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## Changes to TEGL 12-21

The mission of the Employment and Training Administration's (ETA) Office of Foreign Labor Certification (OFLC) is to determine, on a case-by-case basis, whether there are able, willing, and qualified U.S. workers available for a job, and whether there will be adverse impact on the wages and working conditions of similarly employed U.S. workers should a labor certification be granted. The Immigration and Nationality Act (INA) assigns certain responsibilities to the Secretary of Labor (Secretary) for employment-based immigration programs. The Secretary has delegated the non-enforcement responsibilities of these labor certification programs to OFLC. Accordingly, statutory and regulatory provisions of foreign labor certification programs administered by OFLC generally require employers seeking to hire foreign labor on a permanent or temporary basis to apply to the Secretary for a labor certification.

The Department provides annual grants to State Workforce Agencies (SWAs) to support required state-level foreign labor certification activities. These activities include, but are not limited to, reviewing and placing job orders to recruit U.S. workers; providing assistance to employers in the effective recruitment of U.S. workers; conducting safety inspections of employer-provided housing for H-2A agricultural workers; performing prevailing practice and wage surveys used to set the wages and working standards for occupations within the state; and conducting post-certification site visits to support employer compliance with H-2A and H-2B program requirements. SWAs submit annual plans to the Department to establish continued eligibility for these grants. These annual plans describe the SWA's planned foreign labor certification activities and workload expectations for the upcoming year.

### 2022 Regulatory Changes Impacting SWA Grant Activities

On October 12, 2022, the Department published the final rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* ("2022 H-2A Final Rule") to finalize all aspects of the July 2019 Notice of Proposed Rulemaking except the Adverse Effect Wage Rate methodology. See 87 FR 61660. The effective date of the 2022 H-2A final rule was November 14, 2022.

The 2022 H-2A Final Rule contains a number of provisions to modernize the H-2A temporary labor certification process, strengthen worker protections, and enhance the enforcement capabilities of the Department to address H-2A program fraud and abuse that undermines workers' rights and hurts law-abiding employers. Below is a brief list of some of the major changes made by the 2022 H-2A final rule that impact SWA grant activities.

- Mandates electronic filing, with limited exceptions, and permits use of electronic signatures that meet Office of Management and Budget guidelines for valid electronic signatures. See 20 CFR 655.130(c).
- Establishes a single point of entry for electronic filing by requiring employers to submit H-2A Agricultural Clearance Orders (Forms ETA-790/790A) ("job orders"), H-2A Applications for Temporary Employment Certification (Forms ETA-9142A) ("H-2A applications") and supporting documentation through OFLC's Foreign Labor Application Gateway (FLAG) system (<https://flag.dol.gov/>). See 20 CFR 655.121(c), 655.130(c).

- Permits the use of electronic methods for OFLC to send notices and requests to employers, circulate approved job orders to appropriate SWAs for interstate clearance and recruitment of U.S. workers, and issue temporary labor certification decisions directly to the Department of Homeland Security (DHS) on behalf of employers. *See* 20 CFR 655.121(c), (f), 655.162.
- Establishes new regulatory standards permitting multiple individual employers to jointly employ workers in full-time employment. *See* 20 CFR 655.103(b) and 20 CFR 655.131.
- Codifies standards and procedures covering the employment of workers engaged in animal shearing, commercial beekeeping, and custom combining according to a planned itinerary across multiple areas of intended employment in one state or one or more contiguous states. *See* 20 CFR 655.300 to 655.304.
- Replaces outdated prevailing wage survey guidelines from the Department's ETA Handbook 385 with modernized standards that are more effective in producing prevailing wages for distinct crop or agricultural activities and expands the universe of State entities that may conduct prevailing wage surveys, including SWAs, other State agencies, State colleges, or State universities. *See* 20 CFR 655.120(c).
- Provides that rental and/or public accommodations secured to house workers must meet applicable local, State, or Federal standards addressing certain health or safety concerns (e.g., minimum square footage per occupant, sanitary food preparation and storage areas, laundry and washing facilities), and requires employers to submit written documentation that such housing meets applicable standards and contains enough bed(s) and room(s) to accommodate all workers requested. *See* 20 CFR 655.122(d).
- Enhances the Department's debarment authority by holding agents and attorneys, and their successors in interest, accountable for their own misconduct independent of the employer's violation(s), and clarifies that *Applications for Temporary Employment Certification* filed by debarred entities during the period of debarment will be denied without review. *See* 20 CFR 655.182 and 29 CFR 501.20.

