H-2A Temporary Labor Certification Program
October 2017

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

❖ H2A Workload / Filing Trends
❖ H2A Program Requirements
❖ Filing tips and best practices
❖ iCERT updates
H-2A Programs: Filing Trends
H-2A Workload Trends:

- **Workload – Received**: In FY 2017, Applications Received has increased by 15% as compared to FY 2016.

- **Workload – Processed**: Workers Processed has increased by 16% from FY 2016.

- **Worksite Locations**: The Top 3 Work States are Florida, Georgia North Carolina

- **H2ALC Applications**: In FY 2017, Applications Received from H2ALC’s increased by 32% as compared to FY 2016.
### H-2A Program Workload Profile, FY 2017 to date (June 2017)

<table>
<thead>
<tr>
<th>Category</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications Submitted for Processing</td>
<td>10,115</td>
</tr>
<tr>
<td>Applications Processed</td>
<td>10,097</td>
</tr>
<tr>
<td>Certifications</td>
<td>9,797</td>
</tr>
<tr>
<td>Denials</td>
<td>144</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>156</td>
</tr>
<tr>
<td>Worker Positions Requested</td>
<td>206,156</td>
</tr>
<tr>
<td>Worker Positions Certified</td>
<td>200,049</td>
</tr>
<tr>
<td>Worker Positions Denied</td>
<td>3,252</td>
</tr>
<tr>
<td>Worker Positions Withdrawn</td>
<td>2,855</td>
</tr>
</tbody>
</table>
Understanding the H-2A Program

H-2A Program Requirements
Prefiling Procedures

- **Job Order** – no more than 75/no fewer than 60 days
  - Know SWA requirements
    - Tax ID numbers
    - State Farm Labor Contractor Licensing Requirements

- Be responsive to SWAs
  - General information requests
  - Notice of Deficiency response
State Workforce Agency Role

**Housing** – ready for occupancy 30 days prior to date of need

- Employer-provided – requires SWA housing inspection
- Rental or public accommodation – may require SWA inspection – check with your SWA
  - Refer to Round 12 FAQs published June 16th
State Workforce Agency Role

- Recruitment Assistance
  - Process Job Order and begin local recruitment
  - Continue local and begin interstate recruitment
    - Act as Order-Holding Office
      - Provide other SWAs with up-to-date information
        » Changes in crop-conditions, start dates, etc.
H-2A Temporary Labor Certification Program
General Requirements for Employer Participation

- Must qualify as a U.S. employer (e.g., farm/ranch), association of agricultural producers, or farm labor contractor
- Associations of agricultural producers can participate as a sole employer, agent with one member, or joint employer with multiple members
- Work must consist of agricultural labor or services, such as planting, raising, cultivating, harvesting, or production of any agricultural or horticultural commodity
- Work must be full-time (35 hours or more a week)
- Employer’s need for workers must be seasonal or temporary in nature, such as a recurring growing cycle (generally lasting 10 months or less)
H-2A Temporary Labor Certification Program
STEP 1: Obtain a Prevailing Wage & Prepare Application

- Employer obtains minimum wage information from the OFLC agricultural on-line wage library
- Employer must offer, advertise in recruitment, and pay workers the **highest of** the following:
  1. Adverse Effect Wage Rate (AEWR)
  2. Prevailing Hourly Wage or Piece Rate
  3. Collective Bargaining Wage
  4. Federal or State Minimum Wage
- Employer begins preparing a job order on the Form ETA-790 and H-2A application package

**Recommended Timeframe:** 90 and 75 days before work start date
H-2A Temporary Labor Certification Program
Sample Wage Offers on Form ETA-790

- Make sure wage offer(s) **match** the Form ETA-9142A in each of the crops and commodities

