gov>) or if an employer has no internet access, the ETA Form 9141 may be submitted by mail to:

Employment and Training Administration
Office of Foreign Labor Certification,
National Prevailing Wage Center
1341 G Street, NW Suite 201
Washington, DC 20005-3105

Electronic filing is strongly recommended.

3. What form should I use to submit a job order to the State Workforce Agency (SWA)?

There is no federally-mandated form for H-2B non-agricultural job orders. To place the job order, an employer should place the job order using the form or submission format used by the SWA in the State where the work will be performed. While many SWAs allow employers to place job orders using self-service Internet-based software systems, some SWAs also provide more facilitated or staff-assisted job order services for employers. Please remember that each job order must comply with the H-2B regulations, including specific content requirements applicable to job orders, and must inform the SWA that the job order is being placed in connection with a concurrently filed H-2B application.

The Department's Employment and Training Administration (ETA) maintains a website providing a map of SWA Web sites at <http://www.dol.gov/dol/topic/training/onestop.htm> where employers can access job order services.

4. Where do I send the job order?

The employer's original job order must be sent directly to the SWA serving the area of intended employment where work will be performed. Where the job opportunity involves work in more than one State within the same area of intended employment, the employer may send the job order to any of the SWAs with jurisdiction over the worksites. When submitting the job order, the employer must inform the SWA that the job order is being placed in connection with a concurrently filed H-2B *Application for Temporary Employment Certification*.

Concurrently, the employer must send a copy of the job order to the Chicago National Processing Center (NPC) in its *Application for Temporary Employment Certification* filing package. Where multiple States are involved, the employer must identify the SWA receiving the job order on the job order copy submitted to the Chicago NPC. Address and contact information for the SWAs is available on our Web site at <http://www.foreignlaborcert.doleta.gov/contacts.cfm>.

5. How long must the job order be posted?

The regulations require that each SWA in receipt of an employer's job order keep the job order active from the date it receives the Notice of Acceptance from the Chicago NPC approving the job order. In addition to intrastate and interstate clearance, upon the acceptance of the job order and application, the Department will place a copy of the job order on its Electronic Job

Registry. Wherever posted, the the job must remain active until 21 days before the employer's start date of need.

6. What content must the job order include?

An employer's job order must contain the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits as well as the assurances and obligations required under the H-2B regulation. We have developed a checklist of minimally sufficient job order content to help employers satisfy their obligation to apprise prospective applicants of the job opportunity in the job order. To further help employers prepare their job orders to comply with disclosure requirements, we provide in the checklist specific language which we consider to be minimally sufficient to apprise U.S. applicants of certain required items in the job order. The checklist is available on our Web site.

Filing the ETA Form 9142B

7. How do I file an H-2B application?

An employer with a start date of need **before** October 1, 2015 should refer to the the Department's Frequently Asked Questions Round 2, Transition Procedures for filing instructions.

An employer with a start date of need **on or after** October 1, 2015 and before the Department announces the implementation of the H-2B registration process must file an *Application for Temporary Employment Certification*, ETA 9142B with the Chicago NPC either electronically through the iCERT Visa Portal System (<https://icert.doleta.gov/>) or by mail to:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
11 West Quincy Court
Chicago, Illinois 60604

In addition to a completed ETA Form 9142B, the employer must include the applicable information/documents from the list below:

| Employers | Job Contractors |
|---|---|
| Copy of Job Order submitted to the State Workforce Agency | Copy of Job Order submitted to the State Workforce Agency |
| Copy of signed and dated Appendix B | Copy of signed and dated Appendix B |