**Attachment II, Section B of TEGL 12-21 is updated to add the following:**

7. High-Quality Award Descriptions. High-quality award descriptions include specificity regarding the purpose of the award, activities to be performed, deliverables and expected outcomes, intended beneficiaries, subrecipient activities, plain language, and any other pertinent information needed to ensure stakeholders understand the intended outcomes of the award. For foreign labor program activities, the following award description will be used:
  - **Purpose:** To ensure that U.S. workers are notified of available job opportunities, that U.S. employers can meet their labor needs when qualified U.S. workers are not available, and that foreign workers are provided fair wages, working conditions, and adequate and safe housing.
  - **Activities to be performed:** SWAs will review and post job orders to recruit U.S. workers for available positions for which employers intend to file applications for H-2A or H-2B labor certification, ensure the health and safety of farmworkers by inspecting employer-provided housing, and protect workers' wages and working conditions by conducting surveys to determine prevailing wages and practice standards.

- **Deliverables and Expected Outcomes:** Adequate and safe housing is provided to all H-2A workers and, as applicable, U.S. workers in corresponding employment as required by 20 CFR 655.122(d)(1)(i) and (ii), and 20 CFR 655.122(d)(2). Timely review and posting of job orders. Referral of qualified and available U.S. workers to job opportunities. Stakeholder education and outreach.
  - **Intended Beneficiaries:** U.S. and foreign workers. U.S. employers.
  - **Subrecipient Activities:** Grantee may or may not have subawards.
8. Effective Date of 2022 H-2A Final Rule: As of November 14, 2022, state foreign labor certification activities should be performed in accordance with changes implemented by the Department under the 2022 H-2A Final Rule and any clarifying guidance or technical assistance issued by OFLC. This includes activities funded by grants issued in FY 2021 and FY 2022 that are conducted on or after November 14, 2022.
9. Grant Monitoring. OFLC reserves the right to conduct onsite monitoring visits. The primary objective of a monitoring visit is to evaluate the management and administration of the grant, the quality of the program and/or services, and the performance of the grant to determine if the program is operating in compliance with the grant agreement and in a manner that ensures achievement of its goals and outcomes. If your grant is selected for a visit, the Federal Project Officer (FPO) will reach out 30 to 60 days prior to the anticipated monitoring visit for SWA confirmation. The FPO will provide guidance and work closely with SWA staff to help ensure a productive visit.
10. Grant Use. The expenditure period for FY 2023 FLC State Grants is October 1, 2022, to September 30, 2025. The annual plan must reflect foreign labor program activities to be performed over a 12-month period within the expenditure period. While the Department strongly encourages states to spend the entirety of their allocated funds within the fiscal year that the funds are received, the Department understands that unforeseen circumstances may affect fund expenditure and will allow states up to two years to expend all funds allocated for a fiscal year.

**Attachment III, Section B.4. H-2B Post-Determination Services is updated to add the following:**

To the extent resources are available, the SWA agrees that staff funded through the FLC grant will conduct and/or cooperate with and assist Wagner-Peyser Employment Service grant activities that support employer compliance with approved H-2B job orders and certified H-2B applications for temporary labor certification under 20 CFR 655. This means that FLC grant funds may be used to support SWA processing of Complaints and Apparent Violations through the Employment Service and Employment-Related Law Complaint System described at 20 CFR 658 Subpart E and perform field checks as described at 20 CFR 653 Subpart F or other authorized inspections.

All activities funded through the FLC grant for such Employment Service activities will be fully documented, as required by 20 CFR 655 and 20 CFR 658 Subpart E, and all related records and findings will be available to the DOL CO for other appropriate action under 20 CFR 655, Subpart A. The SWA may also provide any findings or related records to the Wage and Hour Division, Occupational Safety and Health Administration, or any other appropriate government enforcement agencies.