



## H-2B Temporary Labor Certification Process 2015 Regulations Stakeholder Webinar May 2015

Office of Foreign Labor Certification  
Employment and Training Administration  
United States Department of Labor

1

## H-2B 2015 Regulatory Actions

Departments of Labor (DOL) and Homeland Security (DHS) jointly published two regulatory actions with an immediate effective date of **April 29, 2015**

- ***Interim Final Rule (IFR): Temporary Non-Agricultural Employment of H-2B Aliens in the United States***  
[www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09694.pdf](http://www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09694.pdf)
- ***Final Rule: Wage Methodology for the Temporary Non-Agricultural Employment in the H-2B Program***  
[www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09692.pdf](http://www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09692.pdf)

## H-2B 2015 Regulatory Actions DOL Authority

- Section 214(c)(1) of the Immigration and Nationality Act requires the DHS to consult with “*appropriate agencies of the Government before adjudicating an H-2B petition,*” including the U.S. Department of Labor (DOL)
- DHS has determined that the best way to provide this consultation is by requiring the employer to first receive a temporary labor certification from the DOL before filing an H-2B petition
- DHS has put this requirement in its regulation *8 CFR 214.2(h)(6)(iii)(A) and (D), (vi)(A)*

## H-2B 2015 Regulatory Actions DOL Authority

- The temporary labor certification serves as DOL’s advice to the DHS with respect to whether . . . .
  1. A qualified U.S. worker is available to fill the petitioning H–2B employer’s job opportunity; and
  2. A foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers
- DHS regulations also requires DOL to “*determine the prevailing wage applicable to an application for temporary labor certification.*” *8 CFR 214.2(h)(6)(iii)(D)*

# H-2B 2015 Regulatory Briefing Outline

## Section I H-2B Temporary Labor Certification Process

H-2B Registration Process

Special Procedures

**Step 1:** Obtain a Prevailing Wage

**Step 2:** File H-2B Application and Job Order

**Step 3:** Conduct Recruitment of U.S. workers

**Step 4:** Completing the Labor Certification Process

## Section II Administrative and Program Integrity Provisions

Key Terms and Definitions

Administrative Review

Audit Examinations

Assisted Recruitment

Revocation and Debarment

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- 5 -

# Pay Attention to Important “Icons”



Emphasizes important documentation requirements needed to support H-2B application



Indicates DOL regulatory requirement contains a definite timeframe for response



Means employer signature is required



“Post-it” notes highlight important reminders for employers

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- 6 -



## Briefing Section I

### H-2B Temporary Labor Certification Process

**Important Note:** Applicable for all H-2B applications with a **start date of need on and after October 1, 2015**

20 CFR 655.2

## DOL Administrative Authority

### Employment and Training Administration Office of Foreign Labor Certification (OFLC)

- Labor certification determinations are made by the OFLC Administrator within the ETA who, in turn, may delegate this responsibility to a designated staff member (e.g., NPC Certifying Officer - CO)
- Currently, H-2B applications are adjudicated at the OFLC Chicago National Processing Center (Chicago NPC)

### Wage Hour Division

- Investigates and enforces the terms and conditions of employment in the H-2B temporary labor certification

## H-2B Registration Process

- 2015 IFR adopts a new registration process for determining an employer's temporary need prior to filing H-2B applications
- Approved registrations are valid for up to 3 years and serves to focus the Department's labor certification process on the recruitment of U.S. workers for the job opportunity
- In order to make the necessary changes to program operations, OFLC will issue a subsequent Federal Register Notice announcing a transition period for the registration process

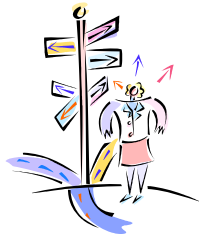
**Important Note:** *Until a subsequent Federal Register Notice is published, employers must continue to submit temporary need documentation with the ETA Form 9142B to the Chicago National Processing Center.*

## Special Procedures (e.g., reforestation, entertainers)

### Important Notice!

- Express regulatory authority for the OFLC Administrator to “*establish or to devise, continue, revise or revoke*” special procedures has been removed
- The D.C. Circuit Court in *Mendoza v. Perez* (2014) held that special procedures for H-2A herding occupations were legislative rules that must be subject to public notice and comment requirements
- In light of the D.C Circuit Court decision, H-2B special procedures currently in place will remain in force until modified or withdrawn by the Department

# Navigating the H-2B Visa Program



## Step 1 Obtain a Prevailing Wage

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- 11 -

## Obtaining a Prevailing Wage General Provisions

20 CFR 655.10

- Employers must request and obtain a prevailing wage determination (PWD) from the OFLC National Prevailing Wage Center (NPWC) before filing an H-2B job order with the State Workforce Agency (SWA)
- PWD must be valid on the date the job order is posted (i.e., date Chicago NPC received the H-2B application and job order)
- Except for emergency situations (20 CFR 655.17), employers who fail to obtain a PWD will have their H-2B applications returned by the OFLC Chicago NPC without review



**Important Note:** Employers are encouraged to file the ETA Form 9141 around 60 calendar days before the date the determination is needed

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- 12 -

## Obtaining a Prevailing Wage General Provisions

20 CFR 655.10, .20(a)

- An employer must advertise in its recruitment a wage rate that is at least equal to the highest of the prevailing wage or the Federal, State or local minimum wage
- Employer must offer and pay this wage (or higher) to both its H-2B workers and workers in corresponding employment
- No wage determination permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local wage law
- If there are multiple worksites within an area of intended employment, the prevailing wage will be the highest applicable wage among all the worksites

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- 13 -

## Obtaining a Prevailing Wage Submission of ETA Form 9141

20 CFR 655.10

- Employers are strongly encouraged to file the ETA Form 9141 *Application for Prevailing Wage Determination electronically* using the iCERT Visa Portal System at <http://icert.doleta.gov>

UNITED STATES  
DEPARTMENT OF LABOR

Home | About ETA | Find Job | Business & Industry | Workforce | Grants & Contracts | ETA Library | Foreign Labor Certification | Performance & Reports | System & Tools

Employment and Training Administration

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Welcome to the iCERT Visa Portal System

Username:

Password:

Log In

New to the iCERT System?  
[Click here to create your account today.](#)

Forgot your username or password?  
[Click here.](#)

System Alerts | PERM Processing Times | Forms | User Guides | Legacy Accounts

Click on a Specific State to Search H-2A Job Orders Posted in the Last 30 Days

PUBLIC JOB REGISTRY [Advanced Search for Job Orders](#)

ICERT CASE STATUS CHECK

Enter up to 30 case numbers, one per line (e.g., 20-180-12345-12345)

Check Status

FIND CURRENT FAQs

To find the latest Frequently Asked Questions (FAQs) issued by the OFLC, [Click Here](#)

SEARCH for PREVAILING WAGES

State/Territory:

Select State

Data Source and Source:

Select Data Source

Collection Type:

All Industries

Academy Higher Education

Area based on:

