

FAQs on H-2B Final Rule Round One

The Department published a Final Rule on the labor certification process and enforcement for H-2B employment on December 19, 2008, which became effective on January 18, 2009. The Final Rule made some significant changes in the processing of applications for H-2B labor certifications. The following “Frequently Asked Questions” (FAQs) are in response to questions arising from the application of the new regulations.

Transition to New Procedures (For applications filed on or after January 18, 2009 for employment with start dates before October 1, 2009)

Question: I have a need for H-2B workers that starts September 1, 2009. When do I begin recruitment?

Answer: An employer is required by the regulation to begin recruitment no more than 120 calendar days before the employer’s date of need for H-2B workers.

Question: During the transition period, as an employer I understand that I need to file the prevailing wage request form with the State Workforce Agency (SWA). Once I get the prevailing wage from the SWA, how does the SWA know to place the job order and the contents of the job order if it does not get the initial Form ETA-9142, Application for Temporary Employment Certification?

Answer: A SWA does not need the ETA 9142 to create or place a job order. An employer is required by the regulation to submit a job order to the SWA serving the area of intended employment no more than 120 calendar days before the employer’s date of need for H-2B workers. The employer may place a job order with the SWA by utilizing whatever form or electronic system the SWA employs for such orders. The employer may also submit the request to the SWA and have the SWA place the order. Regardless of whether the employer places the job order without SWA assistance or requests that the SWA place the job order on its behalf, the employer must identify in the job order itself that the job order is being placed in connection with a future application for H-2B workers.

Question: Prior to October 1, 2009, am I supposed to file the ETA-750 with the State Workforce Agency (SWA), or must I file the ETA-9142?

Answer: The ETA-750 is no longer used to file an application for labor certification for H-2B positions, and as of January 18, 2009, the SWAs no longer receive applications. All applications for labor certification for the purpose of seeking H-2B workers must be filed on form ETA-9142, using Appendix B.1 as

well as the form. The ETA-9142, Appendix B.1, and the Recruitment Report should be filed directly with the Chicago NPC, not the SWA, for adjudication.

Prevailing Wage

Question: Can you tell me when we will need to start using the ETA-9141 for prevailing wage determinations? Will there be instructions posted on how to complete the form?

Answer: For the purposes of the prevailing wage during the transition period, the employer will use whatever form the State Workforce Agency has for such purposes. For any date of need on or after October 1, 2009, the employer will file the ETA-9141, the Prevailing Wage Determination Request form, with the NPC to receive a prevailing wage determination. OFLC will post the form on the OFLC website in time for employers with an October 1, 2009 date of need to utilize it.

Form ETA-9142

Question: Where do I find the NAICS Code that the ETA -9142 asks for on page 2, Section C, Item 13 and what is it?

Answer: "NAICS" stands for the North American Industry Classification System, which is a coding system that classifies all businesses into specific categories enabling statisticians and others in the government and in the private sector to identify trends and keep track of information based on industries. The accompanying instructions to the Form ETA-9142 provide the web address for the Census Bureau, which maintains the NAICS coding system. The code selected by the employer should reflect the nature of the employer's business, not the job for which certification is sought. A listing of NAICS codes can be found at <http://www.census.gov/epcd/www/naics.html>

Question: Where do I find the SOC (ONET/OES) Code and SOC (ONET/OES) Occupation Title requested on page 1, Section B questions 2 and 3 of the new ETA Form 9142?

Answer: Link to <http://www.flcdatcenter.com/OesQuick.aspx> and click on the drop down box under "OR Select an occupation from the list." The number on the left is the SOC code and the title to the right is the Occupation Title.

Question: The employer completes a narrative statement regarding item 9 of ETA Form 9142, but must retain the supporting documents. Can these

documents be submitted with the application instead of in response to the National Processing Center (NPC)'s Request For Information (RFI)?

Answer: No. These documents will be requested under the RFI process outlined in 20 CFR 655.23(c) if the employer has made all necessary attestations and assurances but failed to comply with one or more of the certification criteria set forth in 20 CFR 655.23(b). If the regulatory requirements for certification are met, the petition will be certified and the employer should keep any supporting documents demonstrating temporary need for three years from the date of certification in case of a post-certification audit. Supporting evidence is not defined by the regulations, but the Department has historically considered charts of permanent and temporary employees, payroll records, and signed contracts setting forth the dates of employment to demonstrate temporary need.

