

**Employment and Training Administration**  
**Office of Foreign Labor Certification**  
**Frequently Asked Questions**  
**H-2A Temporary Agricultural Foreign Labor Certification Program**  
**2010 Final Rule: Clarification of the Fifty Percent Rule**  
**October 1, 2010**

*The following question is already contained in Round 2:*

**Question: Under the 2010 Final Rule, there is a different requirement regarding the duration of the period during which I have to receive referrals of U.S. workers. How does the requirement work?**

**Answer:** Under the 2010 Final Rule, the Department reinstated a long-standing H-2A program component from the 1987 Final Rule that requires employers to continue to consider for employment and hire any qualified and eligible U.S. worker who applies for the position up until the end of the first half of the contract period, as identified on the *Agricultural and Food Processing Clearance Order*, ETA Form 790, as well as on the *Application for Temporary Employment Certification*, ETA Form 9142. This program component is referred to as the 50 percent rule. Previously, under the 2008 Final Rule, employers were only required to accept U.S. applicants for the first 30 days of the contract period.

**Question: Am I required to hire every U.S. worker who applies, or is referred to me by the SWA, during the first 50 percent of the contract period?**

**Answer:** For as long as an H-2A worker is employed in a certified position during the first 50 percent of the contract period, the employer must provide employment to any able, willing, qualified and available U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed, regardless of the number of H-2A workers covered by the employer's certification. The start of the work contract timeline is calculated from the first date of need stated on the *Application for Temporary Employment Certification* under which the foreign worker who is in the job was hired.

An employer may continue to employ its H-2A workers under the work contract so long as it complies with all requirements of the H-2A program with respect to the H-2A workers and workers in corresponding employment. The employer may also choose to displace its H-2A workers with the newly hired U.S. workers so long as it pays for the H-2A workers' return transportation and subsistence in accordance with 20 CFR 655.122(h)(2). In the event the employer decides to displace its H-2A employees as a result of hiring U.S. workers, the employer is not liable for the payment of the three-fourths guarantee to the displaced H-2A workers.

**Question: What are my options if the newly hired U.S. workers under the 50 percent rule become unavailable after I have displaced some or all of my H-2A workers?**

**Answer:** If all of the H-2A workers have been displaced, and some or all of the U.S. workers hired as a result of the 50 percent rule become unavailable, i.e., abandon the position or are terminated for cause, during the first 50 percent of the work contract period, the employer is under no obligation, but may continue, to hire any able, willing, qualified and available U.S. workers. However, so long as the employer continues to employ at least one H-2A worker in a certified position during the first 50 percent of the contract period, the employer must continue to hire any able, willing, qualified and available U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed, regardless of the number of U.S. workers hired under the 50 percent rule who become unavailable.

If some or all of the newly hired U.S. workers become unavailable after the first 50 percent of the work contract period, the employer may, but is not obligated to, hire additional able, willing, qualified and available U.S. workers and/or engage in additional recruitment of U.S. workers.

Note: An employer whose *Application for Temporary Employment Certification* is approved for the full number of workers requested may not apply to the National Processing Center for a redetermination of its need based on the unavailability of U.S. workers. Pursuant to the Department's regulations at 20 CFR 655.166, this option is only available to employers whose certifications were initially denied or whose applications were partially certified.