



H-2A Temporary Agricultural Labor Certification Process

Stakeholder Briefing Sessions

February – March 2010

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

H-2A Final Rule Briefing Outline

Briefing Section I: Regulatory Overview

- Purpose and Scope of Final Rule
- Authority of ETA-OFLC and Special Procedures
- Key Terms and Definitions
- Assurances/Obligations of H-2A Employers and Labor Contractors

Briefing Section II: Application Processing and Form

- Implementation Information on 2010 Final Rule
- H-2A Filings Under 2008 Final Rule
- Application Filing Procedures Under 2010 Final Rule
- Administrative and Program Integrity Provisions

H-2A Final Rule Overview



Briefing Section I

Regulatory Overview: Key Provisions and Employer Obligations

- 20 CFR 655, Subpart B, sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of . . .
 1. Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and
 2. Whether the employment of H-2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed

Authority of ETA-OFLC

- Labor certification determinations are made by the OFLC Administrator within DOL-ETA who, in turn, may delegate this responsibility to a designated staff member (e.g., NPC Certifying Officer - CO)

Establishment of Special Procedures

- Provides a limited degree of flexibility in processing certain H-2A applications while not deviating from statutory requirements (e.g., custom combine, sheepherder)
- OFLC Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures
- Employers demonstrate upon written application to DOL that special procedures are necessary

Key Terms and Definitions

Agricultural Association

20 CFR 655.103(b)

- Any nonprofit or cooperative association of farmers, growers, or ranchers
- Incorporated or qualified under applicable State law
- Recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 USC 1188
- May act as:
 - Agent of one or more employer-members
 - Sole employer
 - Joint employer

Key Terms and Definitions

Area of Intended Employment

20 CFR 655.103(b)

- Area within normal commuting distance of the place of the job opportunity
- No rigid measure of distance due to a variety of conditions (*e.g., terrain, man-made barriers/obstacles, quality transportation network*)
- If within an Metropolitan Statistical Area (MSA) – any location in the MSA is deemed to be within the area of intended employment (*including multi-state MSAs*)
- MSAs are not controlling – places outside an MSA may be within normal commuting distance of something within the MSA

Key Terms and Definitions

Corresponding Employment

20 CFR 655.103(b)

- Employment of workers who are not H-2A workers
- Work performed is covered by the job order or any agricultural work performed by H-2A workers
- Work performed during the validity period of job order including any approved extensions

Key Terms and Definitions

Employee

20 CFR 655.103(b)

- General common law meaning
- Based on the presence of certain factors:
 - Hiring party's right to control
 - Manner and means by which work is accomplished
 - Source of the tools
 - Location
 - Hiring party's discretion over time and length of work
 - Whether the work is part of the hiring party's regular business

Key Terms and Definitions

Employer

20 CFR 655.103(b)

Employer

- Has a place of business in the US – physical location and means by which it may be contacted for employment
- Employer relationship with H-2A workers or workers in corresponding employment
- For purposes of filing, possesses an FEIN

Fixed-Site Employer

- Employer who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery etc. where agricultural activities are performed; and
- Recruits, solicits, hires, employs, houses, or transports any worker subject to 8 USC 1188 , 29 CFR Part 501, or 20 CFR Part 655

Key Terms and Definitions

20 CFR 655.103(b)

H-2A Labor Contractor

- Employer that is not a fixed-site employer, agricultural association, or an employee of a fixed-site employer or agricultural association; and
- Recruits, solicits, employs, furnishes, houses, or transports any worker under 8 USC 1188, 29 CFR Part 501, or 20 CFR Part 655

Key Terms and Definitions

20 CFR 655.103(b)

Job Offer/Order and Joint Employment

Job Offer

- Provided by an employer to potential workers describing all material terms and conditions of employment

Job Order

- Disclosure of all material terms and conditions through the ETA Form 790

Joint Employment

- Two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee

Key Terms and Definitions

Master Application

20 CFR 655.103(b)

- Filed by an association of agricultural producers as a joint employer with its employer-members
- Covers the same occupations or comparable agricultural employment
- Same start date of need for all employer-members listed on the H-2A application
- May cover multiple areas of intended employment within a single State but no more than 2 contiguous states
- Master applications may not be filed by associations acting as an agent with its employer-members

Work Contract

- Material terms and conditions of employment relating to wages, hours, working conditions, and other benefits
- Includes any terms and conditions attested to by the H-2A employer
- In the absence of a separate written work contract, the work contract at a minimum shall be . . .
 - The terms of the ETA Form 790 Agricultural and Food Processing Clearance Order; and
 - Any obligations required under 8 USC 1188, 29 CFR Part 501, or 20 CFR Part 655

Key Terms and Definitions

20 CFR 655.103(b)

Positive Recruitment

- Active participation of employer or authorized hiring agent
- Recruitment performed under direction of OFLC
- Recruitment in area of intended employment or state of traditional or expected labor supply

Key Terms and Definitions

Strike

20 CFR 655.103(b)

- Concerted stoppage of work by employees as a result of a labor dispute, or
- Any concerted slowdown or other concerted interruption of operation
- Includes stoppage by reason of the expiration of a collective bargaining agreement

Definition of Agriculture – Major Revisions

- Authority to define agriculture stems from statute
- Final Rule retained logging activities as H-2A
- Work performed within the scope of either the Internal Revenue Code (IRC) or FLSA definition of agriculture qualifies under the H-2A program
- Removes activities defined as non-agriculture by IRC and FLSA to be performed by H-2A workers, so long as no H-2B workers are employed
- Removes minor and incidental activities
- Removes tree planting and reforestation from the H-2A program; remains H-2B

Assurances and Obligations of H-2A Employers

20 CFR 655.135(a)(b)

Non-Discriminatory Hiring Practices

- Job opportunity is and will continue to be open to any qualified U.S. worker through the entire recruitment period regardless of race, color, national origin, age, sex, religion, handicap, or citizenship
- Rejections of any US worker must be only for lawful, job-related reasons
- Employer agrees to retain records of all hires and rejections covering the entire recruitment period

No Strike or Lockout

- The worksite for which H-2A certification is requested does not currently have workers on strike or being locked out in the course of a labor dispute.

Assurances and Obligations of H-2A Employers

20 CFR 655.135(c)

Recruitment Requirements

- Employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply for the job opportunity
- Employer will independently conduct the positive recruitment activities until the date on which the H-2A workers depart for the place of work



→ DON'T FORGET!

Important Note: *Unless the SWA is informed in writing of a different date, the date that is the 3rd day before the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.*

Assurances and Obligations of H-2A Employers

20 CFR 655.135(d)

50 Percent Rule

- Employer must provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed.
- Exceptions where the employer . . .
 - Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor;
 - Is not a member of an association which has filed for H-2A certification; and
 - Has not associated with other employers who filed for H-2A certification

Assurances and Obligations of H-2A Employers

20 CFR 655.135(e)

Compliance with Applicable Laws

- Employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws
- Includes the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 18 U.S.C. 1592(a)
- Employer may not hold or confiscate workers' passports, visas, or other immigration documents
- H-2A employers may also be subject to the FLSA including the payment of wages, overtime, and deductions
- Compliance applies throughout the entire period of employment

Assurances and Obligations of H-2A Employers

20 CFR 655.135(f)(g)

Full-Time Position

- Calculated to be at least 35 hours per work week

No Recent or Future Layoffs

- Employer has not and will not lay off any similarly employed U.S. worker in the occupation in the area of intended employment within 60 days of the date of need
- If layoff has occurred, employer has offered the job opportunity to those laid-off U.S. worker(s)
- Layoff due to lack of work or end of the growing season is permissible if all H-2A workers are laid off before any U.S. worker in corresponding employment

Assurances and Obligations of H-2A Employers

20 CFR 655.135(h)

No Unfair Treatment

- The employer has not and will not engage in . . .
 - Intimidation, threats, restrain, coerce, blacklist, discharge or discriminate against anyone who:
 - filed complaint
 - testified
 - consulted with legal assistance program employee or attorney on matters related to H-2A
 - Exercised or asserted any right or protection afforded by H-2A statute or any other Department regulation relating to H-2A
 - No discharge for these reasons either

Assurances and Obligations of H-2A Employers

20 CFR 655.135(i)

Notice of Departure to Worker

- The employer must inform H-2A workers that they must leave the U.S. at the earlier of
 - end of the certified period of employment
 - separation from the employer
- The departure requirement does not apply if the H-2A worker is being sponsored by another subsequent employer