County/Township

All Areas

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- 14 -

## Obtaining a Prevailing Wage Determining Prevailing Wages

20 CFR 655.10

1. A wage rate set forth in the rules/regulations of a professional sports league covering the job opportunity is considered prevailing
2. A wage rate set forth in a Collective Bargaining Agreement (CBA) covering the job opportunity is considered prevailing
3. If the job opportunity is not covered by a CBA, the prevailing wage shall be the **arithmetic mean** for the occupation in the area of intended employment using the BLS Occupational Employment Statistics Survey (OES)



**Important Note:** Requests to use McNamara-O'Hara Service Contract (SCA) or Davis-Bacon Act (DBA) wages for H-2B prevailing wages **are no longer permitted**

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- 15 -

## Obtaining a Prevailing Wage Determining Prevailing Wages

20 CFR 655.10

4. If the job opportunity is not covered by a CBA or professional sports league's rules/regulations, the NPWC will consider an acceptable survey provided by the employer

### Qualifying Categories for Employer-Provided Surveys

- Survey independently conducted and issued by a state, including any state agency, state college, or state university;
- BLS-OES does not collect wage data for the occupation in geographic area of intended employment **OR** provides an arithmetic mean at the national level for occupation in the area of intended employment;
- Job opportunity is not included within an occupational classification of the SOC system **OR** is within an occupation of the Standard Occupational Classification (SOC) system designated as an "all other" classification.

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- 16 -



## Obtaining a Prevailing Wage Employer-Provided Surveys

20 CFR 655.10



Employer submits a signed ETA Form 9165 at the time of filing the ETA Form 9141

- The survey must be conducted by a bona fide third party;
- Must include the wages of **all workers in the occupation**; and
- Must be most recent version of the survey and must be data collected within 24 months of submittal

OMB Approval: 1205-0216  
Expiration Date: 10/31/2015

**Employer-Provided Survey Attestations to Accompany  
H-2B Prevailing Wage Determination Request Based on a Non-OES Survey**

Form ETA-9165  
U.S. Department of Labor

Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at <http://www.foreignlaborcert.doleta.gov>. Those items marked with \* are required, items marked with † are required if the condition listed is met.

**A. Requestor Point-of-Contact Information (from Form ETA-9141, Section B)**

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Telephone number *	5. Extension	6. Fax Number
7. E-Mail Address		

**B. Employer Information (from Form ETA-9141, Section C)**

1. Legal business name *	
2. Trade name/Doing Business As (DBA), if applicable	
3. Telephone number *	4. Extension
5. Federal Employer Identification Number (FEIN from IRS) *	6. NAICS code (must be at least 4-digits) *

**C. Employer-Provided Survey Information**

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- 17 -

## Obtaining a Prevailing Wage Receiving a PWD and Validity Period

20 CFR 655.10

- All employer requests for a PWD will be processed on a First-In-First-Out basis (i.e., no expedited processing)
- NPWC will issue a PWD, indicate the wage source, and return the ETA Form 9141 electronically to the employer
- NPWC will specify the validity period of the PWD, which must be no more than 365 days and no less than 90 days from the determination date
- Employer must retain for 3 years from the date of issuing the PWD or the date of a final determination on the H-2B application, whichever is later

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- 18 -

## Obtaining a Prevailing Wage Request for Review/Appeal of a PWD

20 CFR 655.13

- More streamlined appeal process
- Request for redetermination with the NPWC CO is eliminated
- Employer may request review directly with the NPWC Director within 7 business days from the date the PWD was issued
- If the employer disagrees with the NPWC Director's final determination, the employer has 10 business days from the date of the final determination to request review by BALCA.

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19

## Navigating the H-2B Visa Program



**Step 2**  
File H-2B Application and  
Job Order

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- 20 -

## H-2B Application Filing Requirements

### General Provisions

20 CFR 655.15

- Filed by an employer or employer's authorized attorney/agent
- Electronic filing of H-2B applications is available through the iCERT System at <http://icert.doleta.gov>
- H-2B applications sent by U.S. Mail or private mail courier should be sent to the following location:
  - U.S. Department of Labor
  - Employment and Training Administration
  - Chicago National Processing Center
  - 11 West Quincy Street
  - Chicago, IL 60604 - 2105
  - Attention: H-2B Program Unit
- Mailed-in H-2B applications will be entered into and processed through the iCERT System

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- 21 -

## H-2B Application Filing Requirements

### General Provisions

20 CFR 655.15

- An association or other organization of employers are **not permitted** to file master applications on behalf of its employer-members
- Only one ETA Form 9142B may be filed for worksite(s) within **one area of intended employment** with an employer for each period of employment
- Certification for multiple positions may be requested as long as all H-2B workers are performing the same services . . .
  - Under the same terms and conditions;
  - In the same occupation and area of intended employment; **and**
  - During the same period of employment

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- 22 -

## H-2B Application Filing Requirements

20 CFR 655.8, .9, .15

### General Provisions



Employer will submit the following documents:

- ✓ ETA 9142B
- ✓ Appendix B - signed and dated copy of original
- ✓ Copy of the job order concurrently submitted to the SWA
- ✓ ETA 9141 or including PWD number in Section G.3 of ETA 9142B



Agent agreement/documentation demonstrating authority to represent the employer (*if applicable*)



Copies of all contracts/agreements with any agent and/or recruiter engaged in international recruitment of H-2B workers (*if applicable*)



Identity and location of all persons and entities hired by or working for the recruiter or agent, including any "sub" agents or employees of such persons and entities (*if applicable*)



Employers should provide certified translations of any contracts or agreements which are not in English to assure timely processing

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- 23 -

## H-2B Application Filing Requirements

20 CFR 655.15

### General Provisions



Required documents (continued)

- ✓ Occupations involving special procedures must submit other required documents (e.g., itineraries)
- ✓ Copy of MSPA registration for the employer or agent (*if applicable*)



Until the registration process under 20 CFR 655.11 and 655.12 are implemented, employers will continue to submit on the ETA Form 9142B Section B . . .

