

2015 H-2B Interim Final Rule

Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States

The Immigration and Nationality Act provides that the Secretary of the Department of Homeland Security (DHS) must consult with “appropriate agencies of the Government” before granting any H-2B visa petitions. Through regulation, DHS requires that an H-2B visa petition for employment in the United States must be accompanied by an approved temporary labor certification from the DOL and delegates enforcement authority for the H-2B program. As part of its labor certification responsibilities, DOL’s Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC) determines whether U.S. workers capable of performing the jobs for which employers are seeking foreign workers are available, and whether the employment of the foreign workers will adversely affect the wages and working conditions of U.S. workers similarly employed. DOL’s Wage and Hour Division (WHD) enforces compliance with the conditions of an H-2B petition and DOL-approved temporary labor certification.

The Interim Final Rule:

- Addresses the critical issue of U.S. worker access to the jobs for which employers seek H-2B workers through a re-engineered program design which focuses on enhanced U.S. worker recruitment and strengthened worker protections.
- Helps employers, through more robust domestic recruitment, find U.S. workers for positions the employers would otherwise seek to fill with temporary H-2B workers.
- Strengthens existing worker protections, establishes new protections, and enhance program integrity measures and enforcement to ensure adequate protections for both U.S. and H-2B workers.
- Ensures that only those employers who demonstrate a legitimate temporary need for foreign workers have access to the H-2B program.

Major features of the Final Rule include:

- A national electronic job registry for all H-2B job orders (an expansion of the H-2A job registry) that improves U.S. worker access to nonagricultural jobs and helps employers find U.S. workers from across the nation.
- Enhanced recruitment of U.S. workers, increasing the amount of time for which U.S. workers must be recruited by requiring employers hire referred qualified U.S. workers until 21 days prior to the employer’s date of need and by requiring the rehiring of former employees when available.
- Reinstatement of the State Workforce Agencies’ (SWA) critical role to assist employers by using their expertise on local labor market conditions and recruitment patterns, thereby expanding job opportunities for U.S. workers.
- An H-2B Registration process in which employers must demonstrate temporary need before applying for a labor certification. The pre-filing H-2B registration process will be implemented over time and allow an employer to “register” its temporary need for a specific number of job opportunities for a period of up to 3 consecutive years. Temporary need (other than a one-time occurrence) can be no more than 9 months. This will reduce burdens and save time for employers who have recurring temporary needs.
- Maximized access to the program by employers with legitimate temporary need through requiring job contractors to demonstrate their own temporary seasonal need, apart from the needs of their employer-clients.

- Greater transparency by requiring employer disclosure of agency agreements and use of foreign labor recruiters in the solicitation of H-2B workers.
- Extension of H-2B program benefits, such as wages and transportation, to certain U.S. workers performing substantially the same work identified in the labor certification or performed by the H-2B workers, to ensure these U.S. workers are not receiving lower wages or fewer benefits than the foreign workers.
- Provides greater clarity and guidance to employers as to which workers fall within the definition of corresponding employment.
- Strengthened worker protections through inclusion of the following provisions that require the employer to:
 - ✓ Pay or reimburse inbound transportation and related subsistence costs for workers to the place of employment after the worker completes 50 percent of the period of employment covered by the job order if the employer has not previously reimbursed such costs;
 - ✓ Pay the return transportation and related subsistence costs from the place of employment to the place from which the worker departed to work for the employer if the worker completes the job order period or is dismissed early;
 - ✓ Pay or reimburse visa, border crossing and related government-mandated fees;
 - ✓ Provide all tools, supplies and equipment;
 - ✓ Offer to each worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period (6-week period if the job order is less than 120 days), requiring full-time work of at least 35 hours per week;
 - ✓ Provide to each worker an accurate earnings statements with clear and lawful deductions and reimbursements; and
 - ✓ Provide workers with copies of the job order no later than the time at which the worker applies for the visa, if the worker is departing directly from his or her home country, and display a poster describing employee rights and protections in English and, if necessary and made available by the Department, another language common to the workers at the work site.
- Strengthened enforcement authorities by providing WHD with independent debarment authority, in addition to ETA, and providing revocation authority to ETA.