Assurances and Obligations of H-2A Employers

20 CFR 655.135(j)(k)

Prohibition Against Employees Paying Fees

- Employer and its agents have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification
- Includes monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor

Contracts with Third Parties

- Employer has contractually forbid any foreign labor contractor or recruiter whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments from prospective employees

Assurances and Obligations of H-2A Employers

20 CFR 655.135(l)

Notice of Worker Rights

- Employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188
- Poster must be provided in any language common to a significant portion of the workers if they are not fluent in English

Navigating the H-2A Visa Program



Briefing Section II

Employer Application Filing: Processing Model and Form

2010 Final Rule Implementation Timeframes

- Rule becomes effective on or after March 15, 2010
- No specific transition period is required – 2010 Final Rule applies to all applications filed on or after effective date
- The following implementation rules will generally apply:
 - Employers who already filed with DOL will be processed in accordance with the 2008 Final Rule’s transition procedures
 - Employers who file with DOL prior to March 15th and have a start date of need before June 1st will be processed in accordance with the 2008 Final Rule’s transition procedures
 - Employers who file with DOL on or after March 15th and have a start date of need before June 1st will be processed in accordance with the 2010 Final Rule’s emergency procedures
 - Employers with a start date of need on or after June 1st will file under the 2010 Final Rule in accordance with normal procedures

Navigating the H-2A Visa Program



Briefing Section II.A

H-2A Filings Under 2008 Final Rule

Remember! 2008 Final Rule transition procedures only apply to H-2A applications received **before** March 15, 2010, **and** start date of need for workers is **before** June 1, 2010

2008 Final Rule H-2A Filings

Transition Procedures – File Prior to 3/15 and DON before 6/1

- Employer will not obtain an offered wage rate through the Chicago National Processing Center (NPC) prior to filing an H-2A application
- Employer will submit the following documents no less than 45 days prior to its date of need to the Chicago NPC
 - ✓ A completed ETA Form 9142
 - ✓ A completed ETA Form 790 and all attachments
- Employer will be required to make all the attestations applicable to its future activities in its application
- Make sure you complete and sign the correct Appendix A.2
- Pre-filing recruitment activities specified at 20 CFR 655.102 will be conducted by the employer post-filing

2008 Final Rule H-2A Filings

Transition Procedures – File Prior to 3/15 and DON before 6/1

- Upon receipt of the H-2A application, the Chicago NPC will . . .
 - Process the application consistent with 20 CFR 655.107
 - Review for obvious inaccuracies or omissions
 - Review for compliance with criteria for certification
 - Transmit a copy of the ETA Form 790 to the SWA having jurisdiction over the area of intended employment
 - In collaboration with the SWA, review the ETA Form 790 for compliance with 20 CFR 653, subpart F, and 20 CFR 655.103-104
- Chicago NPC will notify the employer of any deficiencies with the application within 7 calendar days

2008 Final Rule H-2A Filings

Transition Procedures – File Prior to 3/15 and DON before 6/1

- Upon acceptance of the H-2A application, the Chicago NPC will . . .
 - Provide written notification to the SWA authorizing interstate clearance of the ETA Form 790 and requesting an inspection of the housing
 - Provide written instructions to the employer for recruiting U.S. workers consistent with 20 CFR 655.102(d)(2)-(4)
 - Provide the employer with a minimum offered wage rate in accordance with 20 CFR 655.108
 - Provide a date on which the employer must submit an initial recruitment report prior to issuance of a determination



→ DON'T FORGET!

Important Note: *The Chicago NPC will designate states of traditional or expected labor supply for positive recruitment by the employer on a case-by-case basis during the transition period.*

2008 Final Rule H-2A Filings

Transition Procedures – File Prior to 3/15 and DON before 6/1

- Upon receipt of the employer's initial recruitment report and any other documentation, the NPC will issue a determination to certify or deny the H-2A application consistent with 20 CFR 655.109
- A determination will be issued no later than 30 days before date of need, except for modified applications or those otherwise not meeting the criteria for certification by that date
- Where certified, the NPC will notify the employer in writing to . . .
 - Continue to cooperate with the SWA in recruiting U.S. workers until the end of the designated recruitment period
 - Prepare and retain a final recruitment report within 48 hours of the date that is the end of the designated recruitment period

Navigating the H-2A Visa Program



Briefing Section II.B

Application Filing Procedures Under 2010 Final Rule

Remember! 2010 Final Rule full implementation procedures apply to H-2A applications received on or after March 15, 2010, and start date of need for workers is on or after June 1, 2010

Application Filing Processing

2010 Final Rule

- Major steps in the application filing process

STEP 1
Understand Filing Requirements

STEP 2
Pre-Filing Procedures

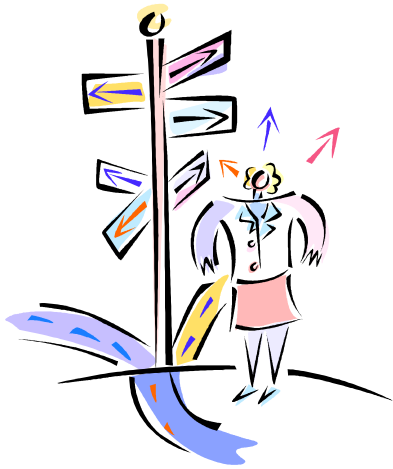
STEP 3
Prepare and Submit the ETA Form 9142

STEP 4
NPC Processing and Recruitment Requirements

STEP 5
NPC Issuance of Final Determinations

STEP 6
Post-Determination Actions

Navigating the H-2A Visa Program



Step 1 Understanding the Application Filing Requirements

General Provisions

- Filed by a U.S. employer by U.S. Mail or private mail courier to the following location:

U.S. Department of Labor
Employment and Training Administration
Chicago National Processing Center
536 South Clark Street,
Chicago, IL 60605 -1509
Attention: H-2A Program Unit

- Any future address changes will be published in the *Federal Register* as well as the USDOL Internet Web site at <http://www.foreignlaborcert.doleta.gov/>
- The Department may also require applications to be filed electronically in addition to or instead of by mail

General Provisions (continued)

- Employer will submit the following documents to the Chicago NPC
 - ✓ ETA Form 9142 – Application for Temporary Employment Certification
 - ✓ ETA Form 790 and all attachments
 - ✓ Supporting documentation (where required)
- A completed ETA Form 9142 must be filed **no less than** 45 calendar days before the first date the employer requires the services of the H-2A workers
- The ETA Form 9142 must bear the original signature of the employer and, if applicable, that of the employer's authorized attorney or agent

→ DON'T FORGET!

Important Note: *Unless an employer belongs to a group or occupation to which special procedures apply, itinerant work in more than one area of intended employment will not be permitted*

Association of Agricultural Producers

- An association of agricultural producers must identify on the ETA Form 9142 whether it is filing as . . .
 - A sole employer;
 - A joint employer with its employer-member employers; or
 - An agent of its employer-members
- Only associations filing as a joint employer are permitted to submit a “master” application so long as it . . .
 - Covers same occupations or comparable agricultural work
 - Start date of need for all employer-members listed on the H-2A application is the same
 - Covers one or more areas of intended employment within a single state but no more than 2 contiguous states

- The association must identify on the ETA Form 9142, by name, address, total number of workers needed, and agricultural work to be performed, each employer that will employ H-2A workers
- An association filing a master application as a joint employer may sign the ETA Form 9142 on behalf of its employer members
- The association will receive a certified ETA Form 9142 that can be copied and sent to USCIS with each employer-member's petition

H2A Labor Contractors (H2ALCs)

- H2ALCs must comply with the following provisions:
 - Meet the definition of "employer" specified at 20 CFR 655.103(b)
 - Must have a place of business (physical location) in the United States and a means by which it may be contacted for employment
 - Comply with all the assurances, guarantees, and other requirements contained in 20 CFR 655 and 653, subpart F
 - All worksites listed on the ETA Form 9142 and ETA Form 790 must be within the same area of intended employment
 - Applications and job orders containing worksites covering multiple areas on intended employment will not be accepted

H2A Labor Contractors (H2ALCs)

- H2ALCs must file the following additional documentation:
 - 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 a surety bond document
 - Where the fixed-site employer will provide housing or transportation to workers, proof that . . .
 - Housing complies with applicable standards and has been certified by the SWA
 - Transportation complies with applicable Federal, State, or local laws and regulations

Agent Requirements

- An agent filing on behalf of employer must submit the following documentation:
 - Copy of the agent agreement or other document demonstrating the agent's authority to represent the employer
 - Copy of the MSPA FLC Certificate of Registration, where required, identifying the specific FLC activities the agent is authorized to perform.