<table>
<thead>
<tr>
<th>Crop Activities</th>
<th>Hourly Wage</th>
<th>Piece Rate / Unit(s)</th>
<th>Special Pay (bonus, etc.)</th>
<th>Deductions*</th>
<th>Yes/No</th>
<th>Pay Period / Periodo de Pago</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cultivos</td>
<td>$11.74</td>
<td>$1.00 per 1-1/8 BU. Box</td>
<td>Pagos Especiales (Bono, etc.)</td>
<td>Social Security / Seguro Social</td>
<td>☒</td>
<td>Weekly / Semanal ☒</td>
</tr>
<tr>
<td>Apple Harvest</td>
<td>$11.74</td>
<td></td>
<td></td>
<td>Federal Tax / Impuestos Federales</td>
<td>☒</td>
<td>Bi-weekly/ Quincenal ☐</td>
</tr>
<tr>
<td>Orchard Labor</td>
<td>$11.74</td>
<td></td>
<td></td>
<td>State Tax / Impuestos Estatales</td>
<td>☒</td>
<td></td>
</tr>
<tr>
<td>Apple Packing</td>
<td>$11.74</td>
<td></td>
<td></td>
<td>Meals / Comidas</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Other (specify) / Otro (especifica)</td>
<td>☐</td>
<td>Monthly/Mensual ☐</td>
</tr>
</tbody>
</table>
STEP 2: Submit a Job Order to the State Workforce Agency

- Employer submits the Form ETA-790 and informs the SWA of intent to file a future application for H-2A workers
- Job order must meet minimum regulatory content requirements (20 CFR 653 Subpart F and 20 CFR 655.122)
- SWA reviews job order and notifies employer of any deficiencies within 7 days OR, if acceptable, begins recruitment of U.S. workers within the state
- Employer will typically request that the SWA inspect housing for farmworkers during this timeframe

**Regulatory Timeframe:** 75 and 60 days before work start date
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-2A workers.
- Not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2A workers.
- Offer job qualifications and requirements (e.g., experience) that are bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops.
- CO or SWA may require employer to submit documentation substantiating the appropriateness of any qualification contained in the ETA Form 790.
## H-2A Temporary Labor Certification Program
### Preparing the Form ETA-790 – General Requirements

- Make sure the job order contains the minimum content requirements under 20 CFR 655.122(d)

<table>
<thead>
<tr>
<th>Minimum Benefits, Wages, and Working Conditions</th>
<th>Regulatory Citation(s)</th>
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<tbody>
<tr>
<td>Provision of Housing</td>
<td>655.122(d)</td>
</tr>
<tr>
<td>Provision of Workers’ Compensation</td>
<td>655.122(e)</td>
</tr>
<tr>
<td>Provision of Tools, Supplies, and Equipment</td>
<td>655.122(f)</td>
</tr>
<tr>
<td>Provision of Meals or Cooking Facilities</td>
<td>655.122(g)</td>
</tr>
<tr>
<td>Provision of Transportation and Daily Subsistence</td>
<td>655.122(h)</td>
</tr>
<tr>
<td>Three-Fourths Guarantee</td>
<td>655.122(i)</td>
</tr>
<tr>
<td>Hours/Earnings Records, Rates and Frequency of Pay</td>
<td>655.122(j) through (m)</td>
</tr>
<tr>
<td>Abandonment or Termination for Cause</td>
<td>655.122(n)</td>
</tr>
<tr>
<td>Contract Impossibility</td>
<td>655.122(o)</td>
</tr>
<tr>
<td>Required Deductions from Worker’s Pay</td>
<td>655.122(p)</td>
</tr>
<tr>
<td>Work Contract or ETA Form 790 and attachments</td>
<td>655.122(q)</td>
</tr>
</tbody>
</table>
Employer will submit the following documents:

- ETA 9142A
- Appendix A - signed and dated copy of original
- Copy of Form ETA-790/all attachments submitted to the SWA
- Itinerary of worksites \((if \text{ applicable})\)
- Workers compensation coverage
- SWA housing inspection report(s) or other documentation demonstrating rental/public accommodation housing meets standards and sufficient to house all workers
- Agent agreement/documentation demonstrating authority to represent the employer and MSPA registration \((if \text{ applicable})\)
Additional documentation for H-2A labor contractors:

