

Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2A Temporary Agricultural Foreign Labor Certification Program
2010 Final Rule, Round 2
September 15, 2010

PRE-FILING

ETA Form 790

Question: Can we put “n/a” on the ETA Form 790 if something doesn’t apply?

Answer: Yes. Employers are encouraged to submit a complete application containing as much detail as possible, including entering “n/a” where appropriate, so as to facilitate the adjudication of the application and minimize the chances of the application package being returned due to incomplete information.

Question: If there are no deficiencies on the ETA Form 790, when will the SWA notify the employer?

Answer: Under the regulations, the SWA is only required to send the employer a Notice of Deficiency, if applicable, within seven days of the date of submission. However, as a courtesy, the SWA will send the employer a Notice of Acceptance verifying placement of the job order and providing a copy of the approved job order. If seven days have passed and the employer has not received a Notice of Deficiency or Notice of Acceptance from the SWA, the employer may contact the SWA to inquire into the status of its submitted ETA Form 790.

TIME FRAMES

Question: For purposes of the H-2A program, is the employer bound by the date on which the job order and/or application was postmarked, or the date on which it was received by the Department?

Answer: The relevant date for purposes of any time calculation or submission in connection with the filing of an *Application for Temporary Employment Certification*, including the application and the job order, is the date on which the Department receives the submission.

Question: Under the H-2A program, how does the National Processing Center determine whether an application has been filed 45 days prior to the employer’s date of need?

Answer: When determining whether an application has been filed “no less than 45 calendar before employer’s date of need,” as required by 20 CFR 655.130(b), the National Processing Center does not include the day the application was received in its calculation. Instead, the next day is counted as day one. For example, if an application is received at the National Processing Center on Tuesday, June 1, 2010, that date is not counted. Instead, Wednesday, June 2nd, is counted as day 1 of the timeframe and Thursday, June 3rd, as day 2; etc., up until Friday, July 16th, which is day 45. In this instance, provided the employer lists its date of need on its submitted application as July 16, 2010, or after, the employer has complied with 20 CFR 655.130(b).

FILING

ETA Form 9142

Question: Where do I find the NAICS Code requested in Section C, question 13 of the ETA Form 9142, and what is it?

Answer: The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. The NAICS coding system is maintained by the U.S. Census Bureau. A listing of NAICS codes can be found at <http://www.census.gov/epcd/www/naics.html>. The code selected by the employer should reflect the nature of the employer’s business, not the job for which certification is sought.

Question: You added several new questions to the ETA Form 9142, including the year the company started, its gross annual revenue, and the number of non-family full-time equivalent (FTE) employees. Will applications be rejected if this information is not included? Should temporary/seasonal employees be included in the non-family FTE count?

Answer: Applications will not be rejected if questions, such as those listed above, are not answered as long as they are not required fields/items containing an asterisk (*). Additionally, temporary and/or seasonal workers should not be included in the non-family FTE count.

Question: Must an employer list the location of the worksite if it is already listed in the ETA Form 790?

Answer: Yes. Both the job order and the ETA Form 9142 must list each worksite where the workers will be working so that they may be apprised of the locations prior to applying for the job opportunity.

JOB OFFERS, ASSURANCES AND OBLIGATIONS

Housing

Question: Is the H-2A employer required to provide housing to U.S. workers who live within normal commuting distance from the worksite, but live in a homeless shelter or no longer want to pay rent?

Answer: The regulations require the employer to provide housing only for those workers who are not reasonably able to return to their residence within the same day. A homeless shelter does not qualify as a person's "residence" because a shelter, by its very nature, is temporary. Therefore, in an instance where a worker is living in a homeless shelter, the employer must offer such worker housing. However, the employer is not required under the regulations to provide housing to a worker who is able to return to his or her residence within the same day but who no longer wants to incur the price of rent.

Question: What if the SWA refuses to do housing inspections?

Answer: SWAs receive grants from the Employment and Training Administration to perform all of the duties necessary under the Office of Foreign Labor Certification's (OFLC) programs, including conducting housing inspections in a timely manner. The regulations now permit employers to request the housing inspections well in advance of the date of need. If a SWA refuses to conduct the housing inspection, employers should contact the Chicago National Processing Center.

Workers' Compensation Insurance Coverage

Question: When do I need to submit proof of workers' compensation insurance coverage?

Answer: Pursuant to 20 CFR 655.122(e)(2), the employer is required to submit proof of workers' compensation insurance coverage before certification. The employer is encouraged to include the documentation when submitting its application. If the employer does not have the documentation ready at the time it submits the application, the employer will be directed by a Notice of Acceptance to submit the documentation by a specific date before certification may be granted.

Question: What documentation should I submit as evidence of workers' compensation insurance coverage?

