

H-2B TEMPORARY NONIMMIGRANT VISA PROGRAM

Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating “Temporary Need”

Effective Date: September 1, 2016

An employer seeking temporary labor certification under the H-2B visa program must establish that its need for non-agricultural services or labor is temporary in nature. Under Department of Homeland Security (DHS) and DOL regulations, temporary need must “be limited to one year or less, but in the case of a one-time event could last up to 3 years.” 8 CFR 214.2(h)(6)(ii)(B), Interim Final Rule (IFR), Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 82 FR 24042, 24055 (April 29, 2015). The agencies categorize and define temporary need into the following four standards: one-time occurrence, seasonal, peakload, or intermittent. 8 CFR 214.2(h)(6)(ii)(B), 20 CFR 655.6. Until the Department announces separately in the Federal Register the initiation and implementation of the registration requirements at 20 CFR 655.11, the Certifying Officer’s (CO’s) adjudication of the employer’s temporary need will continue to occur during the CO’s review of the application and not before.

Currently, employers are required to provide responses to questions on Section B of the Form ETA-9142B, which requires a statement on the nature of the temporary need, the time period of employment, number of workers needed, and the standard of need. This section of the Form ETA-9142B enables the employer to demonstrate in its own words the scope and basis of the temporary need in a way that enables the CO to determine whether the job offer meets the statutory and regulatory standards for temporary need. However, because the Department has not yet initiated implementation of the registration process, many employers submit additional documentation (e.g., summarized monthly payroll records, monthly invoices, executed work contracts) with the Form ETA-9142B, to demonstrate that the job opportunity is temporary in nature and represents bona fide, full-time employment during the period of employment.

The Department notes that many employers use the H-2B visa program on a predictable and recurring, seasonal business cycle, and these job opportunities were previously granted labor certification. Thus, the nature of the need for the services to be performed has been and may continue to be determined temporary. The additional documentation submitted by many employers, which is substantially similar from year-to-year for the same employer or a particular industry, creates an unnecessary burden for employers as well as the CO, who must review all documents submitted with each application.

To reduce paperwork and streamline the adjudication of temporary need, effectively immediately, an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need. It may satisfy this filing requirement more simply by completing Section B “Temporary Need Information,” Field 9 “Statement of Temporary Need” of the Form ETA-9142B. This written statement should clearly explain the nature of the employer’s business or operations, why the job opportunity and number of workers being requested for certification reflect a temporary need, and how the request for the services or labor to be performed meets one of the four DHS regulatory standards of temporary need chosen under Section B, Field 8 of the Form ETA-9142B. Other documentation or evidence

demonstrating temporary need is not required to be filed with the H-2B application. Instead, it must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO. The Form ETA-9142B filing continues to include in Appendix B, a declaration, to be signed under penalty of perjury, to confirm the employer's temporary need under the H-2B visa classification (Appendix B, Section B.1.).

The CO will review the employer's statement of temporary need as well as its recent filing history (if applicable) to determine whether the nature of the employer's temporary need on the current application meets the standard for temporary need under the regulations. If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued. The factors used by the CO to determine whether the employer's need is temporary in nature are the requirements in 20 CFR 655.6 and 655.11(d) and (e).

It is the quality, consistency and probative value of the information provided on the Form ETA-9142B itself that will be determinative in the CO's assessment of temporary need. The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer's current need is temporary in nature. Likewise, inconsistencies between the employer's written statements on the Form ETA-9142B with other evidence in the current or prior application(s) will cause the CO to issue a NOD.