



# H-2B Temporary Labor Certification Program Application Filing Process

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Office of Foreign Labor Certification  
Employment and Training Administration  
U.S. Department of Labor

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# H-2B Applications April 1 Start Date



## **Section I**

### **Filing Process**

# H-2B Applications April 1 Start Date Filing Process for Randomization Procedures



- The application filing window opens on January 1, 2021, at 12:00 a.m. Eastern Time.
- On January 1, 2, and 3 the Office of Foreign Labor Certification (OFLC) will accept all timely filed applications containing an April 1, or later start date of need (i.e., three-day filing window).
- On January 4, OFLC will randomize **all** applications with an April 1 start date and received in this three-day filing window using the procedures published in the Federal Register on March 4, 2019.
- Randomized applications will be assigned to groups:
  - Group A will include a sufficient number of applications (about 35,000 worker positions) to fill the statutory visa cap
  - Each subsequent group will total no more than 20,000 worker positions

# H-2B Applications April 1 Start Date Filing Process



- Once randomization is completed:
  - ✓ Employers (and their agent/attorney) will be notified in writing of their group assignment
  - ✓ Group A applications will be assigned to analysts for review and issuance of first action decisions
  - ✓ After all first actions are issued for Group A applications, Group B applications will be assigned to analysts for review and issuance of first action decisions
  - ✓ Applications will be processed as each successive stage in the labor certification process is completed
- OFLC will publish the list of applications received and their group assignment within five business days after the randomization process has been completed

# H-2B Applications April 1 Start Date

## Where to File



- All H-2B applications will be submitted and processed through the Foreign Labor Application Gateway (FLAG) system at <https://flag.dol.gov>
- Mailed applications will be assigned to OFLC staff for data entry into the FLAG System
  - The official submission date will be the date that OFLC staff **complete** data entry of the application and the application will be processed using the previously stated filing and randomization procedures

# H-2B Applications April 1 Start Date

## What to File



Employer will submit the following documents:

- Form ETA-9142B  
(including valid Prevailing Wage Determination [PWD] Tracking Number)
  - Appendix A – Additional work site locations (if applicable)
  - Appendix B – Signed and dated copy of the original (required)
  - Appendix C – Foreign labor recruiter information (if applicable)
  - Appendix D – Job contractor employer-client information (if applicable)
- Copy of the job order concurrently submitted to the State Workforce Agency (SWA)
- Agent agreement/documentation demonstrating authority to represent the employer (if applicable)
- Copies of all contracts/agreements with any agent and/or recruiter engaged in international recruitment of H-2B workers (if applicable)

# H-2B Applications April 1 Start Date

## What to File (continued)



### Required documents (continued)

- Occupations involving special procedures must submit other required documents (e.g., work itinerary on Appendix A)
- Copy of Migrant and Seasonal Agricultural Worker Protection Act (MSPA) registration for the employer or agent (if applicable)



### Additional documents for **H-2B job contractors**

- Appendix D – Identifying the one employer-client associated with the job opportunity
- Appendix B – Signed and dated copy of original for employer-client
- A separate statement of temporary need for the employer-client on the Form ETA-9142B Section B.8 (include only one attachment)
- Copy of an executed contract with employer-client



## Section II

# Helpful Hints and Reminders

# H-2B Applications

## Helpful Hints and Reminders



- Employers must complete all required fields and upload all required and relevant supporting documentation (e.g., Appendix B, Farm Labor Contractor/Employee (FLC/E) documents, job contractor agreement/contract, etc.)
- **Appendix B – The employer’s signature must not be dated over two months before the date of filing**
- Statement of Temporary Need (Form ETA-9142B, Section B.8) must commence and fill this field. Only if additional space is needed should an attachment be included.
  - **“See Attached” with nothing more in Section B.8 will result in a Notice of Deficiency (NOD)**
- Be attentive to type of need requested. An employer who has a unique need beyond its normal need should select a non-recurring need type such as “one-time occurrence”

# H-2B Applications

## Helpful Hints and Reminders



### Duplicate Applications – Prohibited Under 20 CFR 655.15(f)

- Multiple filings by the same employer will be checked to ensure they are not duplicate filings
- If duplicate filings are identified, the application filed first in time will be the one permitted to proceed
- If an employer files a duplicate application (not first in time) that receives a higher randomization placement, that application will receive a NOD and the employer will be instructed to withdraw that application
- Employer may not separate filings whether they are intended for cap-subject workers and cap-exempt workers. If the jobs are the same, there may only be one filing.

# H-2B Applications

## Helpful Hints and Reminders



- Duplicate filings after a certification:
  - An employer who receives a certification and employs any number of H-2B workers pursuant to that certification may not submit a subsequent application for the same need
    - Any new filing must demonstrate a new need and a need for additional workers over and above those already certified
  - An employer who receives a certification but does not employ any H-2B workers pursuant to that certification may “return” the completely unused certification and file a new application (with a later start date) to cover the same need

# H-2B Applications

## Helpful Hints and Reminders



### Shift in dates of need to accommodate H-2B cap:

- A single period of need now being split into multiple periods of need, such as a peak within a peak
  - A peak within a peak is potentially acceptable
- A change in the requested period of need after a filing history demonstrating a different period of need may result in a NOD
  - The employer must explain and demonstrate through supporting documents the change in business that necessitated a change to its established period of need
- Such a change to filing patterns simply as an accommodation to the cap will not be acceptable

