



# H-2A Temporary Labor Certification Program

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

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# H-2A Temporary Labor Certification Program

## Topics



- ❖ H-2A Workload / Filing Trends of Fiscal Year (FY) 2018
- ❖ H-2A Program Requirements
- ❖ Filing Tips and Best Practices

# H-2A Temporary Labor Certification Program



## H-2A Programs: Filing Trends of FY 2018

# Department of Labor

## H-2A Workload Trends of FY 2018

- *Received applications:* Year to date in FY 2018, the total volume of applications received increased by 18%, as compared to the total of applications received in FY 2017
- *Processed applications:* Year to date in FY 2018, the number of workers processed has increased by 24% from FY 2017
- *Prevalent worksite locations:* The top 3 work States are Florida, Georgia, and Washington
- *H-2A Labor Certification applications (H-2A LCs):* Year to date in FY 2018, the total number of applications received from H-2A LCs has already increased by 30% as compared FY 2017

# Department of Labor

## H-2A Program Workload Profile, FY 2018 (through July 2018)

<b>Applications submitted for processing</b>		<b>10,808</b>
<b>Applications processed</b>		<b>10,473</b>
<i>Certifications</i>		10,166
<i>Denials</i>		128
<i>Withdrawn</i>		179
<b>Worker positions requested</b>		<b>217,162</b>
<i>Worker Positions Certified</i>		210,075
<i>Worker Positions Denied</i>		3,734
<i>Worker Positions Withdrawn</i>		3,353

# Understanding the H-2A Program



## H-2A Program Requirements

# State Workforce Agency Role

## ■ Pre-filing procedures

- *Job order* – No more than 75 days/no fewer than 60 days
  - Know State Workforce Agency (SWA) requirements
    - Tax ID numbers
    - State Farm Labor Contractor Licensing requirements
  - Be responsive to SWAs
    - General information requests
    - Notice of Deficiency (NOD) response
    - Availability for Housing Inspections

# State Workforce Agency Role

- **Housing** – Ready for occupancy 30 days prior to the “date of need”
  - *Employer-provided* – requires SWA housing inspection
  - *Rental or public accommodation* – may require SWA inspection – check with your SWA
  - Refer to Round 12 FAQs published on June 16, 2017

# State Workforce Agency Role

## ■ **Recruitment assistance**

- Process job order and begin local recruitment
- Continue local recruitment and begin interstate recruitment
- Act as Order-Holding Office
- Provide other SWAs with up-to-date information (e.g., Changes in crop-conditions, start dates, etc.)

# General Requirements for Employer Participation

- *Employer* → U.S. employer (e.g., farm/ranch), association of agricultural producers, or farm labor contractor
  - Associations of agricultural producers can participate as sole employers, agent with one member, or joint employer with multiple members
  
- *Work* → Agricultural labor or services (e.g. planting, raising, cultivating, harvesting, or production of any agricultural or horticultural commodity)
  - Full-time (35 hours or more a week)
  
- *Employer's need* → Seasonal or temporary in nature, such as a recurring growing cycle (generally lasting 10 months or less)

# STEP 1: Obtain a Prevailing Wage and Prepare Application

- Obtain minimum wage information from Office of Foreign Labor Certification (OFLC) agricultural on-line wage library
- Offer, advertise, and recruit. Pay hired workers the highest of the following:
  1. Adverse Effect Wage Rate (AEWR)
  2. Prevailing Hourly Wage or Piece Rate
  3. Collective Bargaining Wage
  4. Federal or State Minimum Wage
- Prepare a job order (Form ETA-790) and H-2A application package
  - **Recommended Timeframe: 90 and 75 days before work start date**

# Sample Wage Offers on Form ETA-790

- The offer(s) must match the wages entered in Form ETA-9142A for each crop and commodity