Question: Where do we send the completed Application for Temporary Employment Certification?

Answer: The completed application must be sent directly to the Chicago National Processing Center. The address is:

U.S. Department of Labor
Employment and Training Administration
Chicago National Processing Center
844 N. Rush Street
12th Floor
Chicago, IL 60611

Recruitment

Question: What is my pre-filing recruitment obligation and when must I place the first ad?

Answer: An employer may not place a newspaper advertisement until it has received a prevailing wage (from the State Workforce Agency (SWA) during the transition period or from the Chicago NPC after the transition period). Once an employer has received a prevailing wage it can submit a job order to the SWA serving the area of intended employment and then publish two print advertisements, one of which should be on a Sunday unless no Sunday edition exists (see 20 CFR 655.15(f) for exceptions) during the time the job order is posted with the SWA. The job order cannot be placed more than 120 days prior to the date of need.

In addition, if the employer is a party to a collective bargaining agreement governing the job classification that is subject of the H-2B application, then the employer must formally contact the local union and maintain copies of

correspondence and/or dated logs demonstrating contact with the union, result of such contact, and the number of qualified referrals received from the union. Likewise, if the employer laid off any employees in the same job occupation within 120 days of the first date of need, the employer must document that it has notified or will notify each laid-off worker of the job opportunity and has considered or will consider each laid-off worker who has expressed interest in the opportunity, and the result of the notification and consideration.

Finally, the employer must prepare a Recruitment Report and submit it with the Application for Temporary Employment Certification. The Recruitment Report cannot be prepared any earlier than 2 calendar days after the last date on which the job order was posted and no earlier than 5 calendar days after the last newspaper advertisement was published.

Question: When can I begin my recruitment activities?

Answer: No earlier than 120 days prior to the first date of need.

Question: Can I combine several H-2B job opportunities into one advertisement?

Answer: No. Each job opportunity must have its own advertisement in order to sufficiently apprise potential workers of the job duties.

Question: How long must my recruitment run?

Answer: The job order must be posted with the State Workforce Agency in the area of intended employment for no less than 10 full days. The newspaper advertisements must be published while the job order is posted.

Question: When is the deadline for submitting the Recruitment Report and the Application for Temporary Employment Certification (ETA-9142) along with Appendix B.1?

Answer: The regulations do not specify the last date an employer can submit an application. The regulations do, however, specify the earliest an employer can begin recruitment (120 days prior to first date of need) and the earliest that a Recruitment Report can be created (2 calendar days after the last date on which the job order was posted and 5 calendar days after the last newspaper advertisement was published). The Recruitment Report is necessary to filing a completed Application for Temporary Employment Certification; therefore, an application may not be filed until at least that time that a recruitment report can

be completed. The Recruitment Report and Application for Temporary Employment Certification should not be submitted to the Chicago National Processing Center until all qualified U.S. worker applicants have been considered.

Question: The SWA says they will not place my job order but that I must place it myself, is that right?

Answer: Many SWAs now have automated self-service systems. In those instances, you will be required to place the order yourself, however, you must contact the SWA immediately upon placing the job order and let them know that you have placed an H-2B job order. Your job order must state that it is being filed in support of a future H-2B application.

Question: The SWA states that I must keep my job order active for 30 days, must I?

Answer: The Department of Labor requires that employers post their job orders and keep them active for at least 10 days. If a SWA requires a longer period, then the employer must comply with this requirement and continue to accept referrals. In such an instance, the employer cannot submit its application to the Department until the earliest that a Recruitment Report can be created, i.e. 2 calendar days after the last date on which the job order was posted and 5 calendar days after the last newspaper advertisement is published. The Recruitment Report is necessary to filing a completed Application for Temporary Employment Certification; therefore, an application may not be filed until at least 2 days after the end of the required posting period. Employers seeking to file applications for temporary labor certification for H-2B workers should therefore determine the requirements for posting in the applicable SWA well in advance of the intended employment to ensure compliance. Employers are also reminded that they must keep the job order active until all print advertisements have been published.

Question: What should the Recruitment Report contain?