- ✓ the period of need (**9 months or less, except one-time need**) and the number of positions being requested for certification;
- ✓ description of the employer's business history/services and schedule of operations throughout the calendar year; and
- ✓ how the nature of the employer's need for the services or labor is temporary and justified under either a **seasonal, peakload, intermittent, or one-time occurrence standard**

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- 24 -

## H-2B Application Filing Requirements

### General Provisions

20 CFR 655.19



#### Additional reminders and documents for job contractors

- ✓ Only one ETA 9141 covering the job opportunity for the job contractor and employer-client is required
- ✓ A completed ETA 9142B Sections C & D identifying the one employer-client associated with the job opportunity
- ✓ Appendix B - signed and dated copy of original for employer-client
- ✓ A separate statement of temporary need for the employer-client included in the ETA 9142B Section B.9
- ✓ Copy of an executed contract between the job contractor and employer-client covering the job opportunity
- ✓ Each employer assumes full responsibility for the accuracy of representations made and for all assurances and obligations under the H-2B program

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- 25 -

## H-2B Application Filing Requirements

### General Provisions

20 CFR 655.15

#### IMPORTANT REMINDERS!

- Your application will be returned without review where the employer fails to include a valid ETA Form 9141 or disclose a valid PWD case number in Section G.3 of the ET A Form 9142B
-  All documentation must be filed no more than 90 calendar days and no less than 75 calendar days before the start date of work
- Provide an e-mail address on the ETA Form 9142B for the employer contact and, if applicable, the authorized attorney or agent for more efficient service

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- 26 -

## H-2B Application Filing Requirements

### Job Order Filing and Content

20 CFR 655.16

- A completed job order must be submitted to the SWA **at the same time** the employer submits the H-2B application to the Chicago NPC
- Employer must inform the SWA that the job order is being placed in connection with a concurrent application for H-2B workers
- If the anticipated worksites are located in more than one State within the area of intended employment, the employer may submit the job order to any one of the SWAs having jurisdiction over those worksites



SWA must review the job order for compliance with the criteria at 655.18, as well as any state-specific requirements, and notify the Chicago NPC of any deficiencies **within 6 business days** of receipt

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- 27 -

## H-2B Application Filing Requirements

### Job Order Filing and Content

20 CFR 655.18(a), .20(e)

- Employer's job opportunity must . . .
  - Offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers
  - Not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2B workers
  - Offer job qualifications and requirements that are bona fide and consistent with the normal and accepted qualifications and requirements imposed by employers that **do not** use H-2B workers in the same occupations and area of employment
  - CO may require employers to submit documentation substantiating the appropriateness of any job qualification and/or requirement

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- 28 -

## H-2B Application Filing Requirements Job Order Filing and Content

20 CFR 655.18(b)

Job Order Content Checklist	Regulatory Citation
State the employer's name and contact information	655.18 (b)(1)
Indicate job is temporary, full-time, and number of openings	655.18 (b)(2)
Describe job duties, requirements, hours, duration of work	655.18 (b)(3)
Geographic area of employment	655.18 (b)(4)
Wage offer or range of applicable wage offers	655.18 (b)(5)
Availability of overtime and wage offer <i>(if applicable)</i>	655.18 (b)(6)
Provision of on-the-job training <i>(if applicable)</i>	655.18 (b)(7)
State a single workweek will be used in computing wage due	655.18 (b)(8)
Specify the frequency of pay	655.18 (b)(9)
Provision of board/lodging or other fringe benefits <i>(if applicable)</i>	655.18 (b)(10)
State all deductions from the worker's paycheck	655.18 (b)(11)

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- 29 -

## H-2B Application Filing Requirements Job Order Filing and Content

20 CFR 655.18(b)

Job Order Content Checklist	Regulatory Citation
Inbound transportation/daily subsistence	655.18 (b)(12)
Outbound transportation/daily subsistence	655.18 (b)(13)
Provision of daily transportation <i>(if applicable)</i>	655.18 (b)(14)
State reimbursement of visa, border, and related fees	655.18 (b)(15)
Provision of any tools, supplies, and equipment at no cost	655.18 (b)(16)
Three-fourths guarantee	655.18 (b)(17)
Instruct applicants to contact nearest office of the SWA	655.18 (b)(18)

**Important Note:** The amount of daily subsistence must be at least the amount permitted under 20 CFR 655.173 (H-2A regulations). Employers may obtain the current minimum and maximum subsistence charges at: [http://www.foreignlaborcert.doleta.gov/meal\\_travel\\_subsistence.cfm](http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm)


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- 30 -

## NPC Application Processing Notice of Deficiency

20 CFR 655.30, .31

- Upon receipt of the H-2B application and job order, the CO will ...
  - Review for compliance with all applicable program requirements
- The CO will issue a Notice of Deficiency (NOD) to the employer  within 7 business days where the H-2B application and/or job order does not meet regulatory requirements
- The CO has the authority to issue more than one NOD during processing

**Important Note:** The CO will generally issue correspondence on any minor deficiencies as well as the NOD via e-mail to the employer contact and copy the attorney/agent. Employers will be able to submit their responses back to the CO via e-mail to [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov) to minimize any processing delays



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- 31 -

## NPC Application Processing Notice of Deficiency - Content

20 CFR 655.31

- State the reason(s) why the application or job order fails to meet the criteria for acceptance, citing the relevant regulatory standard(s)
-  Offer the employer an opportunity to submit a modified application or job order within 10 business days from the date of receipt, stating the modification(s) necessary in order for the CO to issue a Notice of Acceptance
-  Offer the employer an opportunity to request administrative review (i.e., appeal) within 10 business days from the date of issuance
- State the application will be denied without appeal rights if the employer fails to either (1) submit a modified application correcting the deficiencies or (2) make a timely request for appeal

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- 32 -



## NPC Application Processing Submission of Modified Applications

20 CFR 655.32

- CO will review the employer's response, including any modification to the application and/or job order
- If accepted, CO will issue a Notice of Acceptance (via e-mail to the SWA, employer and attorney/agent)
- If not accepted, CO may either issue a 2<sup>nd</sup> NOD or a denial determination, in accordance with 20 CFR 655.50
- Employer has a right to request administrative review of the CO's decision to deny the employer's application

**Important Note:** Even if the modifications are accepted, the CO may request additional modifications at any time before a final determination is issued where the job order does not contain all of the minimum benefits, wages and working conditions required by the regulations

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- 33 -

## NPC Application Processing Notice of Acceptance - Content

20 CFR 655.33



CO will issue a Notice of Acceptance (NOA) to the employer **within 7 business days** where the H-2B application and/or job order meets regulatory requirements

- The NOA will . . .
  - Direct the employer to engage in positive recruitment of U.S. workers (e.g., local newspaper ads, contact former U.S. employees), including any additional recruitment ordered by the CO
-  State that such positive recruitment must be conducted by the employer within 14 calendar days from the date the NOA is issued
  - Direct the SWA to place the job order into intra- and interstate clearance (all states designated by the CO, **if applicable**)

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- 34 -

## NPC Application Processing Notice of Acceptance - Content

20 CFR 655.33

- The NOA will . . .