# H-2B Applications

## Common NOD Reasons



### Common Deficiencies

- Changes in dates of need and number of workers. Such changes will trigger a NOD if they are not explained and supported.
  - For repeating needs (e.g. peak load), the new period of need will be expected to be the new norm and must be supported by contracts/payroll in future seasons
  - A change that is due to COVID-19 would create a one-time need for that discrete portion of work

# H-2B Applications

## Common NOD Reasons



- Inconsistencies between job order and ETA-9142B
  - Often start date of need and number of workers.
  - Also, F.d – Daily Transportation, Overtime Available, On-the-Job Training, Employer-Provided Tools, Board/Lodging.
- Incomplete Appendix A, particularly for additional work sites such as carnival, brush clearing, and forestry
  - Employers will receive a NOD and the Chicago National Processing Center (Chicago NPC) will be required to conduct the data entry. This will take time and will delay further processing of the case.
  - A separate itinerary is not acceptable, and a NOD will be issued

# H-2B Applications

## Common NOD Reasons



- Not offering highest wage of all work sites (non-special procedure cases)
- Limits on referrals in Job Orders. The employer should not limit the number of referrals that it will accept from the SWA. The employer must put the highest number possible for number of referrals, such as 999 or 9999.
- Duplicate filings
- Appendix B aged signature – The employer's signature must not be dated over two months before the date of filing

# H-2B Applications

## Additional Reminders



- Employer should upload NOD responses and Recruitment Reports to the "My Cases" table in your FLAG System account
  - DO NOT send a duplicate response to the OFLC Chicago NPC Help Desk
- Monitor case processing dates on the OFLC website. The Chicago NPC will not respond to case status inquiries on cases that are within normal timing parameters.

# H-2B Applications

## Returning a Labor Certification



You can return a temporary labor certification that is no longer needed using the following procedures:

- Email the Chicago NPC at [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov)
- Include the phrase “H-2B Cert Return Notification” followed by the full case number in the email subject line
- Include the full case number and employer name in the body of the email and a brief explanation as to the certification return
- **For Example:** Acme Company will not use the certification for H-400-1234-56789 due to the H-2B cap being reached.



- The Chicago NPC Help Desk will issue a confirmation that the return has been processed and notify the U.S. Citizenship and Immigration Services of the returned certification
- If the employer files a new application for the same worker positions with a later start date (e.g., due to the first-half visa cap being reached), the “return” notification can also be part of the new filing. It should be clearly marked as its own PDF attachment.
- **Please Note:** This option is only available for **unused** temporary labor certifications. If a partially used temporary labor certification is returned and a subsequent application is submitted for the same job opportunity, the application will be considered a duplicate filing.

# H-2B Applications

## Extension of a Certification



- An employer who has received a certification and has an unexpected continued need for its temporary workers may file for an extension of the certification
  - It is not necessary to file a new application
- To request an extension, the employer should submit its request to [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov) with details as to the reason that an extension is needed. Supporting documentation must be included, as applicable.
- A request for extension must be related to weather conditions or other factors beyond the control of the employer
- See 20 CFR 655.60 for complete details on requirements

# H-2B Applications

## Extension of a Certification



- OFLC issues an extension letter that indicates the full dates of certification. This means that the start date of certification will be in the past. USCIS requires that the dates on the I-129 Nonimmigrant Petition match those on the labor certification extension letter.
- Employers must be sure to file their I-129 petitions with the full dates of certification, which means a start date that has passed
- Example:
  - Original Certification: 4/1/2020-9/15/2020
  - Extension Requested: 9/16/2020-10/15/2020
  - Extension Letter Dates: **4/1/2020-10/15/2020**



- All letter correspondence has been updated to include clearer, more concise language
  - **Reminder:** Please read correspondence in its entirety rather than relying on knowledge of the verbiage in older letters
- Stakeholders may receive correspondence on the weekend
- As of December 1, 2020, the Chicago NPC has omitted any additional, “Certifying Officer (CO) directed recruitment requirements.” Employers must complete the 15 business day job posting before submitting the recruitment report (when there is no bargaining representative).

# H-2B Applications April 1 Start Date Processing Times Report



- Updates will be available through the FLAG System every **Monday, Wednesday, and Friday** until the visa cap is met.
- The first posting will be on January 11, 2021.

## Sample

Filing Window	STEP 1	STEP 2		STEP 3	STEP 4
	Total Cases Submitted <sup>3</sup> & Positions Requested	Total Cases Issued First NOA or NOD	Percent Issued NOA or NOD	Total Cases Pending – Post NOA or NOD Issued <sup>4</sup>	Total Cases Issued Final Decision & Workers Certified
Jan 1-3 Group A <sup>5</sup>	2,007 (34,868 Workers)	2,007	100.0%	7 (89 Workers)	2,000 (33,908 Workers)
Jan 1-3 Group B <sup>6</sup>	1,086 (19,104 Workers)	1,086	100.0%	5 (54 Workers)	1,081 (18,353 Workers)
Jan 1-3 Group C <sup>6</sup>	1,059 (18,997 Workers)	1,059	100.0%	23 (307 Workers)	1,036 (17,911 Workers)
Jan 1-3 Group D <sup>6</sup>	1,088 (18,589 Workers)	1,088	100.0%	107 (1,677 Workers)	977 (16,405 Workers)
Jan 1-3 Group E <sup>6</sup>	236 (4,154 Workers)	236	100.0%	77 (1,252 Workers)	158 (2,847 Workers)
Jan 1 – 3 <sup>6</sup>	2 (30 Workers)	2	100.0%	2 (30 Workers)	--