H-2A Temporary Labor Certification Program

Annual NCAE Agriculture Employer Forum

November 2018

Office of Foreign Labor Certification
Employment and Training Administration
United States Department of Labor
Overview of Office of Foreign Labor Certification & FY 2018-2019 Filing Season
Overview of the Immigration Process

Step 1  Obtain a labor certification from the **Department of Labor**
  – Requires conducting a labor market test with the State Workforce Agency where work will be performed.

Step 2  Obtain an approved petition from the **DHS United States Citizenship and Immigration Service** for a specific number of workers under H-2A or H-2B visa classification.

Step 3  After receiving USCIS petition approval, **workers** will apply with one of the **Department of State** visa-issuing consulates abroad for an H-2A or H-2B visa.

Step 4  After receiving the visa from a DOS consulate, workers arrive at a port of entry where **DHS’s Customs and Border Protection** officers verify eligibility for admission and length of stay.
Through a delegation from the Secretary of Labor, OFLC administers employment-based immigration programs.

- “Employment-based” means that an employer and not the foreign worker is filing an application.

OFLC certifies to DHS-USCIS and DOS that:

1. There are not sufficient U.S. workers who are able, willing, qualified, and available for the requested positions; and that the

2. Employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.
OFLC receives and processes employer-filed applications through National Processing Centers.

OFLC programs are divided, by visa classification, into two major types:

- **Immigrant**
  - Atlanta Processing Center
  - Permanent (PERM) Program
    - "Green Card"

- **Non-Immigrant**
  - Chicago Processing Center
  - H-1B, H-1B1, E-3 Skilled Occupations Visas
  - H-2A Temporary Agricultural Visa
  - H-2B Temporary Non-Agricultural Visa
20 CFR 655, Subpart B (effective March 15, 2010)  
https://www.foreignlaborcert.doleta.gov/h-2a.cfm

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**FY 2018 Workload**
- 11,300 labor certifications
- 242,700 workers certified
- 97% certification rate
- 62% of certifications for individual farms-ranches
- 43% of workers certified for farm labor contractors

**Top States of Employment**

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<thead>
<tr>
<th></th>
<th>FY 2008</th>
<th>FY 2018</th>
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<tbody>
<tr>
<td>Georgia</td>
<td>6,500</td>
<td>32,300</td>
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<tr>
<td>Florida</td>
<td>5,800</td>
<td>30,400</td>
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<td>Washington</td>
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</tr>
<tr>
<td>North Carolina</td>
<td>9,100</td>
<td>21,700</td>
</tr>
<tr>
<td>California</td>
<td>2,900</td>
<td>18,900</td>
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<tr>
<td>Regulatory Action</td>
<td>Summary/Description</td>
<td>Status</td>
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| 1205-AB89         | DOL H-2A Program Modernization  
Technical improvements to existing H-2A regulations to modernize and streamline administration of the program | Proposed Rule December 2018 |
| 1205-AB90         | DOL Modernizing H-2A Recruitment Requirements  
Eliminate print newspaper advertisements and modernize requirements for advertising jobs to U.S. workers  
[https://www.federalregister.gov](https://www.federalregister.gov) (published Nov. 9) | Comment Period Ends Dec. 10 |
| 1205-AB91         | DOL-DHS Modernizing H-2B Recruitment Requirements  
Eliminate print newspaper advertisements and modernize requirements for advertising jobs to U.S. workers  
[https://www.federalregister.gov](https://www.federalregister.gov) (published Nov. 9) | Comment Period Ends Dec. 10 |

- For more information, visit [https://www.reginfo.gov/public/](https://www.reginfo.gov/public/)
H-2A Application
Form Revisions

- Published on October 25, 2018
- 60-Day Public Comment Period
- Comments Due On or Before December 24, 2018

To obtain a copy of the proposal, please visit one of the following websites:

www.foreignlaborcert.doleta.gov
www.federalregister.gov

Expected Benefits & Impacts

- Reduce length of H-2A application and streamline data collection
- Better align data collection with current H-2A regulations
- Create a new electronic job order (Form ETA-790A) integrated with the H-2A application
- Eliminate “paper” certifications using a new E-Certification form
Promote electronic filing and continue to examine ways to increase automation (85% electronic filing)

Expand contractor support within the Chicago NPC to provide administrative and case adjudication services

Renew “cross-training” of staff within the OFLC processing centers to perform adjudication functions traditionally performed by other centers

Extend IT contract support for extended hours to address system outages or performance degradation
Based on U.S. Department of Agriculture’s (USDA) Farm Labor Survey