Instruct the SWA to keep the approved job order on its active file until 21 calendar days before the start date of need and transmit a similar instruction to other designated SWAs

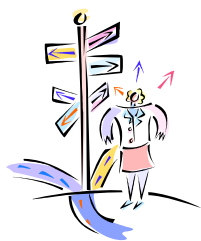
- Where the occupation or industry is traditionally or customarily unionized, direct the SWA to circulate the job order to . . .
  - the central office of the State Federation of Labor; and
  - the local union office(s) representing employees in the same or substantially equivalent job classification in the area(s) of employment
- Instruct the employer to contact appropriate community-based organizations (if applicable)
- Specify the date on which the employer must submit an initial report of its recruitment efforts

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- 35 -

## Navigating the H-2B Visa Program



### Step 3 Conduct Recruitment of U.S. Workers

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- 36 -

## Recruitment of U.S. Workers Electronic Job Registry

20 CFR 655.34

- CO will place a copy of the SWA job order on the iCERT Public Job Registry, including any approved modifications
- Job order will be available in “active” status until 21 days before the start date of need
- H-2B job orders will be posted for all applications where the start date of need is on or after October 1, 2015



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- 37 -

## Recruitment of U.S. Workers Employer-Conducted Recruitment

20 CFR 655.40

- Employer is obligated to conduct positive recruitment for qualified U.S. workers who will be available for the positions listed in the ETA Form 9142B
- Recruitment must be conducted within 14 calendar days from the date the Notice of Acceptance is issued
- Employer must continue to accept referrals and applications of all U.S. applicants interested in the position until 21 days before the date of need
- All employer-conducted recruitment must be completed before a recruitment report can be submitted to the CO for review



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- 38 -

## Recruitment of U.S. Workers Employer-Conducted Recruitment

20 CFR 655.40

- All U.S. applicants must be considered for the job opportunity
- Employers who require interviews of U.S. applicants . . .
  - Must conduct interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost; **and**
  - Cannot provide potential H-2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews
- Employer must accept and hire any applicants who are qualified and who will be available

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- 39 -

## Recruitment of U.S. Workers Additional Requirements for Job Contractors

20 CFR 655.19

- Either the job contractor or employer-client may place the job order, conduct recruitment for U.S. workers, and interview applicants
- The job order and advertisements must disclose the names of both of the joint employers and the location(s) of work
- Where job opportunities are identical, a job contractor may combine more than one of its joint employer-client's job opportunities into a single advertisement



Both of the joint employers must sign and date the recruitment report required by the CO

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- 40 -

# Recruitment of U.S. Workers Advertising Requirements

20 CFR 655.41

## Advertising Requirements

- ✓ Employer's name and contact information
- ✓ Geographic area(s) of employment with specificity to apprise US workers of any travel requirements
- ✓ Description of job duties and requirements
- ✓ Work hours and days
- ✓ Start and end dates of work
- ✓ State the job is "temporary, full-time"
- ✓ Total number of job openings
- ✓ State overtime is available and the wage offer(s) (*if applicable*)
- ✓ State on-the-job training will be provided to the worker (*if applicable*)
- ✓ Wage offer or range of wage offers



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- 41 -

# Recruitment of U.S. Workers Advertising Requirements

20 CFR 655.41

## Advertising Requirements (continued)

-  State any board, lodging, or other facilities (*if applicable*)
- ✓ All deductions not required by law
-  State transportation and subsistence expenses to the worksite and return transportation will be provided
-  State work tools, supplies, and equipment will be provided at no cost to the worker (*if applicable*)
- ✓ State daily transportation to and from the worksite will be provided (*if applicable*)
-  State the three-fourths guarantee
-  SWA contact information and job order number, if available
-  Statement directing applicants to apply at the nearest local office of the SWA in the State in which the advertisement appeared

May 2015

U.S. Department of Labor  
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- 42 -

# Recruitment of U.S. Workers

## Suggested Advertising Language

20 CFR 655.41

Advertising Content Requirement	Suggested Language
Statement providing inbound and outbound transportation and daily subsistence	<i>"Transportation (including meals and, to the extent necessary, lodging) to the place of employment will be provided, or its cost to workers reimbursed, if the worker completes half the employment period. Return transportation will be provided if the worker completes the employment period or is dismissed early by the employer."</i>
Statement providing any tools, supplies, and equipment at no cost	<i>"The employer will provide workers at no charge all tools, supplies, and equipment required to perform the job."</i>
Statement summarizing a guarantee to offer the worker employment for a total number of work hours	<p><b>Two Options:</b></p> <p><b>1. If the job will last less than 120 days . . .</b>  <i>"The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 6-week period of the total employment period."</i></p> <p><b>2. If the job will last 120 days or more . . .</b>  <i>"The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 12-week period of the total employment period."</i></p>

May 2015

U.S. Department of Labor  
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- 43 -

# Recruitment of U.S. Workers

## Newspaper Advertisements

20 CFR 655.42

- Employer must place an advertisement on 2 separate days, which may be consecutive, and one of which must be a Sunday
- Ads must be placed in a newspaper of general circulation in the area of intended employment and appropriate to the occupation and workers likely to apply to the job
- Advertisements must satisfy the requirements of 20 CFR 655.41

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

May 2015

U.S. Department of Labor  
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- 44 -

## Recruitment of U.S. Workers Contact with Former U.S. Employees

20 CFR 655.43

- Employer must contact former U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job
- Employer must contact by mail or other effective means
- Employer is not required to contact employees who were either
  - Dismissed for cause; or
  - Abandoned the worksite
- Documentation sufficient to prove contact must be maintained in the event of an audit examination

May 2015

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- 45 -

## Recruitment of U.S. Workers Bargaining Contact/Notice of Posting

20 CFR 655.45

### Bargaining Representative Exists

- Employer provides a copy of the ETA 9142B and job order to the bargaining representative of employees in the occupation and area of employment
- Employer must document notice of contact and disposition of any referrals in the recruitment report

### Notice of Posting (No Bargaining Representative)

- Post job opportunity in at least 2 conspicuous locations at the place(s) of employment or another manner providing reasonable notification to all employees
- Electronic posting prominently displaying the job and customarily used for posting notices to employees is acceptable



Must be posted for at least 15 consecutive business days

May 2015

U.S. Department of Labor  
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- 46 -

## Recruitment of U.S. Workers Additional Positive Recruitment

20 CFR 655.46

- CO may instruct the employer to conduct additional recruitment for qualified and available U.S. workers, particularly in Areas of Substantial Unemployment (ASU)
- ASU is defined as an area with a population of at least 10,000 with an average unemployment rate equal or exceeding 6.5% for the prior 12 months
- CO will describe the precise number and nature of the additional recruitment efforts, such as employer's website, professional or trade publication, other public or private recruitment/employment-based organizations
- Documentation sufficient to prove additional recruitment efforts will be specified by the CO

May 2015

U.S. Department of Labor  
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- 47 -

## Recruitment of U.S. Workers Submission of Initial Recruitment Report

20 CFR 655.48



Employer must prepare, sign, and date a written recruitment report

- Recruitment report must be submitted by the date specified in the Notice of Acceptance
- Recruitment report contents include . . .
  - ✓ Identification of each recruitment activity or source by name
  - ✓ Name/contact information of each U.S. worker who applied for the job and the disposition of each worker
  - ✓ Clearly indicate, for each worker, whether the job was offered and whether the worker accepted or declined

May 2015

U.S. Department of Labor  
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- 48 -



## Recruitment of U.S. Workers Submission of Initial Recruitment Report

20 CFR 655.48



### Recruitment report contents (continued)

- ✓ Confirm that former US employees were contacted and by what means (*if applicable*)
- ✓ Confirm the bargaining unit was contacted, by what means, and what response was received (*if applicable*) or that a notice of the job opportunity was posted
- ✓ A statement confirming that each additional recruitment activity ordered by the CO was completed, listing each activity
- ✓ Explanation of the lawful job-related reason(s) for not hiring each U.S. worker (*if applicable*)