Answer: The employer must submit documentation that adequately demonstrates that it has the required workers' compensation insurance coverage for the entire period of need requested on the application. (See 20 CFR 655.122(e))

The documentation submitted must demonstrate that the employer's workers' compensation insurance coverage is in compliance with State law and covers

injury and disease arising out of and in the course of the worker's employment. In addition, the documentation submitted must contain the name of the insurance carrier, the insurance policy number, and proof of insurance for the period of need stated on the application, or, if appropriate, proof of State law coverage.

Examples of acceptable documentation of workers' compensation insurance coverage include, but are not limited to, the following:

- Association for Cooperative Operations Research and Development (ACORD) Certificate of Insurance
- State Workers' Compensation Fund Certificate or equivalent
- Certificate of Insurance indicating worker's compensation coverage (copy of policy)

Question: My workers' compensation insurance coverage expires prior to my end date of need. What documentation should I submit as proof of coverage for the entire period of need requested on the application?

If the employer's current workers' compensation insurance coverage will expire before the end date of need requested on the application, the employer must submit a signed and dated written statement showing its intent to renew and maintain coverage for entire period of need requested on the application. The written statement must be submitted in addition to the documentation of the employer's current coverage described above. Also, the employer must retain the proof of renewed coverage in its file and be prepared to submit such documentation if requested.

Meals

Question: Under the 2010 Final Rule the employer is required to provide to its workers either three meals a day or free and convenient cooking and kitchen facilities. What constitutes a meal for purposes of the 2010 Final Rule?

Answer: An employer providing three meals a day to its workers must provide a reasonable balance of food groups and nutrients intended to supply sufficient nutrition to the workers three times a day. The Department advises employers to consult the United States Department of Agriculture's Dietary Guidelines for Americans 2005 report (in effect until the publication of the new report in 2010) that may be accessed or downloaded through the following web site:
<http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2005/2005DGPolicyDocument.pdf>

In addition, the employer may only charge the workers for the actual cost of the meals and may not profit from the provision of food. This amount may not

exceed the amount specified in 20 CFR 655.173, currently set at \$10.64 for three meals a day, absent a successful petition for a higher meal charge.

Transportation and Daily Subsistence

Question: What is the definition of daily subsistence for purposes of travel payments/reimbursement?

Answer: Daily subsistence includes, but is not limited to, the reasonable cost of food and lodging incurred during the worker's inbound trip from the point of recruitment to the employer's worksite, notwithstanding any unauthorized detours, and during the worker's outbound trip from the employer's worksite to the worker's home or subsequent employment, notwithstanding any unauthorized detours, whichever is applicable.

No Strike or Lockout

Question: Under the 2010 Final Rule I am not allowed to import H-2A workers if my domestic workers are on strike or if they are being locked out. Is there a threshold number of workers that must be on strike for this prohibition to apply?

Answer: Yes. The prohibition against importing foreign workers when the employer's domestic workers are on strike or are being locked out applies to any labor dispute involving two or more domestic workers. Any employer engaged in such a dispute at the time the employer seeks to apply for the labor certification may not apply to import H-2A foreign workers.

Question: What if my domestic workers go on strike after I've already applied to bring in the foreign workers?

Answer: Section 218(b) of the Immigration and Nationality Act (INA) requires the Secretary to deny a labor certification if there is a strike or lockout in the course of a labor dispute. An employer seeking to employ H-2A workers must agree that it will abide by the requirements and assurances outlined in 20 CFR 655.135, including that the worksite does not have workers on strike or being locked out in the course of a labor dispute. Therefore, if the employer's workers go on strike after the employer filed its application but before the labor certification is granted, the employer must notify the Department of the strike or lockout and/or withdraw its application until such a time as the labor dispute is resolved.

Question: What happens if my domestic workers go on strike or are being locked out after I have received a labor certification and my H-2A workers are on their way to the worksite or are already working on the farm?

Answer: Absent material misrepresentation or fraud in connection with the application within the meaning of the 2010 Final Rule, the employer may continue to employ H-2A workers notwithstanding a strike by its non-H-2A workers. Lock-outs resulting from a labor dispute will be analyzed on a case by case basis to determine whether they warrant debarment under 20 CFR 655.182(d). Also, if a lock-out meets the definition of a layoff and if it occurs within 60 days of the first date of need, section 20 CFR 655.135(g) requires that the U.S. workers be offered the job opportunity listed in the Application for Temporary Employment Certification before the H-2A workers. Therefore, unless the employer has sufficient work to be performed by all the laid-off U.S. workers and the H-2A workers, the employer will need to dismiss the H-2A workers.

Fifty Percent Rule

Question: I am applying for a temporary employment certification to import H-2A workers to work on my farm and I understand that 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 new 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: What is meant by an employer not being “otherwise associated with” other employers applying to import H-2A workers?