Other Important Filing Tips

- Applications must be legible – hand written applications are often difficult to read
- Ensure all required information on the ETA Forms 790 and 9142 are completed on the face of the form prior to submission
- Ensure all attachments are clearly labeled and submitted where information cannot be legibly written on the face of the forms
- Applications must bear original signatures and dated
- Clearly label all supporting documentation being submitted in connection with the ETA Form 9142
- If represented by an attorney, a G-28 is required at filing
- Provide a physical address for overnight delivery of parcels from SWA and NPC (if different than what is listed on the forms)

Emergency Situations

- The time period for filing may be waived by the CO for . . .
 - Employers who did not make use of H-2A workers during the prior year's agricultural season; or
 - Any employer that has other good and substantial cause to include unforeseen changes in market conditions
- Employer must concurrently submit the following documents to the NPC and SWA
 - ✓ A completed ETA Form 9142
 - ✓ A completed ETA Form 790 and all attachments
 - ✓ Supporting documentation (where required)
 - ✓ A statement justifying the waiver request and, if applicable, detailed information describing the good and substantial cause

Emergency Situations – Special Processing

- Once submitted, the Chicago NPC shall . . .
 - Process the application in accordance with 20 CFR 655.140-145
 - Review for compliance with program requirements
 - Issue a Notice of Deficiency or Notice of Acceptance within 7 calendar days
 - Issue a determination in accordance with 20 CFR 655.160-167, except for modified applications or those otherwise not meeting the criteria for certification by that date
 - CO may deny the emergency filing as unjustified and/or insufficient time to test the availability of US workers
 - Employer has right to appeal the CO's denial determination

Application Filing Requirements

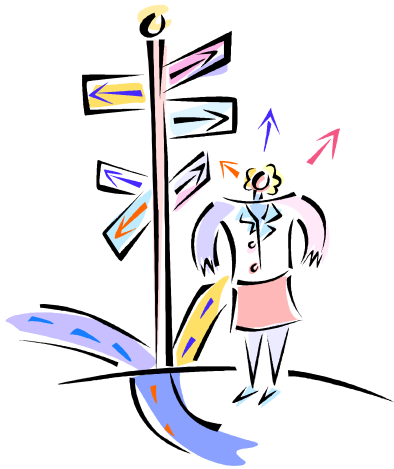
Emergency Situations – Special Processing

20 CFR 655.134(c)

REMEMBER !

- Employers who intend to file H-2A applications **on or after** March 15, 2010 **and** have a start date of need for workers **before** June 1, 2010, will be accepted and processed in accordance with the 2010 Final Rule's emergency procedures at 20 CFR 655.134(c)

Navigating the H-2A Visa Program



Step 2 Pre-Filing Procedures

1. Obtaining Offered Wage Rate

- **DO NOT** send wage requests to the Chicago NPC or the National Prevailing Wage Center located in Washington, DC
- **DO NOT** use the ETA Form 9141
- Employer must offer, advertise, and pay (at the time work is performed) a wage that is the highest of the . . .
 - Adverse Effect Wage Rate (AEWR)
 - Prevailing hourly wage or piece rate
 - Agreed-upon Collective Bargaining Agreement (CBA) wage
 - Federal or State minimum wage



→ DON'T FORGET!

Important Note: *The only exception to this regulatory requirement includes the issuance of a special procedure by the Department for an occupation or specific class of agricultural employment*

1. Obtaining Offered Wage Rate

AEWR

- Annual weighted average hourly wage for field and livestock workers (combined) in States/regions
- Published annually by the USDA based on its quarterly wage survey
- OFLC Administrator will then publish the AEWRs for each State as a notice in the Federal Register (*typically during February*)

Federal Minimum Wage

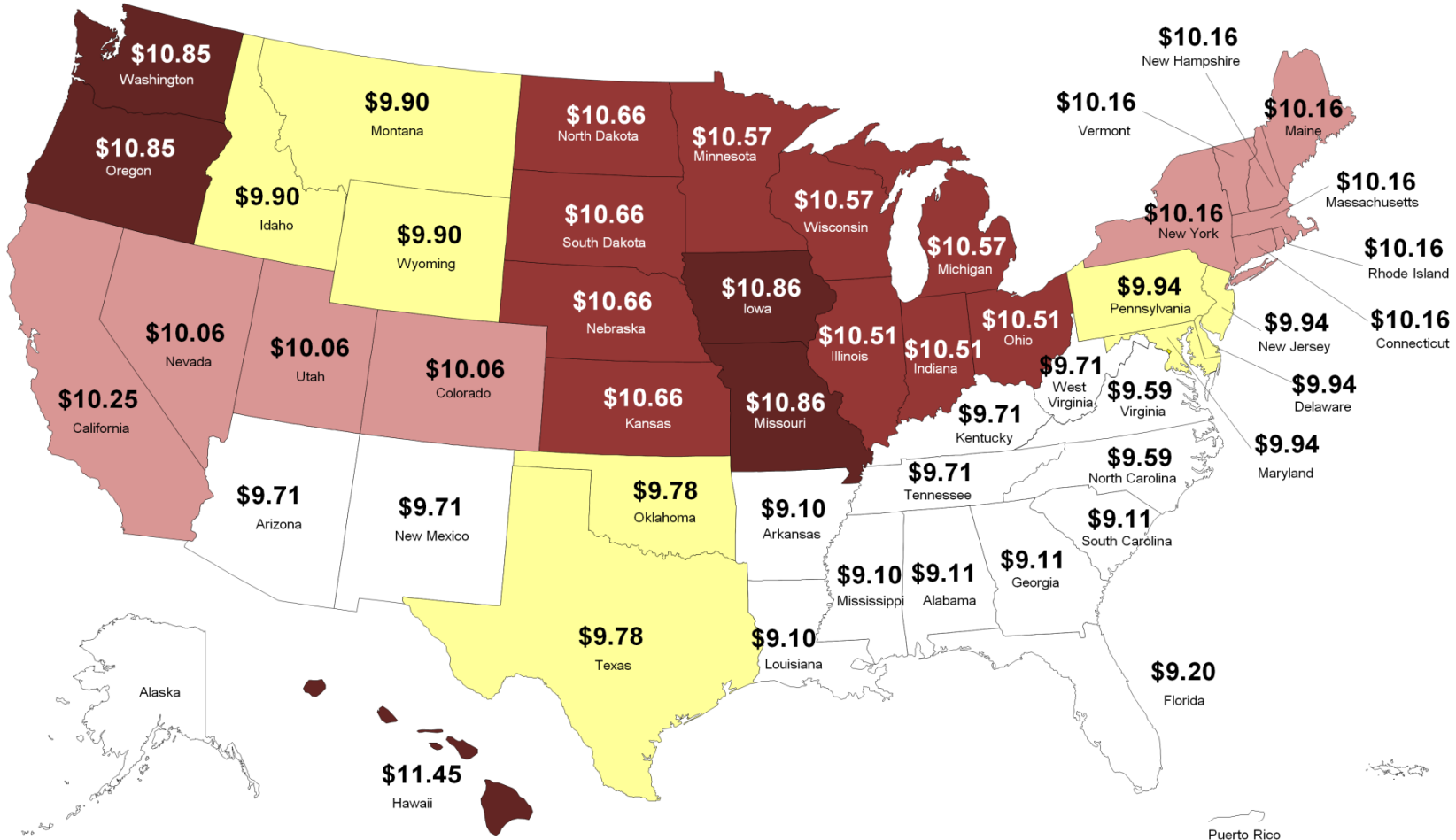
- Currently \$7.25 per hour

Pre-Filing Recruitment Activity

20 CFR 655.120

1. Obtaining Offered Wage Rate

FY 2010 Adverse Effect Wage Rates



1. Obtaining Offered Wage Rate

Prevailing Hourly Wage

- The hourly wage determined by the SWA to be prevailing in the local, regional, or statewide area

Prevailing Piece Rate

- The amount that is typically paid to an agricultural worker per piece (e.g., per load, bin, pallet, bag, bushel) determined by the SWA to be prevailing in the local, regional, or statewide area

- Visit the OFLC Agricultural Online Wage Library at:
<http://www.foreignlaborcert.doleta.gov/aowl.cfm>

The screenshot displays the U.S. Department of Labor Employment & Training Administration website. The main content area is titled "Agricultural Online Wage Library" and is filtered for "North Carolina". It lists various agricultural products and their prevailing wages as of 01/12/2008. The wages are categorized by "WAGE REPORTING AREA": AT-37-00 Statewide and AT-37-01 Greenville.