| Employers | Job Contractors |
|--|--|
| A copy of a valid ETA Form 9141 PWD issued by OFLC <u>or</u> , make sure the PWD case number is entered into Section G.3 of ETA Form 9142B | A copy of a valid ETA Form 9141 PWD issued by OFLC <u>or</u> , make sure the PWD case number is entered into Section G.3 of ETA Form 9142B |
| Statement of temporary need <i>(if not enough room in section B.9)</i> | Statements of temporary need must be presented for the job contractor <u>and separately</u> for the employer-client <i>(if not enough room in Item B.9)</i> |
| Other required documentation for occupations involving special procedures (e.g., itineraries) | Other required documentation for occupations involving special procedures (e.g., itineraries) |
| If applicable, copy of the MSPA Farm Labor Contractor Certificate for the employer <u>and/or agent</u> | If applicable, copy of the MSPA Farm Labor Contractor Certificate for the employer <u>and/or agent</u> |
| If applicable, copy of agent agreement demonstrating authority to represent employer | If applicable, copy of agent agreement demonstrating authority to represent job contractor |
| Copies of all agreements that the employer and, if applicable, attorney or agent have with any agent or recruiter with whom it engages or plans to engage in international recruitment | Copies of all agreements that the employer and, if applicable, attorney or agent have with any agent or recruiter with whom it engages or plans to engage in international recruitment |
| A document containing the identity and location of all persons and entities hired by or working for the foreign labor recruiter or agent, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers | A document containing the identity and location of all persons and entities hired by or working for the foreign labor recruiter or agent, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers |
| | Additional Documentation |
| | Completed Sections C and D of the ETA Form 9142B for the employer-client |
| | Copy of signed and dated Appendix B for employer-client |
| | Copy of an executed contract between job contractor and employer-client |

| Employers | Job Contractors |
|---|---|
| Additional Documentation Requirements for Emergency Filings (less than 75 days before start date of need) | |
| A statement explaining good and substantial cause for the employer's request for a waiver of the required filing timeframe | A statement explaining good and substantial cause for the employer's request for a waiver of the required filing timeframe |
| If a valid PWD was not yet obtained from OFLC, a completed ETA Form 9141, or, if one was already submitted to OFLC, make sure a prevailing wage case number is entered in Section G.3 | If a valid PWD was not yet obtained from OFLC, a completed ETA Form 9141, or, if one was already submitted to OFLC, make sure a prevailing wage case number is entered in Section G.3 |

Important Reminder: The employer must submit the job order to the SWA at the same time as it submits its H-2B application package to the Chicago NPC, unless the employer is submitting its application under the emergency filing procedures. Additional information about the emergency filing procedures is provided in separate FAQs below.

8. Is an agent authorized to file an H-2B application for temporary labor certification?

Yes. In addition to the employer applicant, an *Application for Temporary Employment Certification*, ETA Form 9142B (H-2B application) may be filed by an agent representing an employer if the H-2B application is accompanied by a valid agent agreement or other document demonstrating the agent's authority to represent the employer, and if applicable a copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration.

9. How can an employer be sure it is using the most current version of the *Application for Temporary Employment Certification*, Form ETA 9142?

The current version of the *Application for Temporary Employment Certification*, ETA Form 9142B and Appendix B, is available on our Web site. Employers may download this and other the required forms in PDF format from our Web site at <http://www.foreignlaborcert.doleta.gov/form.cfm>.

Important Note: Under certain circumstances, a form on our Web site at <http://www.foreignlaborcert.doleta.gov/form.cfm> may appear to be nearing expiration, based on the "Expiration Date" appearing in the upper left hand corner of the form. Be assured that we have undertaken the required steps to

ensure continued validity of such a form; the forms on our Web site at <http://www.foreignlaborcert.doleta.gov/form.cfm> are the current forms and are valid for use until expired, in which event they will be immediately removed from our Web site.

10. Under what circumstances would an agent authorized to represent the employer be required to submit a Certificate of Registration under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA or the Act)??

Although the majority of H-2B employment is not subject to MSPA and there is no exhaustive list of H-2B occupations covered by MSPA, certain employers or individuals working in affected industries (e.g., tree planting and reforestation) are covered by the Act and generally are already aware of their obligations including the requirement to maintain a valid Certificate of Registration, which identifies the specific farm labor contracting activities authorized. Where an employer or attorney or agent is subject to MSPA, it must submit a copy of its valid Certificate of Registration with the *Application for Temporary Employment Certification*.