The initial recruitment report must be received by the CO before a final determination is issued on the ETA 9142B

May 2015

U.S. Department of Labor  
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- 49 -

## Withdrawal of an H-2B Application

20 CFR 655.62

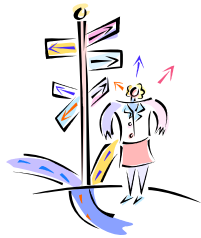
- Employers may withdraw an ETA Form 9142B after it has been accepted and before a final determination is issued by the Chicago NPC CO
- CO will accept written notification and supporting documentation via email at [TLC.chicago@dol.gov](mailto:TLC.chicago@dol.gov) or fax at 312-353-8830
- CO will notify the employer of the decision in writing

May 2015

U.S. Department of Labor  
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- 50 -

## Navigating the H-2B Visa Program



### Step 4 Completing the Labor Certification Process

May 2015

U.S. Department of Labor  
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- 51 -

## NPC Application Processing Issuance of Determinations

20 CFR 655.50-51

- Except where directed by the OFLC Administrator, the CO will make a determination either to certify or deny the ETA 9142
- Employer must meet all the regulatory requirements, including the criteria for certification at 20 CFR 655.51
- Where certification is granted, the CO has determined that . . .
  1. There is an insufficient number of qualified U.S. workers available for the certified job opportunity; **and**
  2. The employment of H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed US workers

**Important Note:** Although not required by regulation, the CO **may issue a final determination 30 days before the start date of need** where the application meets the criteria for certification. An application that is modified under 20 CFR 655.31 or otherwise does not meet the requirements for certification **is not subject to this determination timeframe.**

May 2015

U.S. Department of Labor  
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- 52 -

## Issuance of Determinations Approved Certification

20 CFR 655.52

- Employer will receive the following documents by means normally assuring next day delivery:
  - ✓ Final Determination letter
  - ✓ ETA Form 9142 (printed on blue security paper)



Chicago NPC will no longer print the Appendix B on blue security paper

- Employer will complete the footer on the Appendix B and then submit the original certified ETA Form 9142B and a copy of the Appendix B along with I-129 petition documentation to the appropriate USCIS Service Center

**Important Note:** The employer must retain a signed copy of the ETA Form 9142B and the original signed Appendix B, as required by § 655.56.

May 2015

U.S. Department of Labor  
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- 53 -

## Issuance of Determinations Approved Certification – Job Contractors

20 CFR 655.19(f),(g)

- The ETA Form 9142B (on blue security paper) will be issued and sent to the job contractor
- A courtesy copy of the Final Determination letter will be sent to the employer-client



The USCIS Service Center should receive the original certified ETA Form 9142B and copies of the Appendix B - one covering the job contractor and a separate one for the employer-client

- The job contractor must retain a signed copy of the ETA Form 9142B and the two original signed Appendix B forms, as required by § 655.56.


May 2015

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- 54 -

## Issuance of Determinations Approved Certification - Partial

20 CFR 655.54

- CO may reduce either the period of need **and/or** the number of H-2B workers being requested for certification
- Number of workers certified will be reduced by one for each qualified and available U.S. worker not rejected for a lawful job-related reason(s)
- Employer will receive an amended ETA 9142B and a Final Determination letter that includes . . .
  - the reason(s) partial certification is being granted
  - address the availability of US workers (if applicable), and
  -  provide notice of the employer's right to request administrative review (i.e., appeal) in writing **within 10 business days** from the date of determination

May 2015

U.S. Department of Labor  
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- 55 -

## Issuance of Determinations Validity and Scope of Labor Certification

20 CFR 655.55

- A certified ETA Form 9142B is valid only for . . .
  - ✓ the period of employment;
  - ✓ number of H-2B workers;
  - ✓ area of intended employment;
  - ✓ job classification and specific services or labor to be performed; and
  - ✓ the named employer(s)
- Certification cannot be transferred to another employer, except where the other employer is a successor in interest
- Certification expires on the last day of authorized employment, or any approved extension


May 2015

U.S. Department of Labor  
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- 56 -

## Issuance of Determinations Denials

20 CFR 655.53

- Employer will receive the following by means assuring next day delivery:
  - ✓ Final Determination letter
- Final Determination letter will include . . .
  - the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures
  -  provide notice of the employer's right to request administrative review (i.e., appeal) in writing **within 10 business days** from the date of determination
  - Provide notice that the denial determination is the final decision of the Secretary if the employer does not request administrative review



May 2015

U.S. Department of Labor  
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- 57 -

## Redetermination Requests U.S. Worker Non-availability

20 CFR 655.57

-  Employer may request a redetermination based on non-availability of U.S. workers where the CO issued a denial or a partial certification
- Requests can be made via email, fax, or U.S. mail and include
  - a signed written statement from the employer confirming no U.S. workers are available
  - a listing of the names and contact information of each U.S. worker and reason(s) for unavailability
- CO will consult with the SWA or other sources as to whether replacement U.S. workers are qualified and available
-  CO will issue a determination within 72 hours after the time a complete request is received
- Employer may appeal a denial of a redetermination request

May 2015

U.S. Department of Labor  
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- 58 -

## Post-Determination Actions Updates to Recruitment Report

20 CFR 655.48(b)



Employers must continue to cooperate with the SWA in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies until 21 days before the start date of need

- In joint employment situations, either the job contractor or the employer-client may update the recruitment report
- Employer must continue to update the initial recruitment report submitted to the CO for certification throughout the entire recruitment period



Employer must sign and date the final written recruitment report and be prepared to submit it when requested by the CO in the event of an audit examination or other request from the Department

May 2015

U.S. Department of Labor  
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- 59 -

## Post-Determination Actions Seafood Industry Exemption

20 CFR 655.15(f)(1), (f)(2)

### Staggered Entry of H-2B Workers

- An employer in the seafood industry with a granted USCIS petition may bring into the United States H-2B workers at any time during the 120-day period beginning on the certified start date of work without filing a separate ETA Form 9142B and/or petition
- “Seafood” is defined as fresh or saltwater finfish, crustaceans, other forms of aquatic animal life, including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals, and all mollusks.

