

Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2A Temporary Agricultural Foreign Labor Certification Program
2010 Final Rule, Round 4
December 2011

Job Offers, Assurances and Obligations

Job Qualifications and Requirements

Question: Can an employer require that workers who apply for the job opportunity pass a background check (such as a credit or criminal background check) and/or a drug test as a condition of employment?

Employers are not prohibited from including a requirement in the job opportunity that the applicant must pass a specific background check and/or drug test. However, the requirement that the worker pass a particular background check or drug test will be reviewed on a case-specific basis against the regulatory standard of review that all job requirements must be bona fide and consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops. The State Workforce Agency (SWA) receiving the employer's job offer assists the OFLC Certifying Officer in making determinations as to what are normal and accepted job qualifications and requirements required by non-H-2A employers in that area in the same or comparable occupations or crops.

The results of a background check or drug test may not be used to automatically reject a U.S. worker for agricultural work. Rather, the results of the background check or drug test may be used to reject a worker only if they provide a lawful job-related reason to do so. For example, while a sex offense conviction may be a lawful job-related reason to reject a worker who is applying to work at a "pick-your-own" fruit farm, a Driving Under the Influence (DUI) conviction is very unlikely to be. An employer requiring a background check or drug test should be prepared to provide documentation, if requested by the SWA or the OFLC Certifying Officer, establishing the nexus between the background check or drug test to be conducted and the nature of the job opportunity.

If an employer chooses to disclose in the job order that it will be conducting a criminal background check, the employer's job order must also identify the specific criminal issue(s) for which the employer could lawfully reject an applicant due to the nature of the job opportunity. A general statement about conducting a criminal background check without any further explanation is unacceptable, as it fails to adequately apprise U.S. workers of the job opportunity and applicable conditions of employment.

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Contract Impossibility Provision

Question: What is the minimum acceptable language I need to include in my job order submitted to the State Workforce Agency (SWA) as well as other work contracts with employees to address situations where fulfillment of the contract is impossible due to reasons beyond my control?

The employer, upon receiving approval from the Chicago National Processing Center Certifying Officer, may terminate its work contract before the end date if the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible. The regulations refer to this as the “contract impossibility” provision. Since the contract impossibility provision obligates the employer to certain actions and affects the wages and working conditions of the workers it employs, the employer must disclose this provision in the job order that is submitted to the SWA as well as work contracts to prospective applicants.

To help employers appropriately disclose the contract impossibility provision, the following suggested language can be included in the job order as well as work contracts with its employees:

“Contract Impossibility: The work contract may be terminated before the end date of work specified in the work contract if the services of the workers are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes fulfillment of the contract impossible, as determined by the U.S. Department of Labor. In the event that the work contract is terminated, the employer assures that the three-fourths guarantee will be fulfilled for the time that has elapsed from the start date of work specified in the work contract to the date of termination. The employer also assures that it will make efforts to transfer the worker to other comparable employment acceptable to the worker and, where applicable, consistent with existing immigration laws.

In situations where a transfer is not affected, the employer will return the workers at the employer’s expense to the place from which the worker, disregarding intervening employment, came to work for the employer or transport the worker to his/her next certified H-2A employer, whichever the worker prefers. The employer will also reimburse the worker the full amount of any deductions made by the employer from the worker’s pay for transportation and subsistence expenses to the place of employment, and pay the worker for any transportation and subsistence expenses incurred by the worker to that employer’s place of employment.

The amounts the employer will pay for subsistence expenses shall be a minimum of \$_____ per day and a maximum of \$_____ per day for workers with documentation of actual expenses. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The requirement will be nullified if the worker has contracted with a subsequent employer who has agreed to provide or pay

for the worker's transportation and subsistence expenses from the present employer's worksite to the subsequent employer's worksite."

For the minimum and maximum amounts for subsistence expenses, the employer can find the current amounts to be included in the job order on the OFLC website at http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm

H-2A Labor Contractors

Question: I am an employer needing to file an H-2A application as a labor contractor with the Chicago National Processing Center. What are the minimum requirements of obtaining a surety bond in order for it to be accepted?

As a prospective employer filing as an H-2A Labor Contractor (H-2ALC), you are required to obtain a surety bond demonstrating your ability to meet payroll and other financial obligations to your employees contained in the terms and conditions of the agricultural job order and the *Application for Temporary Employment Certification* (ETA Form 9142). The original bond instrument issued to you by the surety must be submitted with the ETA Form 9142 to the Chicago National Processing Center. Copies of the original bond instrument will not be accepted.

At a minimum, the bond instrument issued to you by the surety must:

1. Identify the surety's name, address, phone number, and contact person;
2. Specify the amount of the bond based on the number of workers to be employed;
3. State that the aggregate liability of the surety shall not exceed the amount of the bond;
4. State that the bond must be payable to the "Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210";
5. Obligate the surety to pay any sums for (a) wages and benefits owed to an H-2A worker or worker engaged in corresponding employment, or (b) to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation(s) of the regulation relating to the certified ETA Form 9142 the bond is intended to cover;
6. Specify the date of issuance and expiration covering liability incurred during the period of employment listed on the certified ETA Form 9142. The bond may be amended to cover any extensions requested by the H-2ALC employer and approved by DHS and/or the Chicago NPC;

7. Contain a designation or company seal used by the surety for the bond;
8. State that the bond will remain in force for a period of no less than 2 years from the date on which the certified ETA Form 9142 expires; and
9. State that the bond may not be canceled or terminated unless 45 days notice is provided by the surety, in writing, to the Administrator, Wage and Hour Division, using the same address provided in Item 3 above.

Important Reminder: If the Wage and Hour Division commences any enforcement action under the regulations against an H-2ALC employer or any successor in interest within 2 years from the expiration date of the certified ETA Form 9142, the bond shall remain in force until the conclusion of such action and any related appeal or related litigation.

Question: How do I determine the amount of coverage for the surety bond?

The amount of coverage disclosed on the surety bond depends on the number of workers you plan to employ under the H-2A temporary labor certification. The table below provides the amount of coverage required in relation to the range of workers to be employed.

Bond Amount	Number of Workers to be Employed
\$5,000	less than 25 workers
\$10,000	25 to 49 workers
\$20,000	50 to 74 workers
\$50,000	75 to 99 workers
\$75,000	100 or more workers

Important Reminder: When it is shown based on objective criteria that the amount of the surety bond is insufficient to meet potential liabilities, the Administrator, Wage and Hour Division, may require that an H-2ALC employer obtain a surety bond with a higher amount of coverage after notice and an opportunity for a hearing.