Employers who would like to learn more about MSPA should visit the Wage and Hour Division's website <http://www.dol.gov/whd/mspa/> or call or call 1-866-4USWAGE (1-866-487-9243). Information on how to apply as a Farm Labor Contractor (FLC) or Farm Labor Contractor Employee (FLCE) may be found here http://www.dol.gov/whd/forms/fts_wh530.htm. The WHD website also contains a listing of persons and companies currently registered as an FLC or FLCE (at <http://www.dol.gov/whd/regs/statutes/FLCList.htm>), as well as those who are not eligible to register and may not engage in any activity as an FLC or FLCE (at http://www.dol.gov/whd/regs/statutes/mspa_debar.htm).

11. If the employer seeks workers for several counties throughout the state, is the employer required to file a separate H-2B application for each location?

All worksite locations must be disclosed on the H-2B application with as much geographic specificity as possible. In general, if the worksite locations are not within a single area of intended employment, i.e. are not within the normal commuting distance of one another, the employer will be required to file separate applications for each area of intended employment.

12. May I submit an *Application for Temporary Employment Certification* by courier instead of by mail and, if so, which date will be considered the "postmark" date for purposes of filing?

An employer may use the most commercially available overnight courier services to file an *Application for Temporary Employment Certification* with the Chicago National Processing Center (NPC). However, due to restricted access to the Federal building where the Chicago NPC offices are located, the employer may not use private courier services or otherwise attempt to submit an application in person. Where the employer is using a commercially available overnight courier service to file the application, the Chicago NPC will use the date the filing is accepted by the courier and entered into the courier's tracking system as the "postmark" date.

13. Am I required to submit copies of agreements my agent or attorney has with foreign labor recruiters or agents who are assisting in recruiting H-2B workers for my job opportunity?

Yes. The 2015 Interim Final Rule requires an employer to submit a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers. This requirement includes agreements that the employer itself has entered into and agreements the employer's agent or attorney has entered into with such entities.

Important Note: The requirement to submit agreements with any agent or recruiter engaged in the recruitment of H-2B workers does not apply to employers with a start date of need before October 1, 2015.

14. The regulations require that I submit a copy of agreements with any foreign labor recruiters or agents who are assisting me or my agent/attorney in recruiting H-2B workers. My documents are in a language other than English - am I required to provide translations?

The 2015 Interim Final Rule requires an employer to submit a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers. Moreover, the regulation requires these agreements to contain a contractual prohibition against charging workers fees that must be borne by the employer according to the regulations. Although the regulation does not specifically require that these agreements be in English, the Certifying Officer (CO) must be able to verify that the agreement includes the required contractual prohibition. In order to facilitate timely adjudication of applications, we encourage employers to submit certified translations of agreements with foreign labor recruiters or agents along with their H-2B applications. Where an employer submits an agreement in a language other than English without providing a certified translation and the CO is not able to identify the required contractual prohibition in the agreement, the CO is authorized to request further information (e.g., through a Notice of Deficiency) to ensure that the contractual prohibition is in the agreement.

For any foreign language certified translation, the translator must certify that s/he is competent to translate and that the translation is accurate. The translation certification format should include the certifier's name, signature, address, and date of certification. A suggested format is:

Certification by Translator

I [typed name], hereby attest that I am fluent (conversant) in the English and _____ languages, and that the above/attached document is an accurate translation of the document attached entitled

_____.

Signature _____

Date

Typed Name

Address

Emergency Procedures

15. Do I have to apply for a prevailing wage determination (PWD) or H-2B Registration before I request a waiver of the filing time period requirement under the emergency situations provision?

No. The emergency situation provision permits an employer that did not previously apply for a PWD or, after implementation of the H-2B registration process, an *H-2B Registration*, to simultaneously submit either one or both of those applications with its *Application for Temporary Employment Certification* and waiver request.

16. I am submitting my H-2B application under Emergency Situations. For purposes of a justification of the required filing time period, what constitutes good and substantial cause?