Product	Wage	Effective Date
WAGE REPORTING AREA: AT-37-00 Statewide:		
Cabbage, Harvesting	\$6.30 Per Hour	01/12/2008
Tomatoe, Harvesting	\$7.00 Per Hour	01/12/2008
Strawberry, Harvesting	\$7.00 Per Hour	01/12/2008
Cucumber, Harvesting	\$0.75 Per 5/8 Bushel	01/12/2008
Banana Peppers, Harvesting	No Finding 1	01/12/2008
Squash, Harvesting	\$6.50 Per Hour	01/12/2008
Grape, Harvesting	\$8.50 Per Hour	01/12/2008
Burley Tobacco, Harvesting	\$9.00 Per Hour	01/12/2008
Watermelon, Harvesting	\$7.00 Per Hour	01/12/2008
Sweet Corn, Harvesting	\$6.50 Per Hour	01/12/2008
Long Green Cucumber, Harvesting	\$0.50 Per 5/8 Bushel	01/12/2008
Jalapeno Peppers, Harvesting	\$7.50 Per Hour	01/12/2008
Onion, Harvesting	No Finding 1	01/12/2008
Cantaloupe, Harvesting	\$6.40 Per Hour	01/12/2008
Pumpkin, Harvesting	\$8.00 Per Hour	01/12/2008
Sweet Potato, Harvesting	\$0.40 Per 5/8 Bushel	01/12/2008
WAGE REPORTING AREA: AT-37-01 Greenville:		
Tobacco, Transplanting	\$7.00 Per Hour	01/12/2008

2. Submit Job Order to SWA

- A completed ETA Form 790 must be submitted to the SWA no more than 75 calendar days and no fewer than 60 calendar days before the date of need for intrastate and interstate clearance
- Employer must identify the ETA Form 790 as a job order to be placed in connection with a future application for H-2A workers
- If the anticipated worksites are located in more than one State within the area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction

→ DON'T FORGET!

Important Note: *For an association filing a future master application as a joint employer, the association may submit a single job order on behalf of all employer members who will be named on the ETA Form 9142*

2. Submit Job Order to SWA

- ETA Form 790 must satisfy all the following requirements:
 - Content for agricultural clearance orders at 20 CFR 653 Subpart F
 - Content for job offers at 20 CFR 655.122
- SWA review process
 - Notifies the employer of any deficiencies within 7 calendar days after receipt
 - Employer must respond within 5 calendar days after receipt of SWA notification
 - SWA will review modified job order and provide a final notice within 3 calendar days
- Upon acceptance, the SWA must promptly place the job order in intrastate clearance on its active file and begin recruitment of eligible U.S. workers

2. Submit Job Order to SWA

- Where the job order includes worksites which fall within the jurisdiction of more than one SWA, the originating SWA will also forward a copy of the approved job order to the other SWAs serving the area of intended employment
- SWA must keep the job order on its active file until 50 percent of the period of the work contract has elapsed
- SWA must refer each U.S. worker who applies (or on whose behalf an application is made) for the job opportunity

→ DON'T FORGET!

Important Note: SWAs will no longer be required to conduct I-9 employment eligibility verification of job applicants referred to job opportunities for which H-2A workers are sought. Under the INA, the employer is responsible for verifying the employment eligibility of all of its hires.

2. Submit Job Order to SWA

- Employer may utilize emergency filing procedures at 20 CFR 655.134 in the following circumstances . . .
 - Unable to resolve deficiencies with the SWA
 - SWA was not able to respond within the stated timelines
- Employer must submit with the ETA 9142 and ETA 790 a statement describing the nature of the dispute **and** proof of timely submission of the job order with the SWA
- CO will review all information and process the application in accordance with the emergency procedures
- In the event of a Notice of Deficiency, employer has appeal rights

2. Submit Job Order to SWA

- 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 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

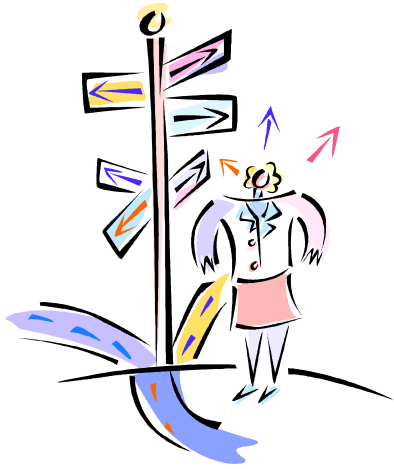
Pre-Filing Recruitment Activity

20 CFR 655.122

2. Submit Job Order to SWA

Minimum Benefits, Wages, and Working Conditions	Regulatory Citation(s)
Provision of Housing	655.122(d)
Provision of Workers' Compensation	655.122(e)
Provision of Tools, Supplies, and Equipment	655.122(f)
Provision of Meals or Cooking Facilities	655.122(g)
Provision of Transportation and Daily Subsistence	655.122(h)
Three-Fourths Guarantee	655.122(i)
Hours/Earnings Records, Rates and Frequency of Pay	655.122(j)through (m)
Abandonment or Termination for Cause	655.122(n)
Contract Impossibility	655.122(o)
Required Deductions from Worker's Pay	655.122(p)
Work Contract or ETA Form 790 and attachments	655.122(q)

Navigating the H-2A Visa Program



Step 3

Preparing the ETA Form 9142

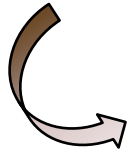
(sample for illustrative purposes only)

Sample ETA Form 9142

Header and Footer

Header

- Displays OMB approved collection number and expiration date



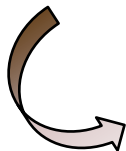
OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor



Footer

- Displays case tracking number, status, and validity period of labor certification on each page
- Do not write in this section



ETA Form 9142

FOR DEPARTMENT OF LABOR USE ONLY

Page 1 of 7

Case Number: _____ Case Status: _____ Validity Period: _____ to _____

Sample ETA Form 9142

Sections A and B – Employment/Temporary Need Information

A. Employment-Based Nonimmigrant Visa Information

1. Indicate the type of visa classification supported by this application (Write classification symbol):*

H-2A

B. Temporary Need Information

1. Job Title * **Farmworker, Diversified**

2. SOC (ONET/OES) code *
45-2092.00

3. SOC (ONET/OES) occupation title *
Farmworkers and Laborers, Crop

4. Is this a full-time position? *

Yes No

Period of Intended Employment

5. Begin Date * **05/10/2010**

6. End Date * **11/05/2010**

7. Worker positions needed/basis for the visa classification supported by this application

100

Total Worker Positions Being Requested for Certification *

Basis for the visa classification supported by this application

(indicate the total workers in each applicable category based on the total workers identified above)

100

a. New employment*

0

d. New concurrent employment*

0

b. Continuation of previously approved employment*
without change with the same employer

0

e. Change in employer*

0

c. Change in previously approved employment*

0

f. Amended petition *

8. Nature of Temporary Need: (Choose only one of the standards) *

Seasonal Peakload One-Time Occurrence Intermittent or Other Temporary Need

9. Statement of Temporary Need *

WRITE "N/A or NOT APPLICABLE" WHERE THE ANSWER TO QUESTION #8 IS "SEASONAL"

Sample ETA Form 9142

Section C – Employer Information

C. Employer Information

Important Note: Enter the full name of the individual employer, partnership, or corporation and all other required information in this section. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, identify the main or primary employer in the section below and then submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application.



1. Legal business name *		
PASTERNAK GROWERS ASSOCIATION		
2. Trade name/Doing Business As (DBA), if applicable		
N/A		
3. Address 1 *		
1313 MOCKINGBIRD LANE		
4. Address 2		
SUITE 101		
5. City *	6. State *	7. Postal code *
ROCKY MOUNT	NC	27801
8. Country *	9. Province	
USA	N/A	
10. Telephone number *	11. Extension	
999-999-9999	9999	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	
99-9999999	1112	
14. Number of non-family full-time equivalent employees	15. Annual gross revenue	16. Year established
9,999	9,999,999.99	9999
17.. Type of employer application (choose only one box below) *		
<input type="checkbox"/> Individual Employer <input type="checkbox"/> Association – Sole Employer (H-2A only)		
<input type="checkbox"/> H-2A Labor Contractor or Job Contractor <input checked="" type="checkbox"/> Association – Joint Employer (H-2A only)		
<input type="checkbox"/> Association – Filing as Agent (H-2A only)		

NEW Data Collection !