17. Wage Rates, Special Pay Information and Deductions / Tarifa de Pago, Información Sobre Pagos Especiales y Deducciones (Rebajas)							
Crop Activities	Hourly Wage	Piece Rate / Unit(s)	Special Pay (bonus, etc.)	Deductions*	Yes/Si	No	Pay Period / Período de Pago
Cultivos	Sálario por Hora	Pago por Pieza / Unidad(es)	Pagos Especiales (Bono, etc.)	Deducciones			/ /
Apple Harvest	\$11.74	\$1.00 per 1-1/8 BU. Box		Social Security / Seguro Social	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Weekly / Semanal <input checked="" type="checkbox"/>
Orchard Labor	\$11.74			Federal Tax / Impuestos Federales	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Apple Packing	\$11.74			State Tax / Impuestos Estatales	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Bi-weekly / Quincenal
				Meals / Comidas	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
				Other (specify) / Otro (especifica)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Monthly/Mensual <input type="checkbox"/>

## STEP 2: Submit a Job Order to the SWA

- Submit the job order (Form ETA-790) and inform the SWA of the intent to file a future application for H-2A workers
  - Job order must meet minimum regulatory content requirements (*20 CFR 653 Subpart F and 20 CFR 655.122*)
  - SWA reviews job order and notifies employer of any deficiencies within 7 days **OR**, if acceptable, begins recruitment of U.S. workers within the State
  - Request that the SWA inspect housing for farmworkers during this timeframe
- **Regulatory Timeframe: 75 and 60 days before work start date**

# Preparing the Form ETA-790 – General Requirements

- The 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; or
  - Offer **job qualifications and requirements** (e.g., experience) 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
    - Certifying Officer (CO) or SWA may require employer to submit documentation substantiating the appropriateness of any qualification contained in the ETA Form 790

# Preparing the Form ETA-790 – General Requirements

- The job order must contain the minimum content requirements under 20 CFR 655.122(d)

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)

# Step 3: File Application with OFLC



Submit the following documents:

- **Form ETA 9142A;**
- **Appendix A** - signed and dated copy of original;
- Copy of Form **ETA-790 and all attachments** submitted to the SWA;
- **Itinerary** of worksites (*if applicable*);
- Workers **compensation** coverage;
- **SWA housing inspection report(s)** or other documentation demonstrating rental/public accommodation housing meets standards and sufficient to house all workers; and
- **Agent agreement/documentation** demonstrating authority to represent the employer and Migrant and Seasonal Agricultural Worker Protector Act registration (MSPA) (*if applicable*)

# Labor Contractor Filing Checklist



## Additional documentation for H-2A labor contractors:

- Name and location of each fixed-site employer, expected start and end dates of work, and a description of the crops and activities;
- Copy of fully-executed work contracts with each fixed-site employer
- Copy of MSPA FLC Certificate of Registration, where required, identifying the specific FLC activities;
- Proof of ability to discharge financial obligations by submitting an original surety bond document;
- Bond should be original and clearly indicate case number; and
- Where the fixed-site employer will provide housing or transportation to workers, information that confirms it
  - Housing complies with applicable standards and has been certified by the SWA (see housing FAQ to determine if inspection required)
  - Transportation complies with applicable Federal, State, or local laws and regulations

# STEP 4: DOL-OFLC Processing of H-2A Application

- OFLC reviews application for obvious errors or inaccuracies and compliance with program requirements
  - **Statutory Timeframe:** Within 7 days of receipt of the H-2A application
  
- OFLC issues a Notice of Deficiency (NOD) or Acceptance (NOA)
  - If a NOD is issued, the employer has 5 business days to respond
  - If the application is accepted, the employer may start positive recruitment of U.S. workers
  
- If applicable, the SWA is required to submit a housing inspection report

# STEP 4: DOL-OFLC Processing of H-2A Application

## Conducting Positive Recruitment for U.S. Workers

- Place 2 print advertisements in local area
- Contact U.S. employees from prior season/year
- Conduct out-of-state recruitment (*not more than 3 States*)
  - Additional recruitment can be ordered at the discretion of the Department
  - Positive recruitment must occur no later than 3 days before the start date of work

**Regulatory Timeframe: Until H-2A workers depart or 3 days before start date, whichever occurs first**

# Submission of Initial Recruitment Report (20 CFR 655.156(a))

- The employer must prepare, sign, date, and submit a written recruitment report on a date specified by the CO in NOA
  
- The recruitment report must:
  - Identify each recruitment source by name;
  - Include name/contact information of each U.S. worker who applied for the job and the disposition of each worker;
  - Confirm that former U.S. employees were contacted and how they were contacted; and
  - Provide explanation of the lawful job-related reason(s) for not hiring each U.S. worker (if applicable)