For applications filed under 20 CFR 655.17 Emergency Situations, good and substantial cause may include but is not limited to: the substantial loss of U.S. workers due to an Act of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control, unforeseeable changes in market conditions, or pandemic health issues.

17. How will the Department review my request to file an emergency H-2B application?

Under 20 CFR 655.17, the Certifying Officer (CO) will review the employer's request for a waiver of the time period requirement(s) and may grant or deny the waiver. The CO's determination rests on whether the employer has

established good and substantial cause and whether the CO has sufficient time to thoroughly test the U.S. labor market on an expedited basis and make a final determination, as required by the regulations. Where the CO determines the request is not justified and/or there is not sufficient time to make a determination of temporary need or to ensure compliance with the criteria for certification, the CO will deny the waiver and send a Final Determination letter to the employer, stating the reason(s) certification is denied and offering the employer an opportunity to appeal the denial. Otherwise, the CO will grant the waiver and process the emergency application in a manner consistent with the regulations, beginning with the issuance of a Notice of Acceptance or Notice of Deficiency.

Processing

18. What will happen after I submit my H-2B application?

After the employer submits its Application for Temporary Employment Certification, ETA Form 9142B, the Certifying Officer (CO) at the Chicago National Processing Center (NPC) will review the application and job order for compliance with all applicable program requirements. If the CO determines that the application or job order is incomplete, contains errors or inaccuracies, or does not meet the relevant regulatory requirements, the CO will issue a Notice of Deficiency. The Notice of Deficiency will include all the reasons of why the application failed to meet with the criteria for acceptance, and will give the employer 10 business days to submit the required modifications or request administrative review. In the alternative, if the application meets the criteria for acceptance the CO will issue a Notice of Acceptance. The Notice of Deficiency or the Notice of Acceptance will be issued within 7 business days from the date the employer's application is received by the Chicago NPC.

19. After I submit my job order to the State Workforce Agency (SWA), the SWA has 6 business days to report any deficiencies to the Chicago National Processing Center (NPC). Will the Chicago NPC wait to receive this information from the SWA before beginning to process my application?

No. Under the 2015 Interim Final Rule, the SWA and the Chicago NPC will review the job order submitted with the *Application for Temporary Employment Certification* at the same time. The SWA has 6 business days to notify the Chicago NPC of any deficiencies and the Chicago NPC has 7 business days to issue either a Notice of Deficiency (NOD) or a Notice of Acceptance. These timeframes run concurrently. If the Certifying Officer determines that it must issue a NOD, s/he will include any deficiencies noted

by the SWA in the NOD. The employer will be required to respond to the NOD and will resolve all job order deficiencies directly with the Chicago NPC.

20. If the Certifying Officer issues a Notice of Acceptance, will that mean that my H-2B application is certified?

No. The Certifying Officer (CO) will issue a Notice of Acceptance when it is determined that the employer's *Application for Temporary Employment Certification* (H-2B application) ETA Form 9142B and job order are complete and meet the relevant regulatory requirements. The Notice of Acceptance will include instructions for the SWA regarding job order placement and circulation, and for the employer related to the recruitment of U.S. workers, the submission of the required recruitment report, and any other actions required for the approval and certification of the employer's H-2B application.

Final Determinations

21. How will I know if my H-2B application was certified?

After the employer submits its recruitment report consistent with the instructions contained in the Notice of Acceptance and after the CO determines that the application meets all regulatory requirements and criteria for certification in accordance with the regulations, the CO will issue a final determination indicating that there are – an insufficient number of U.S. workers who are qualified and available to staff the employer's job opportunity and that the employment of the H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. Upon certification, the employer will receive an original certified ETA Form 9142B and a Final Determination letter. Upon receipt of the original certified ETA Form 9142B, the employer or, if applicable, the employer's agent or attorney, must complete the footer on the original Appendix B, *retain* the original Appendix B, and submit a signed copy of Appendix B, together with the original certified ETA Form 9142B directly to the appropriate Service Center of the United States Citizenship and Immigration Services (see, <http://www.uscis.gov/i-129-addresses>).