Sample ETA Form 9142

Section D – Employer Contact Information

D. Employer Point of Contact Information

Important Note: The information contained in this Section must be that of an employee of the employer who is authorized to act on behalf of the employer in labor certification matters. The information in this Section must be different from the agent or attorney information listed in Section E, unless the attorney is an employee of the employer. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, enter only the contact information for the main or primary employer (e.g., contact for an association filing as joint employer) under the application.

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
Pasternak	Brian	D
4. Contact's job title *		
Director of Human Resources		
3. Address 1 *		
1313 MOCKINGBIRD LANE		
4. Address 2		
SUITE 101		
5. City *	6. State *	7. Postal code *
ROCKY MOUNT	NC	27801
8. Country *	9. Province	
USA	N/A	
12. Telephone number *	13. Extension	14. E-Mail address
999-999-9999	9999	Pasternak.brian@email.net

Sample ETA Form 9142

Section E – Attorney/Agent Information

E. Attorney or Agent Information (If applicable)

1. Is/are the employer(s) represented by an attorney or agent in the filing of this application (including associations acting as agent under the H-2A program)? If "Yes", complete Section E. *		<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
2. Attorney or Agent's last (family) name § Doe	3. First (given) name § Jane	4. Middle name(s) § G	
5. Address 1 § 1100 Wednesday Avenue			
6. Address 2 Suite 108			
7. City § Raleigh	8. State § NC	9. Postal code § 99999	
10. Country § USA	11. Province N/A		
12. Telephone number § 999-999-9999	13. Extension 9999	14. E-Mail address Doe.jane@email.net	
15. Law firm/Business name § Jane Doe Workforce Solutions		16. Law firm/Business FEIN § 99-9999999	
17. State Bar number (only if attorney) § N/A	18. State of highest court where attorney is in good standing (only if attorney) § N/A		
19. Name of the highest court where attorney is in good standing (only if attorney) § N/A			

Sample ETA Form 9142

Section F – Job Offer Information

F. Job Offer Information

a. Job Description

1. Job Title *	
Farmworker, Diversified	
2. Number of hours of work per week	3. Hourly Work Schedule *
Basic *: <u>40</u> Overtime: <u>N/A</u>	A.M. (h:mm): <u>7 : 00</u> P.M. (h:mm): <u>3 : 00</u>
4. Does this position supervise the work of other employees? *	4a. If yes, number of employees worker will supervise (if applicable) §
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<u>N/A</u>
5. Job duties – A description of the duties to be performed MUST begin in this space. If necessary, add attachment to <u>continue and complete</u> description. *	
IMPORTANT NOTE: Write the same job duties/specifications in this area as those stated on the ETA Form 790, Item #10	

Sample ETA Form 9142

Sections F – Job Offer Information (continued)

F. Job Offer Information *(continued)*

b. Minimum Job Requirements

1. Education: minimum U.S. diploma/degree required *	
<input checked="" type="checkbox"/> None <input type="checkbox"/> High School/GED <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate (PhD) <input type="checkbox"/> Other degree (JD, MD, etc.)	
1a. If "Other degree" in question 1, specify the diploma/degree required § N/A	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field) N/A
2. Does the employer require a second U.S. diploma/degree? *	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required § N/A	
3. Is training for the job opportunity required? *	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
3a. If "Yes" in question 3, specify the number of months of training required § N/A	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type) N/A
4. Is employment experience required? *	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
4a. If "Yes" in question 4, specify the number of months of experience required § N/A	4b. Indicate the occupation required § N/A
5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *	
<p>EXAMPLE: ABLE TO WORK IN HOT, HUMID WEATHER, BENDING OR STOOPING TO REACH GROUND LEVEL CROPS AND ABLE TO STAND ON FEET FOR LONG PERIODS OF TIME. WORKERS MAY BE REQUIRED TO TAKE A RANDOM DRUG AND/OR ALCOHOL TEST AT NO COST TO THE WORKER. TESTING POSITIVE OR FAILURE TO COMPLY MAY RESULT IN IMMEDIATE TERMINATION FROM EMPLOYMENT.</p>	

Sample ETA Form 9142

Sections F – Job Offer Information (continued)

c. Place of Employment Information

1. Worksite address 1 *

List Address of Association Employing Workers as Joint-Employer

2. Address 2

N/A

3. City *

List Nearest City of the Worksite

4. County *

Worksite County

5. State/District/Territory *

North Carolina

6. Postal code *

Worksite Postal Code

7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *

Yes No

7a. If Yes in question 7, identify the geographic place(s) of employment with as much specificity as possible. If necessary, submit an attachment to continue and complete a listing of all anticipated worksites. §

Multiple worksites for employer-members across the states of North Carolina and southern Virginia. See Addendum I for a complete listing of physical locations.

Sample ETA Form 9142

Section G – Rate of Pay Information

G. Rate of Pay

1. Basic Rate of Pay Offered *		1a. Overtime Rate of Pay (if applicable) §	
From: \$X.XX To (Optional): \$ _____ . _____		From: \$ _____ . _____ To (Optional): \$ _____ . _____	
2. Per: (Choose only one) * <input checked="" type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year <input type="checkbox"/> Piece Rate			
2a. If Piece Rate is indicated in question 2, specify the wage offer requirements: § N/A			
3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures) § EMPLOYER WILL PAY PIECE RATES WHENEVER POSSIBLE OR ELECT TO PAY WORKERS AT THE HOURLY RATE INDICATED ABOVE.			
4. For multiple applications where the rate of pay is based upon <u>multiple crop or agricultural</u>		<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	
at least Appendix A.1 is complete and being submitted with the filing of this application. §			



**Appendix A.1 has been eliminated.
No longer required under 2010 Final Rule.**

Sample ETA Form 9142

Sections H – Recruitment Information

H. Recruitment Information

1. Name of State Workforce Agency (SWA) serving the area of intended employment* North Carolina Employment Security Commission		
2. SWA job order identification number* NCESC-99999999	2a. Start date of SWA job order* MM/DD/YYYY	2b. End date of SWA job order* (In H-2A this date is 50% of contract period) MM/DD/YYYY
3. Is there a Sunday edition of a newspaper (of general circulation) in the area of intended employment? *		<input type="checkbox"/> Yes <input type="checkbox"/> No
Name of Newspaper/Publication <i>(in area of intended employment for H-2B only)</i>		Dates of Print Advertisement §
4.	From:	To:
5.	From:	To:
6. Additional Recruitment Activities for H-2B program. Use the space below to identify the type(s) or source(s) of recruitment, geographic location(s) of recruitment, and the date(s) on which recruitment was conducted. If necessary, add attachment to continue and complete description.*		

Sample ETA Form 9142

Sections I through K – Declarations/Certification

I. Declaration of Employer and Attorney/Agent

In accordance with Federal regulations, the employer must attest that it will abide by certain terms, assurances and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Applications that fail to attach Appendix A.2 or Appendix B.1 will be considered incomplete and not accepted for processing by the ETA application processing center.

1. For H-2A Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in Appendix A.2. §	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
2. For H-2B Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in Appendix B.1. §	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

J. Preparer

Complete this section if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Last (family) name § DOE	2. First (given) name § MARY	3. Middle initial § JANE
4. Job Title § HUMAN RESOURCES SPECIALIST		
5. Firm/Business name § GROWERS ASSOCIATION OF ROCKY MOUNT		
6. E-Mail address § DOE.MARYJANE@EMAIL.NET		

K. U.S. Government Agency Use (ONLY)

Pursuant to the provisions of Section 101 (a)(15)(h)(ii) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. By virtue of the signature below, the Department of Labor hereby acknowledges the following:

This certification is valid from _____ to _____.

