

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2022 H-2A Final Rule FAQs

Round 1: Implementation of 2022 H-2A Final Rule

October 12, 2022

On October 12, 2022, the Department of Labor (the Department) published a final rule promulgating regulations governing the certification of employment of nonimmigrant workers in temporary agricultural employment and the enforcement of obligations applicable to employers of H-2A workers and workers in the United States similarly employed. The Department is providing these FAQs to assist employers, workers, and other interested parties in understanding this final rule as it goes into effect.

1. Why did the Department issue a new final rule governing the H-2A program?

In recent years, the Department has engaged in rulemaking to propose changes to the H-2A temporary labor certification (TLC) program after nearly 10 years of administering the program under the 2010 Final Rule. In particular, the Department proposed changes to the H-2A program regulations through a Notice of Proposed Rulemaking (NPRM) that published on July 26, 2019.¹ This rulemaking included proposals that sought to strengthen worker protections, enhance enforcement to prevent fraud and abuse committed against workers, and simplify the H-2A application and TLC process.

After consideration of comments received in response to the NPRM, the Department separated the NPRM's proposals into two rulemaking activities. The first, at issue here, serves to address all proposals and comments outside of proposed changes to the Adverse Effect Wage Rate (AEWR) methodology. The second will be specific to the proposed changes to the AEWR methodology.²

On October 12, 2022, the Department published this final rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* ("2022 H-2A final rule" or "final rule") to finalize all aspects of the July 2019 NPRM except for the AEWR methodology. The 2022 H-2A final rule strengthens protections for agricultural workers, enhances

¹ Notice of Proposed Rulemaking, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 FR 36168 (July 26, 2019).

² Most recently, on December 1, 2021, the Department issued an NPRM (2021 H-2A AEWR NPRM), which proposed to revise the methodology for establishing the AEWR for non-range occupations. 86 FR 68174. The comment period for the 2021 H-2A AEWR NPRM closed on January 31, 2022, and the Department will address those comments in a separate rulemaking.

enforcement to prevent fraud and abuse, and simplifies and modernizes the H-2A application and TLC process and the prevailing wage determination process. Simultaneously, this final rule enhances the enforcement capabilities of the Office of Foreign Labor Certification (OFLC) and the Wage and Hour Division (WHD).

2. How is the 2022 H-2A final rule different from the 2010 H-2A regulations?

Below is a brief list of some of the major changes made by the 2022 H-2A final rule.

- Mandates electronic filing, with limited exceptions, and permits use of electronic signatures that meet Office of Management and Budget guidelines for valid electronic signatures.
- Establishes a single point of entry for electronic filing. As a result, employers will 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 system (<https://flag.dol.gov/>), a centralized electronic system maintained by the Department.
- Permits the use of electronic methods for OFLC to send notices and requests to employers, circulate approved job orders to appropriate State Workforce Agencies (SWAs) for interstate clearance and recruitment of U.S. workers, and issue TLC decisions directly to the Department of Homeland Security (DHS) on behalf of employers.
- Establishes new standards permitting multiple individual employers to jointly employ full-time workers.
- 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.

Wages:

- Modernizes prevailing wage survey standards and expands the universe of state entities that may conduct prevailing wage surveys, provided such surveys are approved by the SWA and OFLC.
- Addresses prevailing wage rate and/or AEWR changes—both increases and decreases—that may occur during the work contract period.

Employer assurances and obligations:

- *Housing:*
 - Provides that rental and public accommodations (i.e., hotels, motels, and other similar accommodations that are available to the public to rent for relatively short-term stays) must meet applicable local, State, or Federal standards addressing certain health or safety concerns and requires employers to submit written documentation that such housing meets applicable standards and contains a sufficient number of bed(s) and room(s) to accommodate all workers and clarifies documentation requirements.

- Establishes mobile housing standards for employers of custom combine and animal shearing workers on planned itineraries.
- *Surety Bonds*:
 - Implements a standardized surety bond form and permits electronic submission of surety bonds.
 - Requires incremental increases in bond amounts for each additional 50 H-2A workers over 100.
 - Adjusts required bond amounts annually.

Enforcement:

- Permits debarment of agents and attorneys (and their successors in interest) for their own misconduct independent of the employer’s violation(s), and clarifies that impacted applications filed during the period of debarment will be denied without review.
- Permits debarment of H-2A Labor Contractors (H-2ALCs) that fail to provide adequate surety bonds.

3. When does the 2022 H-2A final rule become effective? How will employers know whether the 2022 H-2A final rule governs the processing of a particular H-2A application?

The effective date of the 2022 H-2A final rule is November 14, 2022. Employers’ obligations under the H-2A program begin upon submitting a job order for SWA review and clearance. This typically occurs before submission of the *H-2A Application for Temporary Employment Certification* with the Department. Therefore, the Department established a transition procedure at 20 CFR 655.102 to provide regulatory continuity for processing both H-2A program job orders and *H-2A Applications for Temporary Employment Certification*.

Under the transition procedure, an *H-2A Application for Temporary Employment Certification* (Form ETA-9142A) and the related job order (Form ETA-790/790A) will continue to be processed under the 2010 H-2A final rule procedures if:

- The Form ETA-9142A was submitted before November 14, 2022; or
- The Form ETA-9142A was submitted on or after November 14, 2022, with a first date of need no later than February 12, 2023, *i.e.*, 90 days after the effective date of this final rule.

Any other Form ETA-9142A and related job order will be processed under the procedures in the 2022 H-2A final rule, using the OMB-approved forms for the 2022 H-2A final rule.

Using the employer’s first date of need, the Department’s electronic filing system will require the employer to complete the applicable OMB-approved forms for the employer’s *H-2A Application for Temporary Employment Certification* and related job order. To prevent the inadvertent submission of incorrect forms, the Department’s electronic filing system will not permit an employer to submit an application or job order with a first date of need after February 12, 2023, using forms associated with the prior rule.

- 4. I filed a job order (Form ETA-790/790A) with the SWA before the effective date of the 2022 H-2A final rule, but I have not yet submitted the related H-2A application (Form ETA-9142A). Will I need to refile? What processing procedures will apply?**

No, it is not necessary to refile the job order. A job order submitted to the SWA before the effective date of this final rule will have a first date of need no later than 75 days after the effective date of this final rule. The 2022 H-2A final rule governs the processing of any *H-2A Application for Temporary Employment Certification* submitted on or after November 14, 2022, with a first date of need on or after February 13, 2023, *i.e.*, 90 days after the effective date of the final rule. The employer's job order, and related *H-2A Application for Temporary Employment Certification*, will continue to be processed under the 2010 H-2A final rule procedures.

- 5. I filed an *H-2A Application for Temporary Employment Certification* (Form ETA-9142A) before the effective date of the 2022 H-2A final rule. Will I need to refile? What processing procedures will apply?**

No, it is not necessary to refile the application. Any *H-2A Application for Temporary Employment Certification* submitted before the effective date of this final rule (*i.e.*, before November 14, 2022) will continue to be processed under the 2010 H-2A final rule procedures.

- 6. I received temporary agricultural labor certification before the Department published the 2022 H-2A final rule. Is the certification still valid?**

Yes. All H-2A temporary labor certifications issued before the effective date of this final rule (*i.e.*, before November 14, 2022) will remain valid for the validity period stated on that certification, unless the certification is subject to revocation or other integrity actions that affect the validity of the certification.