# STEP 5: Issuance of Labor Certification Determination

- Temporary labor certifications will be granted no later than 30 days before the start date of work as long as all program requirements are met
- An employer has rights to appeal any denial determination or partial certification of its request for H-2A workers
- OFLC issues the original certified Form ETA-9142A on “blue security paper” to employers
- OFLC instructs employers to submit the certified Form ETA-9142A and a signed and dated copy of the Appendix A to the appropriate USCIS Service Center

**Important Reminder:** Employers **must** consider and hire U.S. workers until 50 percent of the certified period of work has elapsed

# REMINDER: Issuance of Final Determination

- OFLC issues a final determination 30 days before the start date of work as long as all program requirements are met
- Lacking the following documentation will result in delaying the issuance of an H-2A final determination:
  - Proof of valid workers' compensation coverage;
  - Housing documentation for farmworkers;
  - Valid farm labor contractor licenses;
  - Valid surety bond for labor contractors; and
  - Recruitment report
- Changes to the original application submitted (e.g., housing, number of workers, etc.), although allowed, often delay final determinations
- DOL provides employers with additional time to submit required documents to obtain certification, rather than issue a denial forcing employers to choose between filing an appeal or new application

# General Filing Tips & Issues

## Post-Certification Recruitment Obligations

- Employers must continue to cooperate with the SWA in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies for the job opportunity
  - Until 50 percent of the certified period of work has elapsed
  - Exemptions must be requested and approved by OFLC/Chicago National Processing Center
  
- Employer must continue to update the initial recruitment report submitted to the CO for certification throughout the entire recruitment period
  
- Employer must sign and date the final written recruitment report and be prepared to submit it to the CO upon request or in response to an audit examination

# Important Reminders

- Pay the required H-2A certification fees in full and timely manner (within 30 days after the certified is issued)
- Maintain all documents supporting the certification for a period of 3 years
- Report the termination or separation/abandonment of workers in a timely manner (no later than 2 working days)
- If requesting change in period of employment, please ensure changes represent bona fide business need in documentation
  - NOTE: Claiming expected government delays is not an acceptable justification.

# Important Reminders

- Agents/Attorneys - If using a template to submit applications and the CO issues a NOD impacting your template, remember to amend the template to avoid a continuation of the same NOD for each application
- Change iCERT password frequently
- Check H-2A Round 12 FAQs published on June 16, 2017, *Housing Assurances required when using public accommodations*

# Additional OFLC H-2A Resources

- <https://www.foreignlaborcert.doleta.gov/h-2a.cfm>

The screenshot displays the OFLC H-2A Certification website. At the top, a dark red navigation bar contains links for Home, Career Info, Industry, Professionals, Contracts, TAA Program, Certification, & Results, and States. Below this, a breadcrumb trail reads: Home > Foreign Labor Certification > H-2A Certification.

The main content area features a blue header with the text "Foreign Labor Certification" and the tagline "Helping U.S. employers fill jobs while protecting U.S. and foreign workers". Below the header, a yellow banner highlights the "H-2A Temporary Agricultural Program".

A "Helpful Links" section is prominently displayed, featuring a grid of buttons for: Frequently Asked Questions, Regulations and Special Procedures, Factsheets and Filing Tips, Wage and Survey Information, Public Job Registry, Disclosure Data, Forms, Program Debarments, H-2A Ombudsman Program, and Additional Resources. A yellow banner below this section announces "H-2A Electronic Filing via iCERT Portal System Now Available".

The "Program Overview" section provides a brief description: "The H-2A temporary agricultural program allows agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle, and requires labor levels above what is necessary for ongoing operations."

A sidebar on the left contains several categories of links: "Office of Foreign Labor Certification" (About FLC, OFLC Division Organization Chart, How do I..., Policies & Regulations, Program Debarments, Foreign Labor Recruiter List), "Ombudsman Programs" (H-2A, H-2B), "Electronic Filing" (iCERT Online Filing System, H-2A and H-2B Electronic Filing Resources, PERM Online Filing System), "Forms and Instructions", and "Hiring Foreign Workers" (Permanent, H-1B, H-1B1).