- Annual weighted average hourly wage for field and livestock workers *(combined)*
- Wage rates are statewide based on USDA regions

2019 AEWRs will be published in the Federal Register (December 2018)

For current AEWRs, visit the OFLC Agricultural Online Wage Library at: [https://www.foreignlaborcert.doleta.gov/adverse.cfm](https://www.foreignlaborcert.doleta.gov/adverse.cfm)
Briefing Section II

H-2A Program 101: The Basics
H-2A 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).
Minimum wage information available at OFLC agricultural on-line wage library (https://www.foreignlaborcert.doleta.gov/aowl.cfm)

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 (Form ETA-790) and H-2A application package

**Recommended Timeframe:** 90 and 75 days before work start date
H-2A Program
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
Make sure the job order contains the minimum content requirements under 20 CFR 655.122(d)

### Minimum Benefits, Wages, and Working Conditions

<table>
<thead>
<tr>
<th>Provision</th>
<th>Regulatory Citation(s)</th>
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<tbody>
<tr>
<td>Provision of Housing</td>
<td>655.122(d)</td>
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<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>
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<tr>
<td>Provision of Meals or Cooking Facilities</td>
<td>655.122(g)</td>
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<td>Provision of Transportation and Daily Subsistence</td>
<td>655.122(h)</td>
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<td>Three-Fourths Guarantee</td>
<td>655.122(i)</td>
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<tr>
<td>Hours/Earnings Records, Rates and Frequency of Pay</td>
<td>655.122(j) through (m)</td>
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<tr>
<td>Abandonment or Termination for Cause</td>
<td>655.122(n)</td>
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<tr>
<td>Contract Impossibility</td>
<td>655.122(o)</td>
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<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>
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H-2A Program
Tips for Preparing the Form ETA-790

- Make sure the expected start and end dates of work and the number of workers requested match the Form ETA-9142A.
- Identify all housing units for workers including:
  - Clear and legible directions to each housing location
  - Description of the housing and type (e.g., rental/public accommodation, labor camp, 2-story wood frame barracks)
  - Capacity of the housing unit, if available
- For rental housing or other public accommodations, employer must provide a signed and dated assurance from the housing operator that identifies the applicable housing standards (e.g., local, state, federal) and that the housing unit(s) meet those standards.
Disclose the current amounts for transportation and daily subsistence payments to workers located at:
http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm

Proofread documents prior to submission for errors and inconsistencies

Ensure all required information on the ETA Forms 790 are **completed** prior to submission

Ensure the form is signed and dated by the employer; **NOT** the employer’s authorized agent or attorney
  - Electronic signature of the employer on the Form ETA-790 is acceptable
H-2A Program
STEP 3: Submit H-2A Application to DOL-OFLC

- File applications by U.S. mail or electronically (https://icert.doleta.gov/)
- Basic H-2A Application Package
  - Form ETA-9142A and Appendix A
  - Copy of Form ETA-790/all attachments submitted to the SWA
  - Itinerary of worksites (if applicable)
  - Workers compensation coverage
  - Housing inspection report/documentation
  - Agent agreement/documentation demonstrating authority to represent the employer and MSPA registration (if applicable)

**Statutory Timeframe:** No later than 45 days before work start date
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
  - Transportation complies with applicable Federal, State, or local laws and regulations
Ensure all required fields on the ETA-9142A are completed prior to submission.

Review your application package carefully and ensure all required documents are included or uploaded electronically:

- Use a “checklist cover sheet” that identifies all items submitted for processing with your application package.
- For more efficient processing, upload separate electronic documents for each document type (e.g., job order, agent agreement) rather than one large file.

Provide legible copies of supporting documentation - this is a particular problem with contractor documents (e.g., FLC registrations, H-2A surety bonds).
H-2A Program
STEP 4: DOL-OFLC Processing of H-2A Application

- 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 advertisements as directed by the CO
- Contact U.S. employees from prior season/year
- 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
H-2A 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.
- 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 of workers in a timely manner (no later than 2 working days)
- Ensure the workforce and period of employment requested for certification represent bona fide business need (e.g., claiming expected government delays is not an acceptable justification)
General program and processing questions

Email: TLC.Chicago@dol.gov
Fax: (312) 353-6757
Mail: U.S. Department of Labor
Office of Foreign Labor Certification
Chicago National Processing Center
11 West Quincy Court, IL 60604-2105

Check the OFLC website on regular basis for updates, FAQs, webinar announcements, and updated forms
http://www.foreignlaborcert.doleta.gov
H-2A Program
Helpful Resources

- Visit the OFLC website and “Subscribe” for e-mail updates
  http://www.foreignlaborcert.doleta.gov
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