Answer: The Recruitment Report must identify each recruitment source by name; list the name and contact information for each U.S. worker who applied or was referred, and the disposition of each worker, including any applicable laid-off workers; indicate whether the worker was hired or not and if the worker was not hired, list the lawful job-related reasons for not hiring the worker. There is no required format or form for a recruitment report other than it contain these elements.

Question: Do I submit newspaper ad tear sheets with the Recruitment Report which is now filed directly with your office?

Answer: An employer is not required to submit evidence of the placement of such advertisements, such as newspaper tear sheets, with the Application for Temporary Employment Certification. The employer must attest to the dates on which the advertisements were placed, and must maintain copies of the newspaper pages, tear sheets, or other proof of publication containing the text of the advertisement and dates of publication for 3 years from the date of certification, to be presented to the Department in the event of a request for additional information prior to adjudication, an audit or other investigation.

Question: Do I need to submit copies of resumes or applications with my Application for Temporary Employment Certification?

Answer: No. An employer is not required to submit copies of resumes or job application forms completed by job applicants with its Application for Temporary Employment Certification. However, the employer must maintain for 3 years resumes and evidence of contact with each U.S. worker who applied or was referred to the job opportunity, to be provided to the Department in response to an RFI, audit, or other investigation.

Question: What are the employer's obligations with respect to contacting labor unions?

Answer: The H-2B regulations at 20 CFR 655.15(g) require an employer that is a party to a collective bargaining agreement (CBA) covering the job classification that is the subject of the H-2B labor certification application to formally contact the local union that is a party to the CBA. Such contact may be by U.S. mail or other effective means during the same period of time that the SWA is circulating a copy of the employer's job offer within the state. After contact, the employer must maintain dated logs demonstrating: (1) that the union was contacted and notified timely of the position openings; (2) whether the union referred qualified U.S. worker(s); (3) the number of U.S. workers that were referred, if applicable; and (4) whether or not the union was responsive to the employer's request.

Question: What are the SWA obligations with respect to contacting labor unions?

Answer: The Department strongly recommends that a SWA, which has knowledge that the employer's job opportunity is in an occupation that is traditionally unionized, circulate a copy of the intrastate job order to all applicable

unions and other sources of recruitment and apprise these sources of the available position(s) within the area of intended employment. To ensure that the labor unions and other sources of recruitment will have a sufficient amount of time to apprise their members to apply for the available position(s), we strongly recommend that the SWA contact the union on the first day that it places the intrastate job order on its active file for recruitment and request that referrals of applicants be made to the SWA within the active recruitment period. Last, the SWA should allow a reasonable period of time, e.g., 3 calendar days after the close of the job order, for referrals sent the day the order closed to be received and considered by the SWA.

In accordance with 20 CFR 655.15(e)(1), the SWA must place the job order no more than 120 calendar days before the employer's date of need for H-2B workers for a period of not less than 10 calendar days.

Recruitment Fees

Question: Pursuant to the Final Rule, employers and their attorneys or agents are prohibited from seeking or receiving "payment of any kind from the employee for any activity related to obtaining the labor certification, including payment of the employer's attorneys' or agent fees, ... or recruitment costs." This includes any monetary payments, wage concessions, kickbacks, bribes, tributes, in kind payments, and free labor. Does this prohibition apply to petitions that were filed prior to January 18, 2009 and does it apply only to workers abroad or in-country as well?

Answer: Applications that were filed before January 18, 2009 are being adjudicated under the regulations in effect at the time of filing. The prohibition on seeking or receiving payment from the employee for any activity relating to the obtaining of the labor certification therefore does not apply to them. For those applications filed on or after January 18, 2009, the prohibition applies to recruiter and other fees charged to any foreign workers, whether in the U.S. or abroad, relating to the obtaining of the labor certification.

Former Regulations vs. New Regulations

Question: If an H-2B application has been certified with dates of need from 02/01/2009 to 12/01/2009, is this application governed by the new regulations or can we file a petition with USCIS under the former rules?

Answer: Once an application is certified by the Department of Labor it is valid for the duration of the certification and can be filed with USCIS. What procedures an employer should utilize to file a certified labor certification with the Department of Homeland Security's USCIS and whether or not their new

regulations, promulgated simultaneously with ours, prohibit the use of a labor certification certified under the old regulations is a question that needs to be posed to USCIS.