Department of Labor, Office of Foreign Labor Certification

Determination Date (date signed)

NPC Application Processing Amendments – Number of Workers

20 CFR 655.145(a)

- Applications may be amended before the NPC determination to increase the number workers requested for certification
 - Not more than 20 percent without requiring an additional recruitment period for U.S. workers
 - Not more than 50 percent for employers requesting less than 10 workers
- Requests for increases above the percent prescribed may be approved only when the . . .
 - Request is submitted in writing
 - Need for additional workers could not have been foreseen
 - Crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period

NPC Application Processing

Amendments – Period of Employment

20 CFR 655.145(b)

- Applications may be amended to make minor changes in the period of employment
- CO will determine whether the reason(s) for the request are justified taking into account the effect(s) of such change on the underlying labor market test
- Where the employer is requesting a change in start date and workers have already departed for the place of work, the CO may only approve the request where the employer provides a signed and date assurance to provide housing and subsistence until work commences
- Upon acceptance of an amendment, the NPC will submit to the SWA any necessary modifications to the ETA Form 790

NPC Application Processing Withdrawal Provisions

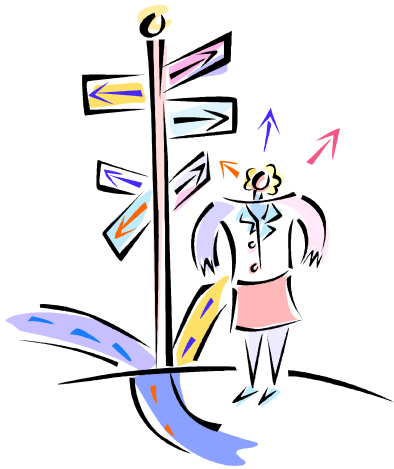
Job Order – ETA Form 790

- Employer may withdraw a job order submitted to the SWA where it no longer plans to file an ETA Form 9142 with DOL
- Withdrawal does not nullify obligations to any workers recruited in connection with the placement of the withdrawn job order

Application – ETA Form 9142

- Employer may withdrawal an H-2A application once it has been formally accepted by the CO
- Withdrawal does not nullify obligations to comply with the terms and conditions of employment for any workers recruited in connection with the submission of the H-2A application

Navigating the H-2A Visa Program



Step 4 NPC Processing & Recruitment Requirements

NPC Application Processing

General Provisions

20 CFR 655.140

- Employer will submit the following documents no less than 45 days prior to its date of need to the NPC
 - ✓ ETA Form 9142 – Application for Temporary Employment Certification
 - ✓ A copy of the ETA Form 790 and all attachments
 - ✓ Supporting documentation (where required)
- Upon receipt of the application, the NPC shall . . .
 - Review for obvious inaccuracies or omissions
 - Review for compliance with all applicable program requirements



→ DON'T FORGET!

Important Note: *Unless otherwise noted, any notice or request sent by the CO to an applicant requiring a response shall be sent by means normally assuring next-day delivery, to afford the applicant sufficient time to respond*

NPC Application Processing

Notice of Deficiency - Content

- Chicago NPC will notify the employer of any deficiencies with the application within 7 calendar days
- State the reason(s) why the application or job order fails to meet the criteria for acceptance, citing the relevant regulatory standard(s)
- Offer the employer an opportunity to submit a modified application or job order within 5 business days from date of receipt, stating the modification is necessary for the CO to issue a Notice of Acceptance
- State that the CO's determination will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modified application within the timeframe and in a manner specified by the CO

NPC Application Processing

Notice of Deficiency - Content

20 CFR 655.141

- Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an Administrative Law Judge (ALJ)
- In order to obtain such a review or hearing, the employer must file within 5 business days of the receipt of the notice
- CO will deny the application where the employer does not comply with the regulatory requirements or request an expedited review or a de novo hearing before an ALJ
- A copy of the Notice of Deficiency will be sent to the SWA serving the area of intended employment

NPC Application Processing

Submission of Modified Applications

- A timely determination will be issued as long as the employer submits the requested modified application within 5 business days and in a manner specified by the CO
- CO's determination will be postponed by 1 calendar day for each day that passes beyond the 5 business day timeframe for the employer to submit a modified application; up to a maximum of 5 calendar days
- If not approved, employer has right to appeal a denial of a modified application or job order

→ DON'T FORGET!

Important Note: Application will be deemed abandoned and denied if requested modification is not submitted within 12 calendar days after the Notice of Deficiency was issued

NPC Application Processing

Notice of Acceptance - Content

20 CFR 655.143

- CO will issue a Notice of Acceptance within 7 calendar days where the application and job order are complete and meet program requirements
- Notice of Acceptance will . . .
 - Authorize conditional access to the interstate clearance system
 - Direct SWA to circulate a copy of the job order to other such States the CO determines to be potential sources of U.S. workers
 - Direct employer to engage in positive recruitment of U.S. workers
 - Specify any additional documentation needed to grant certification (*e.g., SWA certification of housing, workers' compensation insurance coverage*)

NPC Application Processing

Notice of Acceptance - Content

- Notice of Acceptance will . . . *(continued)*
 - State that positive recruitment is in addition to circulation of the ETA Form 790 by the SWA
 - Specify a date on which the employer must submit a report of its positive recruitment efforts
 - State that CO will issue a determination to grant or deny the ETA Form 9142 no later than 30 calendar days before the date of need, except for modified applications



→ DON'T FORGET!

Important Note: *Positive recruitment will terminate on the actual date on which the H-2A workers depart for the place of work, or 3 calendar days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first.*

NPC Application Processing

Electronic Job Registry

20 CFR 655.144

- Once a Notice of Acceptance is issued, the CO will promptly place a copy of the ETA Form 790 and attachments into a publicly available job registry
- Any modified job orders submitted to the CO will also be placed on the job registry
- The ETA Form 790 and attachments will be available for public examination until the end of 50 percent of the period of employment
- This regulatory procedure will be implemented once the Department initiates operation of the registry
(*scheduled for implementation in June 2010*)

NPC Application Processing

Post-Acceptance Requirements

20 CFR 655.150-158

- Notice of Acceptance will contain the following recruitment instructions
 1. Interstate clearance of ETA Form 790 and all attachments
 2. Advertisement in local newspapers
 3. Contact with former US employees
 4. Multi-state recruitment of traditional or expected labor supply
 5. Submission of initial recruitment report to the CO
- SWAs will refer qualified applicants who have been apprised of all the material terms and conditions of employment
- Employer may submit a written complaint to the CO when it has reason to believe a person or entity has willfully and knowingly withheld US workers prior to the arrival of H-2A workers (20 CFR 655.157)

1. Interstate Clearance of Job Order

- Notice of Acceptance authorizes conditional access to the interstate clearance system for the employer's job order
- SWA must promptly transmit a copy of the ETA Form 790 and attachments to all States designated by the CO
- At a minimum, the clearance will include all States listed in the job order as anticipated worksites
- Each of the SWAs will maintain the job order on its active file until 50 percent of the work contract has elapsed

2. Newspaper Advertisements

- Employer must place an advertisement on 2 separate days, one of which must be a Sunday, in a newspaper of general circulation in the area of intended employment
- Advertisements must satisfy the requirements of 20 CFR 655.152
- Advertisements must be published after the Notice of Acceptance and before the H-2A workers depart for the place or work or the 3rd day preceding the start date of work, whichever is earlier

→ DON'T FORGET!

Important Note: *If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.*

2. Newspaper Advertisements



Advertising Requirements

- ✓ Employer's name
- ✓ Geographic area(s) of employment with specificity to apprise US workers of any travel requirements
- ✓ Description of job opportunity with particularity
- ✓ Anticipated start and end dates of work
- ✓ Wage offer or range of applicable wage offers
- ✓ Three-fourths guarantee specified in 20 CFR 655.122(i)
- ✓ Indication the job is "temporary"
- ✓ Total number of job openings
- ✓ A statement that work tools, supplies, and equipment will be provided at no cost to the worker (*if applicable*)



2. Newspaper Advertisements



Advertising Requirements (continued)

- ✓ A statement that transportation and subsistence expenses to the worksite will be provided upon completion of 50 percent of the work contract, or earlier, if appropriate
- ✓ A statement that housing will be made available at no cost to workers, including US workers, who cannot reasonably return to their permanent residence at the end of each working day
- ✓ SWA contact information and job order number, if available
- ✓ Statement directing applicants to apply at the nearest local office of the SWA in the State in which the advertisement appeared



Important Note: Employers requiring interviews must conduct those by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited at little or no cost to the worker

3. Contact with Former U.S. Employees

- Employer must contact former U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job.
- Employer must contact by mail or other effective means
- Employer is not required to contact employees who were either
 - Dismissed for cause; or
 - Abandoned the worksite
- Contact must occur after the Notice of Acceptance and before the H-2A workers depart for the place or work or the 3rd day preceding the start date of work, whichever is earlier
- Documentation sufficient to prove contact must be maintained in the event of an audit examination