May 2015

U.S. Department of Labor  
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- 60 -

## Post-Determination Actions Seafood Industry Exemption

20 CFR 655.15(f)(1), (f)(2)

- An employer in the seafood industry may **only** bring H-2B workers into the United States after the date that is 90 days after the certified start date of work where a new recruitment effort for U.S. workers is conducted
- An employer must conduct a new recruitment effort that . . .
  - Begins at least 45 days after, and ends before the 90<sup>th</sup> day after, the certified start date of work;
  - Lists the job orders in local newspapers on 2 separate Sundays;
  - Places the job order with the SWA serving the area of intended employment **and** posts a notice at the place of employment for at least 10 calendar days

May 2015

U.S. Department of Labor  
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- 61 -

## Post-Determination Actions Seafood Industry Exemption

20 CFR 655.15(f)(1), (f)(2)

- Employer must offer the job an equally or better qualified United States worker who applies and will be available for the job
- All additional recruitment documentation must be retained by the employer with its original certified H-2B application for a period of 3 years from the date of certification, as required by 20 CFR 655.56

**Important Note:** Seafood industry employers who conduct the required additional recruitment **should not** submit proof of the additional recruitment to the OFLC Chicago NPC

May 2015

U.S. Department of Labor  
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- 62 -

## Post-Determination Actions Seafood Industry Exemption

20 CFR 655.15(f)(1), (f)(2)



An employer in the seafood industry bringing in H-2B workers must sign and date an attestation form available on the OFLC website [www.foreignlaborcert.doleta.gov/form.cfm](http://www.foreignlaborcert.doleta.gov/form.cfm)

- Each H-2B worker seeking admission to the United States must be provided with a copy of the employer's signed and dated attestation
- Each H-2B worker must present the signed attestation to the Department of State's consular officers when they apply for a visa and/or the Department of Homeland Security's U.S Customs and Border Protection officers when seeking admission to the United States

May 2015

U.S. Department of Labor  
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- 63 -

## Post-Determination Actions Seafood Industry Exemption

20 CFR 655.15(f)(1), (f)(2)

### IMPORTANT REMINDERS!

- Without this attestation, an H-2B worker may be denied a visa or admission to the United States if seeking to enter at any time other than the start date stated in the petition
- The attestation is not necessary when filing an amended petition based on a worker who is being substituted, in accordance with DHS regulations
- The attestation presented by an H-2B worker must be the official attestation downloaded from OFLC's website and may not be altered or revised in any manner

May 2015

U.S. Department of Labor  
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- 64 -



## Post-Determination Actions Reporting Worker Abandonments/Terminations

20 CFR 655.20(y)

- Employers must notify OFLC within 2 days of the separation of an H-2B worker or worker in corresponding employment if the separation occurs before the end date certified H-2B application
- Separate notification requirements to the DHS apply
- Worker abandonment begins after a worker fails to report for work without the employer's consent for 5 consecutive working days

**Important Note:** The Chicago NPC will accept a copy of the written notification of abandonment/separation submitted by the employer to DHS as long as it contains all of the required information. Employers must retain records in accordance with documentation retention requirements outlined at 20 CFR 655.56.

May 2015

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- 65 -

## Post-Determination Actions Reporting Worker Abandonments/Terminations

20 CFR 655.20(y)

- Employer is not responsible for subsequent transportation and subsistence or the three-fourths guarantee where . . .
  - H-2B worker or worker in corresponding employment voluntarily abandons employment; and
  - Employer has provided the required notification to the OFLC
- Employer's obligation to guarantee three-fourths of the work ends with the last full 12-week period (or 6-week period, as appropriate) preceding the worker's voluntary abandonment or termination for cause

May 2015

U.S. Department of Labor  
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- 66 -

## Post-Determination Actions Reporting Worker Abandonments/Terminations

20 CFR 655.20(y)

- CO will accept written notification and documentation via email at [TLC.chicago@dol.gov](mailto:TLC.chicago@dol.gov) or fax at 312-886-1688
- Employer's written notification should include the following:
  - Reason(s) for notification or late notification (*if applicable*);
  - H-2B application case number(s);
  - Employer's FEIN, name, address, and telephone number
  - Date(s) of abandonment or separation from employment;
  - Number of H-2B worker(s) and/or other worker(s) in corresponding employment who abandoned or was/were separated from employment; and
  - Name(s) of each such H-2B worker and/or worker in corresponding employment and each employee's last known address

May 2015

U.S. Department of Labor  
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- 67 -

## Navigating the H-2B Visa Program



### Briefing Section II

#### *Administrative and Program Integrity Provisions*

May 2015

U.S. Department of Labor  
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- 68 -

## Establishing Temporary Need

- A job opportunity is temporary if the nature of the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary
- Part-time employment does not qualify for H-2B certification; only full-time (*i.e., 35 hours or more per week*) employment will be certified
- A labor shortage, however severe, does not establish a temporary need under the H-2B classification
- For job contractors, the Department will examine the nature of the job contractor's own need based on only a seasonal or one-time occurrence standard

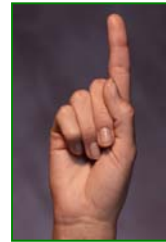
## Establishing Temporary Need

- On the ETA Form 9142B, the employer must establish that its need for nonagricultural services or labor is temporary
- Burden of proof is on the employer
- As defined by the DHS (8 CFR 214.2(h)(6)(ii)), employer's need is considered temporary if justified as either a:
  1. One-time occurrence;
  2. Seasonal need;
  3. Peakload need; or
  4. Intermittent need

## Establishing Temporary Need One-Time Occurrence Standard

20 CFR 655.6

- Employer must establish the following:
  - It has not employed workers to perform the services or labor in the past and it will not need the workers to perform the services or labor in the future
  - or
  - It has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers



**Important Note:** An employer's need is limited to 9 months, but in the case of a one-time occurrence could last up to 3 years.

May 2015

U.S. Department of Labor  
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- 71 -

## Establishing Temporary Need Seasonal Standard

20 CFR 655.6

- Employer must establish the following:
  - The services or labor to be performed is traditionally tied to a season of the year by an event or pattern and is of a recurring nature
  - and
  - The period(s) of time during each year in which the employer does not need the services or labor



Employment is not seasonal if the period of need is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees

May 2015

U.S. Department of Labor  
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- 72 -

## Establishing Temporary Need

### Establishing Temporary Need – Peakload

20 CFR 655.6

- Employer must establish the following:
  - It regularly employs permanent workers to perform the services or labor at the place of employment
  - and**
  - It needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand
  - and**
  - The temporary additions to staff will not become a part of the employer’s regular operation (*i.e., permanent staff*)

**Important Note:** Job contractors will not be eligible for participation in the H-2B program under this standard of temporary need.

May 2015

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- 73 -

## Establishing Temporary Need

### Key Distinctions Between Seasonal vs. Peakload

20 CFR 655.6

#### Seasonal

- Employer’s need is clearly tied to a season and has a predictable pattern each year
- Quite often business operations “shut down” or do not employ workers at all in that occupation for part of the year
- It is possible for the business to operate year round, but the need for workers in the occupation is seasonal
- **Lasts 9 months or less**

#### Peakload

- Need for workers can be tied to one or more seasons or other short-term demand
- Business operations are year-round and employ workers in that occupation on a permanent basis
- Employer’s need is “above and beyond” the existing workers employed in that occupation
- **Lasts 9 months or less**

May 2015

U.S. Department of Labor  
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- 74 -

## Establishing Temporary Need Intermittent Standard

20 CFR 655.6

- Employer must establish the following:
  - It has not employed permanent or full-time workers to perform the services or labor
  - but**
  - Occasionally or intermittently needs temporary workers to perform the services or labor for short periods



**Important Note:** Job contractors will not be eligible for participation in the H-2B program under this standard of temporary need.