Answer: As discussed above, an employer who is a member of an association which has applied for a labor certification on behalf of its members is not exempt from the 50 percent rule. Similarly, an employer who technically is not a member of an association but otherwise maintains a relationship with other employers who are either members of an association that has applied for a labor certification and/or who have individually applied for a labor certification, such that this employer together with the other employers forms an informal group that effectively operates as an association – i.e., shares employees – would be considered to have “otherwise associated with other employers” and thus would not be exempt from the 50 percent rule.

Question: Should an employer who wishes to claim the small business exemption submit documentation substantiating eligibility with its application and/or job order?

Answer: The Department is not requiring that an employer submit supporting documentation with its application at the time of filing, but the employer must in the application certify to the Certifying Officer that the small business exemption applies and be prepared to provide documentation in support of such a claim if requested through an audit or investigation. However, the employer should notify the SWA if it wishes to claim the exemption at the time it submits the job order for intrastate clearance and include such documentation as the SWA requires. This will ensure that the SWA will not refer applicants to that employer for the duration of the 50 percent of the contract period.

H-2A LABOR CONTRACTORS

Question: What is the difference between an H-2A Labor Contractor and a Farm Labor Contractor?

Answer: An H-2A Labor Contractor (H-2ALC) is any person who meets the definition of employer under 20 CFR 655.103(b) and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker(s) subject to section 218 of the Immigration and Nationality Act.

A Farm Labor Contractor (FLC), as defined under the Migrant and Seasonal Worker Protection Act (MSPA), is any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

MSPA applies separately from the Department's H-2A regulations at 20 CFR part 655, Subpart B. Under the requirements of MSPA, FLCs (and any employee who performs farm labor contracting functions) must register with the Department before recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker. Agricultural employers and associations (and their employees) need not register as FLCs.

POSITIVE RECRUITMENT AND HIRING OF U.S. WORKERS

Interviews

Question: I have received referrals from the SWAs who know very little about the job opportunity. Under the Department's regulations, may I reject those workers for not being fully apprised of the job opportunity?

Answer: No. Under the 2010 Final Rule and historically in the H-2A program, the employer has an affirmative obligation to apprise all workers, including H-2A workers and workers in corresponding employment of all material terms and conditions of employment. The Department's regulations, at 20 CFR 655.122(q), additionally require each employer to provide its H-2A workers and workers in corresponding employment with a copy of the work contract (or in the absence of a separate work contract, with a copy of the application and job order) in a language understood by the worker. Finally, rejections of U.S. workers who apply for the job must be only for lawful, job-related reasons – not being aware of all the terms and conditions of employment is not a lawful, job-related reason to not hire an otherwise qualified and eligible U.S. worker.

POST FILING

Amendments

Question: If an employer or association of employers realizes that it needs either more or fewer H-2A workers than stated on the ETA Form 9142, how late in the process can it request a change?

Answer: Employers may request to amend, i.e., to either increase or decrease, the number of workers requested in their initial application at any time before final determination. Employers may request an increase in the number of workers without additional recruitment as long as the increase is no more than 20 percent of the original number requested or 50 percent in the case of an employer requesting less than 10 workers. For requests for increases above the percentages prescribed, without additional recruitment, the employer must demonstrate that the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

Withdrawals

Question: May I withdraw a job order I submitted to the SWA once it has been accepted into intrastate clearance?

Answer: Yes. An employer who submitted a job order in connection with a future H-2A application may withdraw it once it has been accepted for intrastate clearance but before the employer files an *Application for Temporary Employment Certification*, ETA Form 9142 with the Chicago National Processing Center, but the employer's withdrawal of the job order does will not nullify existing obligations to workers who were recruited in connection with that job order. If the employer received SWA referrals pursuant to the withdrawn job order and successfully recruited U.S. workers, the employer will be bound by the

terms and conditions of employment reflected in the job order with respect to those workers, including but not limited to wages, housing, and transportation.

Question: May I withdraw my Application for Temporary Employment Certification and job order after filing an Application for Temporary Employment Certification with the Chicago NPC?

Answer: Yes. An employer may withdraw its *Application for Temporary Employment Certification* and job order submitted in connection with the application, after the job order is accepted by the SWA and placed intrastate clearance, but before the Certifying Officer issues a Notice of Acceptance. However, the employer will be required to comply with the terms and conditions of employment contained in the job order with respect to workers recruited in connection with that application and job order.

Question: May I withdraw my Application for Temporary Employment Certification and job order after I receive a Notice of Acceptance from the Chicago NPC?

Answer: Yes. An employer may withdraw its *Application for Temporary Employment Certification* and job order submitted in connection with the application after the Certifying Officer issues a Notice of Acceptance. The employer will be required to comply with the terms and conditions of employment contained in the application and job order with respect to workers recruited in connection with that application and/or job order.