4. Recruitment in Traditional or Labor Supply States

- Employer will conduct positive recruitment within a multistate region of traditional or expected labor supply
- CO methods of recruitment will be . . .
 - No less than the normal efforts of non-H-2A employers of comparable or smaller size in the area of intended employment; and
 - The kind and degree of recruitment which the employer made to obtain foreign workers
- Employer will conduct recruitment in no more than 3 States for each area of intended employment
- Documentation sufficient to prove recruitment will be specified by the CO and maintained by the employer in the event of an audit examination

4. Recruitment in Traditional or Labor Supply States

- Recruitment specified by the CO must occur after the Notice of Acceptance and before the H-2A workers depart for the place or work or the 3rd day preceding the start date of work, whichever is earlier
- Documentation sufficient to prove recruitment will be specified by the CO and maintained by the employer in the event of an audit examination

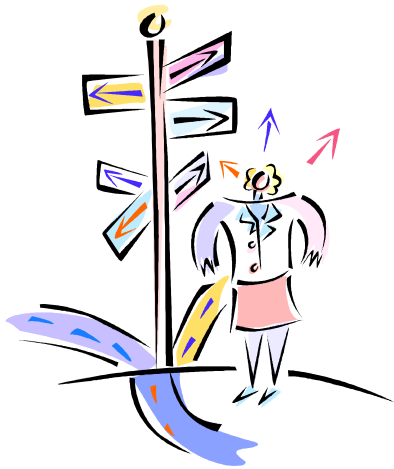
5. Submission of Initial Recruitment Report

- Employer must prepare, sign, date, and submit a written recruitment report on a date specified by the CO *(generally 32 or 31 days before the start date of need)*
- 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)*



Important Note: *The initial recruitment report must be received by the CO before a temporary labor certification may be granted*

Navigating the H-2A Visa Program



Step 5 NPC Issuance of Final Determinations

NPC Application Processing

Issuance of Determinations

20 CFR 655.160

- CO will make a determination either to grant or deny the ETA Form 9142 no later than 30 days before the start date of need
- Employer must meet all the regulatory requirements, including the criteria for certification at 20 CFR 655.161(a)
- CO will determine that employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed US workers
- CO will notify employer in writing (either electronically or by mail) of the labor certification determination

→ DON'T FORGET!

Important Note: An employer's failure to provide housing that complies with the applicable standards and/or proof of workers' compensation coverage will result in either a denial of a pending ETA Form 9142 or revocation of a certification

Issuance of Determinations

Full Certification

- Employer or employer's agent or attorney will receive the following documents from USDOL
 - ✓ Final Determination letter
 - ✓ ETA Form 9142
 - ✓ An invoice for payment of fees within 30 days
- Employer must continue to cooperate with the SWA by accepting referrals of eligible workers until the recruitment period (*i.e.*, 50 percent rule)
- Employer must file the certified ETA Form 9142 and appropriate documentation to the USCIS California Service Center (see www.uscis.gov for more information)

Partial Certification

- CO may reduce either the period of need and/or the number of H-2A workers being requested for certification
- Employer or employer's agent or attorney will receive the same documents from USDOL as those for "Full Certification"
- Employer must continue to cooperate with the SWA by accepting referrals of eligible workers until the recruitment period (*i.e., 50 percent rule*)
- Determination letter will include the following:
 - Reason(s) partial certification is being granted
 - If applicable, address the availability of US workers
 - Notice of opportunity to request expedited administrative review or a de novo hearing in writing within 7 calendar days of the date of the notice

Denials

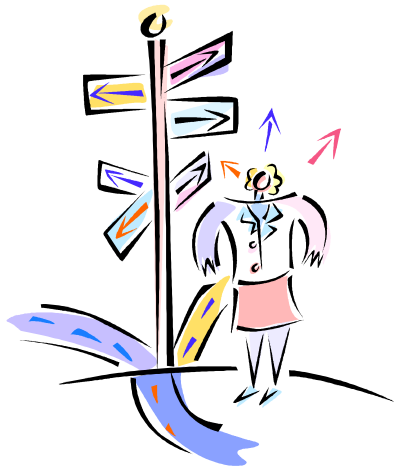
- Employer or employer's agent or attorney will receive the following documents from USDOL
 - ✓ Final Determination letter
- Determination letter will include the following:
 - Reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures
 - If applicable, address the availability of US workers
 - Notice of opportunity to request expedited administrative review or a de novo hearing in writing within 7 calendar days of the date of notice
 - Notice that the denial determination is the final decision of the Secretary if employer does not make a timely request for review or de novo hearing

Redetermination Requests

US Worker Availability

- Employer may request a redetermination based on non-availability of US workers where CO issued a denial or partial certification
- Request must be made via telephone or email and confirmed through a signed written statement
- Written statement must be received within 72 hours of the CO's receipt of the redetermination request
- CO will consult with the SWA or other sources whether replacement of US workers can be present at the employer's worksite within 72 hours
- Employer may appeal a denial of a redetermination request by the CO

Navigating the H-2A Visa Program



Step 6 Post-Determination Actions

To Do:

Employers must continue to cooperate with the SWA by accepting referrals of qualified U.S. workers who apply until 50 percent of the period of the work contract has elapsed

- Employer **must** supplement the initial recruitment report submitted to the CO for certification throughout the entire recruitment period
- Employer must sign and date any supplemental written recruitment report when requested by the CO

→ DON'T FORGET!

Important Note: The Department strongly recommends the employer prepare a final recruitment report **within 48 hours** of the date that is the end of the recruitment period

Important Reminder !

- Where the prevailing hourly wage rate or piece rate is adjusted upward during a work contract and becomes the highest of the wage options in effect at the time the work is performed, the employer must pay that higher prevailing wage or piece rate
- Updates to SWA wage surveys will continue to be posted on the OFLC Agricultural Online Wage Library (AOWL)
- The Department will examine the results of SWA wage surveys conducted throughout the year to determine if the hourly wage rate or piece rate is the highest
- Employers and authorized representatives will begin receiving official notification from the Department when the prevailing wage becomes the new rate of pay for workers

Updates to Job Order or Work Contract

20 CFR 655.122(q)

Important Reminder !

- Employer must provide all recruited workers with a copy of the modified job order (ETA Form 790 and attachments) or work contract which reflects the material terms and conditions of employment, including any amendments
- Should be provided on the first day of employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first

Extension Requests

Period of Employment

20 CFR 655.170(a)(b)

Short-Term

- 2 weeks or less
- Apply in writing to the USCIS service center
- If approved by USCIS, validity period of the ETA Form 9142 will be deemed extended

Long-Term

- Greater than 2 weeks
- Apply in writing directly to the CO
- CO will accept written notification via email at the following address: H2a.amend&extend.chicago@dol.gov

Extension Requests

Period of Employment

20 CFR 655.170(b)

Long-Term *(continued)*

- Must be related to weather conditions or other factors and need could not have been reasonably foreseen
- CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision
- Extensions will not be approved where the total period of employment would be 12 months or more, except in extraordinary circumstances
- Employer may appeal a denial of an extension request



→ DON'T FORGET!

Important Note: Employer must promptly provide workers with a copy of any approved extension, pursuant to 20 CFR 655.122(q).