May 2015

U.S. Department of Labor  
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- 75 -

## Key Terms and Definitions Non-agricultural labor and services

20 CFR 655.5

- Any labor or services not considered to be agricultural labor or services as defined in 20 CFR part 655, subpart B
- By statute, does not include the provision of services as members of the medical profession by graduates or medical schools.

**Important Note:** Unlike logging, which was included in the definition of agricultural labor and services with the H-2A 2010 Final Rule, reforestation and pine straw activities continue to be included in the definition of non-agricultural labor and services

May 2015

U.S. Department of Labor  
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- 76 -

## Key Terms and Definitions

### Area of Intended Employment

20 CFR 655.5

- Geographic area within normal commuting distance of the worksite of the job opportunity
- No rigid measure of distance due to a variety of conditions (*e.g., terrain, obstacles to reaching worksite, quality of transportation network*)
- If within an Metropolitan Statistical Area (MSA) – any location in the MSA is deemed to be within normal commuting distance of the place of intended employment (*including multi-state MSAs*)
- MSAs are not controlling – a location outside an MSA may be within normal commuting distance of a location that is inside the MSA

May 2015

U.S. Department of Labor  
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- 77 -

## Key Terms and Definitions

### Employer

20 CFR 655.5

- Person (*individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties*) that:
  - Has a place of business (*physical location*) in the US and means by which it may be contacted for employment
  - Employer relationship (*hire, pay, fire, supervise/control the work*) with an H-2B worker(s) or a worker(s) in corresponding employment
  - For purposes of filing, possesses a valid Federal Employer Identification Number (FEIN)



Where two or more employers each have sufficient definitional indicia of employment with an employee, those employers will be considered to jointly employ that employee

May 2015

U.S. Department of Labor  
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- 78 -

## Key Terms and Definitions Employer-client

20 CFR 655.5

- An employer that has entered into an agreement with a job contractor for specific services or labor **and**
  - The employer is not an affiliate, branch or subsidiary of the job contractor;
  - The employer, not the job contractor, will exercise substantial, day-to-day, supervision and control over the services or labor being performed; **and**
  - The job contractor's employer relationship to the workers will be limited to hiring, paying and firing the workers.

May 2015

U.S. Department of Labor  
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- 79 -

## Key Terms and Definitions Job Contractor

20 CFR 655.5

- Must meet the definition of an employer **and**
  - Contracts services or labor on a temporary basis to one or more employers;
  - Its employer-clients are not affiliates, branches, or subsidiaries of the job contractor;
  - Does not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor; **and**
  - Deals with hiring, paying, and firing of workers

**Important Note:** *An employer who contracts services or labor to another employer and does exercise substantial day-to-day supervision and control over the work, such as through an on-site supervisor, is not a job contractor within the meaning of this definition*

May 2015

U.S. Department of Labor  
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- 80 -



## Key Terms and Definitions Employee

20 CFR 655.5

- General common law meaning of a person engaged to perform work for an employer
- Determination of employee status includes:
  - Hiring party's right to control the manner and means by which work is accomplished
  - Skill required and location to perform the work
  - Source of instrumentalities and tools for accomplishing the work
  - Hiring party's discretion over when and how long to work
  - Whether the work is part of the hiring party's regular business
- Terms "employee" and "worker" have the same meaning

May 2015

U.S. Department of Labor  
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- 81 -

## Key Terms and Definitions Job Offer vs. Order

20 CFR 655.5

### Job Offer

- Offer made by an employer or potential employer of H-2B workers to both U.S. and H-2B workers describing all the material terms and conditions of employment, including those related to wages, working conditions and other benefits

### Job Order

- Document posted by and among the State Workforce Agencies on their job clearance systems
- Contains the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits including the obligations and assurances under the regulations

May 2015

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- 82 -

## Key Terms and Definitions

20 CFR 655.5, .20(e)

### Job Opportunity vs Qualification vs. Requirement

#### Job Opportunity

- One or more bona fide openings for full-time employment within a specified area(s) of intended employment for which the employer is seeking workers.

#### Job Qualification

- A characteristic that is necessary to the individual's ability to perform the job in question

#### Job Requirement

- A term or condition of employment which a worker is required to accept in order to obtain the job opportunity


May 2015

U.S. Department of Labor  
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- 83 -

## Administrative Review

20 CFR 655.61




- Employer has a right to request administrative review, where expressly authorized
  - Examples include notices of deficiency, partial certifications/denial of labor certification, denials of redetermination requests, denials of modified application or job order, denial of extension request
-  Requests for administrative review must be sent simultaneously to BALCA and the CO who issued the determination **within 10 business days** from the date of determination
- Request must identify the determination, include a copy of the CO determination, and set forth the grounds for BALCA review
- Request may contain only legal argument(s) and such evidence as was actually submitted to the CO before the date the CO's determination was issued

May 2015

U.S. Department of Labor  
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- 84 -

## Administrative Review

-  Upon receipt, the CO will assemble and submit the Appeal File to the BALCA and employer within 7 business days
-  Upon receipt of the Appeal File, legal counsel for the CO may submit a brief in support of the CO's determination within 7 business days
  - BALCA will perform a review using the Appeal File, the employer's request for review, and any legal briefs submitted
-  BALCA will notify employer of the decision within 7 business days of the submission of the CO's brief or 10 business days after it received the Appeal file, whichever is later
  - BALCA has authority to Affirm, Reverse, Modify, or Remand for further action the CO's determination

## Program Integrity Provision Audit Examinations

- CO may conduct audits of both certified and denied applications and has sole discretion to choose the applications selected for audit
- CO will issue a Notice of Audit Examination Letter specifying the following:
  - Documentation to be submitted by the employer
  - Specify a date no more than 30 calendar days from issuance in which the CO must receive the documentation
  - Notice that failure to fully comply with the audit process may result in assisted recruitment, revocation of the certified application or program debarment from future filings

## Program Integrity Provision Audit Examinations

20 CFR 655.70

- Supplemental Information and/or documentation may be requested from the employer to complete the audit
  - CO may issue one or more requests
- Potential results from the audit findings include:
  - Affirm Compliance
  - Revocation of certified application
  - Debarment proceedings
  - Referral to DHS, WHD or other appropriate enforcement agency
  - Referral to DOJ Civil Rights Division where the employer discouraged U.S. worker from applying or failed to hire, discharged or otherwise discriminated against U.S. workers

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- 87 -

## Program Integrity Provision Assisted Recruitment

20 CFR 655.71

- CO may issue a Notice of Assisted Recruitment where one or more violations occur that is not severe enough to warrant debarment
- Notification to the employer will
  - Specify an assisted recruitment period for future applications of up to 2 years from the date the notice is issued
  - State the reason(s) for the imposition of assisted recruitment
  - Offer the employer an opportunity to request administrative review

