

LABOR CERTIFICATION FOR TEMPORARY AGRICULTURAL EMPLOYMENT OF H-2A ALIENS IN THE UNITED STATES (H-2A WORKERS)

On September 4, 2009, the Department published in the Federal Register a Notice of Proposed Rulemaking proposing to amend the 2008 regulations governing the labor certification process under the H-2A temporary agricultural worker program. The comment period initially was planned to end on October 5, 2009 but was extended to October 20, 2009. The timeline for completion of a Final Rule targets January 6, 2010 for submission to the Office of Management and Budget for review, with a tentative publication on February 12, 2010.

Under the Immigration and Nationality Act, the Department of Labor must ensure that U.S. workers are provided access to temporary agricultural jobs, and that both U.S. and foreign workers are provided with appropriate worker protections. This rulemaking reflects the Administration's commitment to providing fair wages and strong labor protections for this vulnerable group of workers.

Major Features of the Final Rule:

- The employer must provide the Department with documentation that it has complied with the prerequisites for bringing H-2A workers into the country, including the requirements related to recruiting for qualified U.S. workers, instead of simply attesting to compliance.
- Returns to using the USDA Farm Labor Survey as the basis for determining the Adverse Effect Wage Rate (AEWR). The 2008 rule used the Occupational Employment Statistics Survey, which resulted in a substantial reduction of worker wages (an average of over \$1.00/hour).
- Reinstates the critical role of the State Workforce Agencies (SWA) in assisting employers by using their expertise on local labor market conditions and recruitment patterns, thereby expanding job opportunities for U.S. workers.
- Reinstates the requirement that the SWA inspect and approve employer-provided housing before the Department issues an H-2A labor certification.
- Requires that all employer-provided transportation meet, at a minimum, the same Federal standards for vehicle safety, vehicle insurance and driver licensure applicable to most other agricultural workers.
- Strengthens revocation and debarment authorities by providing WHD with independent debarment authority in addition to ETA, raises civil money penalties and expands audit authority to include housing.
- Continues to include logging as an H-2A occupation. The NPRM proposed to add other forestry-related occupations such as tree planting and related reforestation activities as well as pine straw gathering, but this was not included in the Final Rule in response to concerns from both the industry and advocates about the costs and the workers' potential loss of MSPA protections, including a private right of action.
- Creates a national electronic job registry for all H-2A job orders to improve U.S. worker access to agricultural jobs and help growers find workers from across the U.S.
- Extends H-2A program benefits to workers in "corresponding employment" (other workers employed by an H-2A employer in any work included in the job order and any work performed by the H-2A workers) to ensure that similarly employed U.S. workers are not provided with lower wages or fewer benefits.
- Requires employers to provide workers with copies of the job orders no later than before departure, including from the workers' home countries and to display a poster describing employee rights and protections in English and another language common to the workers at the work site.
- Prohibits the use of multi-area itineraries by H-2A Labor Contractors, ending the practice of moving H-2A workers from site to site in multiple areas of employment under one labor certification. Labor contractors participating in this program will now have the same regulatory standards as fixed-site farmers. Required surety bond amounts for H-2ALCs have been increased.
- Prohibits the approval of labor certification applications for worksites where workers are on strike or locked out and protects U.S. workers who are denied employment or laid off.