- Name and location of each fixed-site employer, expected start and end dates of work, and a description of the crops and activities
- Copy of fully-executed work contracts with each fixed-site employer
- Copy of MSPA FLC Certificate of Registration, where required, identifying the specific FLC activities
- Proof of ability to discharge financial obligations by submitting an original surety bond document
- Where the fixed-site employer will provide housing or transportation to workers, information that confirms...
  - Housing complies with applicable standards and has been certified by the SWA (see housing FAQ to determine if inspection required)
  - Transportation complies with applicable Federal, State, or local laws and regulations
Department reviews application for obvious errors or inaccuracies and compliance with program requirements

**Statutory Timeframe:** Within 7 days of receipt of the H-2A application

- Issues Notice of Deficiency or Acceptance
  - If deficiency is issued, employer has 5 business days to respond
  - If application is accepted, employer positively recruits for U.S. workers

- SWA is required to submit a housing inspection report *(if applicable)*
Conducting Positive Recruitment for U.S. Workers

- Place 2 print advertisements in local area
- Contact U.S. employees from prior season/year
- Conduct out-of-state recruitment (*not more than 3 states*)
- Additional recruitment can be ordered at the discretion of the Department
- Positive recruitment must occur no later than 3 days before the start date of work
- Report of recruitment efforts can be submitted by the date specified in the Notice of Acceptance

**Regulatory Timeframe:** Until H-2A workers depart or 3 days before start date, whichever occurs first
Employer must prepare, sign, date, and submit a written recruitment report on a date specified by the CO in NOA.

Recruitment report must contain the following information:

- Identification of each recruitment source by name
- Name/contact information of each U.S. worker who applied for the job and the disposition of each worker
- Confirm that former US employees were contacted and by what means
- Explanation of the lawful job-related reason(s) for not hiring each U.S. worker (if applicable)
H-2A Temporary Labor Certification Program
STEP 5: Issuance of Labor Certification Determination

- Temporary labor certification will be granted **no later than 30 days before start date of work** as long as all program requirements are met.
- Employer has rights to appeal any denial determination or partial certification of its request for H-2A workers.
- Department issues an original Form ETA-9142A certified on “blue security paper” to the employer.
- Department instructs the employer to submit the certified Form ETA-9142A and a signed and dated copy of Appendix A to the appropriate USCIS Service Center.

**Important Reminder:** Employers must consider and hire U.S. workers until 50 percent of the certified period of work has elapsed.
In the H-2A program, DOL issues a final determination 30 days before the start date of work as long as all program requirements are met.

Common reason(s) for delaying the H-2A final determination is the employer or authorized representative not providing:
- Proof of valid workers’ compensation coverage
- Housing documentation for farmworkers
- Valid farm labor contractor licenses
- Valid surety bond for labor contractors
- Recruitment report

DOL provides employers with additional time to submit required documents to obtain certification, rather than issue a denial forcing employers to choose between filing an appeal or new application.
Post-Certification Recruitment Obligations

- 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 for the job opportunity
  - H-2A until 50 percent of the certified period of work has elapsed
- 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
Pay the required H-2A certification fees in full and timely (within 30 days after the certified is issued)

Maintain all documents supporting the certification for a period of 3 years

Report the termination or separation/abandonment of workers in a timely manner (no later than 2 working days)

If changing period of employment requested for certification- please ensure changes represent bona fide business need in documentation (e.g., claiming expected government delays is not an acceptable justification)
• Agents/Attorneys- If using a template to submit applications and the CO issues a Notice of Deficiency (NOD) impacting your template, remember to amend the template to avoid a continuation of the same NOD for each application

• Change iCERT password frequently

• Round 12 H2A FAQ’s published June 16, 2017
  Housing Assurances required when using public accommodations
Additional OFLC H2A Resources

iCert Enhancements 2017

- Agricultural Association Data Entry improvements
- SWA document upload capability
- Mandatory Documents Upload feature at case submission

iCERT VISA PORTAL SYSTEM QUICK START GUIDE FOR H-2A MANDATORY DOCUMENTS UPLOAD