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- 88 -

## Program Integrity Provision Assisted Recruitment

20 CFR 655.71

- Assisted recruitment shall specify procedures to be taken in addition to the normal regulatory recruitment provisions
- Can include:
  - Submission of a draft ad for review
  - Designation of sources of U.S. workers
  - Proof of publication of ads, SWA referrals, contact with referrals and former U.S. workers
  - Additional recruitment/longer placement of ad/job order
- Material failure to comply will lead to denial of temporary labor certification or debarment

May 2015

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- 89 -

## Program Integrity Provision Revocation

20 CFR 655.72

- OFLC Administrator may revoke certified applications
- Bases for revocation include:
  - Certification was not justified due to fraud or willful misrepresentation of a material fact in the application process
  - Substantial failure to meet any of the terms/conditions of the registration, the certified application, or the petition
    - Substantial failure is a willful failure to comply that constitutes a significant deviation from the terms/conditions of the documents
  - Failure to cooperate with a DOL investigation or DOL official performing an investigation, inspection, audit, or law enforcement function
  - Failure to comply with one or more sanctions or remedies imposed by WHD or one or more decisions of the Secretary


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- 90 -

## Program Integrity Provision Revocation Procedures

20 CFR 655.72

- Employer or representative will receive a Notice of Revocation
- Notice will state the reason(s) for revocation and provide an opportunity for the employer to submit evidence to rebut the charge(s) or request administrative review
-  CO must receive a response within **10 business days**
  - If no evidence is submitted, the revocation is the Secretary's final decision and takes effect immediately
  - If evidence is submitted timely, OFLC Administrator will provide a Final Notice **within 10 business days**
- Final Notice will provide an opportunity for administrative review by the ALJ
- A timely submission of evidence or appeal stays the revocation

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- 91 -

## Program Integrity Provision Revocation – Employer Obligations

20 CFR 655.72

- OFLC Administrator will send a copy of the final revocation to DHS and DOS
- Where revoked, the employer is responsible for the following:
  - Reimbursement of actual inbound transportation and subsistence expenses
  - Workers' outbound transportation expenses
  - Payment to the worker(s) of the amount due under the three-fourths guarantee
  - Any other wages, benefits, and working conditions due or owing to the worker(s)

May 2015

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- 92 -

## Program Integrity Provision Debarment

20 CFR 655.73

- Debarment proceedings may be initiated on an employer or attorney/agent who committed a violation or participated in the employer's violation
- Jurisdiction to debar concurrent with WHD; WHD and OFLC will coordinate their activities, single debarment proceeding
- Can be imposed for no less than 1 year and up to 5 years
- Debarred party will be disqualified from filing any labor certification or condition applications with the Department
- Copies of final debarment decisions will be sent promptly to the DHS and DOS

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- 93 -

## Program Integrity Provision Debarment Violations

20 CFR 655.73

- Violations subject to debarment proceedings include:
  - Willful misrepresentation of a material fact in the H-2B Registration, H-2B application, or DHS H-2B petition, or DOS visa application process
  - Substantial failure to meet any of the terms and conditions of H-2B Registration, Application, or H-2B petition

**Important Note:** A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents.

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- 94 -

## Program Integrity Provision Debarment Violations

20 CFR 655.73

- Acts of commission or omission which involve:
  - Failure to pay/provide required wages, benefits or working conditions to workers, recruit or offer employment to US workers
  - Employing an H-2B worker outside the terms of the job order
  - Improper layoff or displacement of US workers or workers in corresponding employment
  - Violating certain requirements (prohibition on fees)
  - Failure to comply with certain processes (NODs, assisted recruitment) or remedies imposed by WHD, DOL or a court of law
  - Fraud involving the H-2B Registration, Application or Petition
  - Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot be expected

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- 95 -

## Program Integrity Provision Debarment Standards

20 CFR 655.73

- Determining whether a violation is willful
  - Occurs when the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions
- Determining whether a violation is significant
  - Violation represents a significant deviation from the terms and conditions of the H-2B Registration, Application, or H-2B petition taking into consideration of at least the factors contained at 20 CFR 655.73(e)

May 2015



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- 96 -



## Program Integrity Provision Debarment Procedures

20 CFR 655.73

- The affected party will receive a Notice of Debarment  
 Notice will state the reason(s)/duration for debarment and provide an opportunity for the employer to submit rebuttal evidence or request administrative review within 30 calendar days
  - If no evidence is submitted, the debarment is the Secretary's final decision and takes effect at end of 30-day period
  - Timely submission of evidence or appeal stays the debarment
-  If evidence is submitted timely, OFLC Administrator will issue final determination within 30 calendar days
- The affected party has a right to administrative review of a final debarment determination



May 2015

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- 97 -

## Program Integrity Provision Debarment Procedures

20 CFR 655.73

- Hearing:  
 Must request ALJ hearing within 30 calendar days
  - OFLC Administrator must send the case to Chief ALJ within 10 business days of request
  - ALJ must affirm, reverse, or modify the OFLC Administrator's determination within 60 days after hearing/record closes
- ARB Review of Debarment Decision:  
 Must petition for ARB review within 30 calendar days
  - ARB has 30 calendar days to determine whether to accept
  - If petition for review accepted, ALJ's decision stayed
  - ALJ must affirm, reverse, or modify the determination within 90 calendar days

May 2015

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- 98 -

# Helpful Resources – OFLC Website

www.foreignlaborcert.doleta.gov/2015\_H-2B\_IFR.cfm



- On May 13<sup>th</sup> and 15<sup>th</sup> OFLC hosted two webinars on the H-2B 2015 Wage Final Rule
- The recordings of the two PWD webinars may be found under the *Prevailing Wage Information* dropdown on this page
- The information provided in today's (May 27<sup>th</sup>) presentation is being recorded and will be made available on this page soon

The screenshot shows the OFLC website interface. At the top, there is a navigation bar with links for Home, Find Job & Career Info, Business & Industry, Training Professionals, Grants & Contracts, TIA Program, Foreign Labor Certification, Performance & Results, and Regions & States. The main content area is titled 'Foreign Labor Certification' and features a prominent heading for 'H-2B Temporary Non-agricultural Program 2015 Interim Final Rule Resources'. A news item dated May 26, 2015, announces a webinar on the H-2B 2015 Interim Final Rule. Below this, there is a section for 'Helpful Links' with buttons for 'Frequently Asked Questions', 'Regulations and Special Procedures', 'Factbooks and Filing Tips', 'Prevailing Wage Information', 'ICERT Portal System', 'Disclosure Data', 'H-2B Registration', 'Program Debarments', 'Public Job Registry', 'Additional Resources', 'Forms', and 'NJC/NPWC/SWA Contacts'. A sidebar on the left contains various navigation options like 'Office of Foreign Labor Certification', 'Additional Programs', 'Electronic Filing', and 'Forms and Instructions'.

## Disclaimer

**This presentation is intended for training use only and does not carry the force of legal opinion.**

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