Department recommends notifying workers within 48 hours of approval

Post-Determination Actions

Document Retention Requirements

20 CFR 655.167

- All employers filing an ETA Form 9142 must retain records and documents supporting program compliance
- Retention period is 3 years from date of determination
- All applicants must retain the following documents:
 - ✓ ETA Form 790 and all attachments
 - ✓ Newspaper/journal advertisements
 - ✓ Contact with former U.S. workers
 - ✓ Additional positive recruitment efforts
 - ✓ Recruitment Report
 - ✓ Documentation substantiating disposition of each US worker on recruitment report
 - ✓ Proof of workers' compensation
 - ✓ Earnings records for each worker
 - ✓ Work contract or copy of ETA Form 9142
 - ✓ Status of association as employer or agent

Navigating the H-2A Visa Program



Briefing Section II.C

Administrative and Program Integrity Provisions

- Employer has a right to request administrative review
- Available for deficiency notices, partial certifications/denial of labor certification, denial of redetermination requests, denial refusal to accept, denials of amendments
- CO delivers a copy of case file to the Chief ALJ
- ALJ may permit briefs or other written submission but no new evidence may be introduced
- Decision issued within 5 business days - must either affirm, reverse, modify CO's decision, or remand back to the CO for further action

De Novo Hearing

- Employer may request a *de novo* hearing for deficiency notices, partial certifications/denial of labor certification, denial of redetermination requests, denial refusal to accept, denials of amendments
- Procedures at 29 CFR part 18 apply except . . .
 - Not considered a complaint to which an answer is required
 - Hearing with 5 business days after receipt of the case file by the ALJ, if employer so requests
 - Allows for the introduction of new evidence
- Final decision rendered within 10 calendar days after the hearing to affirm, reverse, modify, or remand back to the CO for further action

- Conducted on certified H-2A applications only
- Applications selected within the sole discretion of the CO
- CO will issue a Notice of Audit Examination Letter containing the following:
 - Documentation retained by the employer or other information regarding the certified application
 - A date no more than 30 days in which the CO must receive the documentation
 - Notice that failure to comply with the audit process may result in revocation of the certified application or program debarment from future filings

Audit Examinations

Results of Findings

- CO may issue a request for supplemental information and/or documentation from the employer to complete the audit examination
- Potential results from the audit findings include:
 - Affirm Compliance
 - Revocation of certified application
 - Debarment proceedings
 - Referral to DHS or other appropriate enforcement agency
 - Referral to DOJ (finding employer discouraged or discriminated against US workers)

- OFLC Administrator may revoke certified applications
- Violations rising to revocation include . . .
 1. Fraud or misrepresentation in the application process
 2. Substantial violation of a material term or condition of the certified application
 3. Failure to cooperate with a DOL investigation, inspection, audit, or law enforcement function
 4. Failure to comply with one or more sanctions or remedies imposed by WHD, DOL or a court of law

Revocation Procedures

20 CFR 655.181

- Employer or representative will receive a Notice of Revocation (NOR)
- Provides an opportunity for the employer to submit evidence to rebut the charge(s) or appeal
- CO must receive a response within 14 calendar days
 - If no evidence is submitted, the NOR is the Secretary's final decision and takes effect immediately
 - If evidence is submitted timely, OFLC Administrator will provide a Final Notice within 14 calendar days
- Final Notice will provide an opportunity for appeal to ALJ
- A timely submission of evidence or appeal stays the revocation

Revocation Employer Obligations

20 CFR 655.181

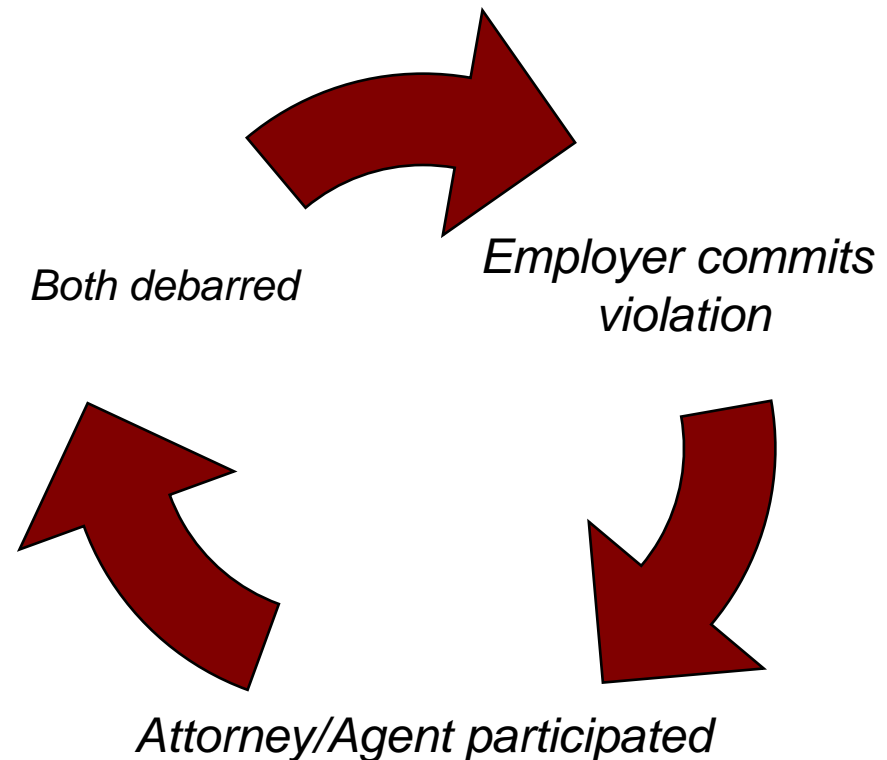
- OFLC Administrator will send a copy of the revocation to DHS and DOS
- Where revoked, the employer is responsible for the following:
 - Reimbursement of actual inbound transportation and subsistence expenses
 - Worker's outbound transportation expenses
 - Payment to the worker of the amount due under the three-fourths guarantee
 - Any other wages, benefits, and working conditions due or owing to the worker

- Can be imposed for up to 3 years
- Debarments must be initiated within 2 years of the occurrence of the violation
- Entities that can be debarred
 - Employers or any successor in interest
 - Agents
 - Attorneys

Debarment Grounds for Action

20 CFR 655.182

- Employer commits substantial violation
- Attorney or agent
 - participated in
 - had knowledge of
 - had reason to know of employer's substantial violation



Debarment

Definition of Violation

- Acts of commission or omission which involve:
 - Failure to pay/provide required wages, benefits or working conditions to workers
 - Failure to offer employment to qualified US workers who applied for the job opportunity
 - Failure to comply with recruitment requirements
 - Improper layoff or displacement of US workers
 - Failure to comply with one or more sanctions or remedies imposed by WHD, DOL or a court of law
 - Impeding an investigation or audit examination

Debarment

Definition of Violation

- Acts of commission or omission which involve (*cont'd*):
 - Employing an H-2A worker outside the conditions of the certified application
 - Violation of the requirements regarding prohibition of fees
 - Violation of any provision at 29 CFR 501.4(a)
 - Single heinous act showing flagrant disregard for the law
- Failure to pay a necessary certification fee in a timely manner
- Fraud involving the H-2A application
- Material misrepresentation of fact during the application process

Determining Substantial Violation

- OFLC Administrator may consider, but is not limited to, the following:
 - Previous history of violations
 - Number of workers who were and/or are affected by the violation(s)
 - Gravity of the violation(s)
 - Good faith efforts to comply with the regulatory requirements
 - Explanation from the person charged with the violation(s)
 - Commitment to future compliance
 - Extent to which violator achieved financial gain or potential financial loss or physical injury to workers

- Employer or representative will receive a Notice of Debarment (NOD)
- Provides an opportunity for the employer to submit evidence to rebut the charge(s) or appeal
- CO must receive a response within 30 calendar days
 - If no evidence is submitted, the NOD is the Secretary's final decision and takes effect immediately
 - If evidence is submitted timely, OFLC Administrator will provide a Final Notice within 30 calendar days
- Final Notice will provide an opportunity for appeal to ALJ

Administrative Review of Decision

- Goes to an ALJ for hearing
- New evidence permitted
- Decision must affirm, reverse, or modify the OFLC Administrator's determination.
- Review is available from the Administrative Review Board – must be requested within 30 days of decision, acceptance for review is discretionary
- Debarment becomes final once all time for review runs
- Requests for review stay debarment effectiveness

- OFLC Administrator may impose special procedures on employers determined to have committed less than substantial violations
- May include on-site positive recruitment, streamlined referral
- OFLC Administrator will notify employer, agent or attorney in writing of imposition of special procedures
- Failure to comply with special procedures may result in certification reduction

Applications Involving Fraud or Willful Misrepresentation

- Possible fraud or willful misrepresentation - CO may refer to DHS and DOL-OIG for investigation
- Any application that is found to involve fraud or misrepresentation will be deemed invalid; revocation will result if application has been approved
- May also constitute a debarrable violation

- Enhanced from current regulation
- Any complaint arising under these regulations can be brought to the Job Service complaint system
- Contract complaints brought to the SWA will be raised to WHD
- Discouragement complaints regarding US workers may also be referred to DOJ, and DOJ may provide such information to DOL and the SWA

Questions

H-2A Regulations

Please send an electronic mail to

H-2A.Regulation@dol.gov

and indicate “*H-2A Rule Question*”
in the subject line



DO NOT send email inquiries regarding these regulations to the Chicago National Processing Center. All such inquiries will be forwarded to the appropriate email box listed above.