

**U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION**

2022 H-2A Final Rule FAQs

**Round 2: Job Order Filing and Processing
October 25,2022**

Electronic Filing

1. How do I submit a job order for an H-2A job opportunity?

Employers and their authorized attorneys or agents must submit H-2A job orders (*i.e.*, *H-2A Agricultural Clearance Order*, Form ETA-790/790A) using the electronic method(s) designated by the OFLC Administrator, unless a specific exemption applies. Currently, the Department's [Foreign Labor Application Gateway \(FLAG\) System](#), is the OFLC Administrator's designated electronic filing method. Only employers the OFLC Administrator authorizes to file by mail due to lack of internet access or authorizes to file using a reasonable accommodation due to a disability would be permitted to file using those other means. *See* 20 CFR 655.655.130(c).

How-to content, including videos posted on YouTube, is available in the "Support" area of the FLAG homepage to guide users through the major features of the system, such as creating an account, logging in, and creating and joining a network.

Important Note for Joint-Employers: In joint-employer situations, only one job order is submitted for the job opportunity, with each employer identified in the job order, as explained in the Form ETA-790A, *General Instructions*.

2. Is the employer's original signature required on the job order submission?

Yes. The Form ETA-790A, *H-2A Agricultural Clearance Order*, must contain the employer's original signature. For electronic submission, the original signature requirement may be satisfied with an electronic (scanned) copy of the employer's original signature or a valid, verifiable electronic signature method, as directed by the OFLC Administrator.

The OFLC Administrator will accept electronic signatures affixed to required documents using any available technology that meets all five of the following signing requirements in guidelines published by the Office of Management and Budget through the Federal Chief Information Council, *Use of Electronic Signatures in Federal Organization Transactions*,

Version 1.0 (Jan. 25, 2013): (1) the signer must use an acceptable electronic form of signature; (2) the electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record; (3) the electronic form of signature must be attached to or associated with the electronic record being signed; (4) there must be a means to identify and authenticate a particular person as the signer; and (5) there must be a means to preserve the integrity of the signed record.

Important Note for Joint-Employers: Apart from “master applications,” each employer in joint-employer filings must sign the job order. For an agricultural association filing a “master application” as a joint-employer with its employer-members, only the agricultural association’s signatory must sign the job order.

Timing Considerations

3. Is there a timeframe requirement that governs when I submit a job order?

Yes. Employers and their authorized attorneys or agents must submit completed job orders (*i.e.*, Forms ETA-790 and ETA-790A) to the National Processing Center (NPC) no more than 75 calendar days and no fewer than 60 calendar days before the employer’s first date of need, except in emergency situations that satisfy the criteria of 20 CFR 655.134.

4. I am ready to submit my job order, but it is less than 60 days from my first date of need. What should I do when submitting my job order?

An employer cannot submit a job order that lists a first date of need fewer than 60 calendar days from the date of submission, except in emergency situations that satisfy the criteria of 20 CFR 655.134. In situations where the employer does not satisfy the emergency situations filing criteria, the employer may submit its job order but must adjust its requested first date of need for certification so that the first date of need for temporary workers is at least 60 days from the date of submission.

Under 20 CFR 655.134, the Certifying Officer (CO) may waive the time period for filing for employers who did not make use of temporary foreign agricultural workers during the prior year’s agricultural season or for any employer that has other good and substantial cause, provided the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100. To request processing under the emergency situations filing provision, the employer must simultaneously submit to the NPC: A complete job order; a complete Form ETA-9142A, *H-2A Application for Temporary Employment Certification*; all supporting documentation required at the time of filing; and a statement justifying the employer’s request for a waiver of the time period requirement.

The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior year’s agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer’s statement must also include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (*e.g.*, a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer’s control.

5. When should I contact the State Workforce Agency (SWA) to inspect the housing I plan to provide to my workers?

If the employer will use housing that requires a pre-occupancy housing inspection and certification from the SWA, the employer should contact the SWA to schedule inspection well in advance of its first date of need. Early contact with the SWA will provide the employer with time to resolve potential housing compliance issues which, if not timely addressed, may impact the issuance of the temporary labor certification. An employer is not

required to submit proof that its housing complies with applicable housing standards at the time of filing its *H-2A Application for Temporary Employment Certification* (Form ETA-9142A), but, if available, submission of such documentation at the time of filing or as soon as possible thereafter is encouraged. The Department cannot grant a temporary labor

certification without proof that the employer-provided housing has sufficient capacity and is in compliance with applicable housing standards.

We encourage an employer who has not already obtained the SWA's approval of its housing to contact the SWA to schedule the required pre-occupancy housing inspection as part of its initial preparations to submit an *H-2A Application for Temporary Employment Certification*. At the latest, the employer should request the housing inspection when submitting its job order (Forms ETA-790 and ETA-790A).

Wage Offer Requirements

6. What wage rate should I list on my job order?

Prospective H-2A employers, other than those where workers will be employed in herding or production of livestock on the range, are required to offer, advertise in their recruitment, and pay, a wage that is at least equal to the highest wage rate applicable from the following wage sources:

- the Adverse Effect Wage Rate (AEWR);
- the prevailing wage rate (if available);
- the agreed-upon collective bargaining wage rate (if applicable);
- the Federal minimum wage rate; or
- the State minimum wage rate.

Therefore, an employer should compare its intended wage offer to the wage rate applicable to its job opportunity from each of these wage sources. If the employer's intended wage offer is equal to or higher than the highest wage rate from these sources, the employer should enter its wage offer on the job order. If, however, the employer's intended wage offer is less than the highest wage rate present in these sources, the employer must increase its wage offer such that it is at least equal to the highest wage rate from these sources.

Resources: Information about [AEWRs](#) is available on the Office of Foreign Labor Certification's webpage, and information about [approved prevailing wage surveys are available](#).

Reminder: Prospective employers of workers to be engaged in range occupations are covered by 20 CFR 655.200 through 655.235, which include a distinct list of wage sources applicable to H-2A job orders for work in range occupations.

7. My job opportunity is subject to a collective bargaining agreement (CBA). Do I need to submit a copy of the CBA with my job order?

Yes. If a job opportunity is subject to a CBA, the employer must submit a copy of the CBA when submitting its job order to enable the SWA to compare all of the wage sources applicable to the employer's job opportunity.

8. What will happen if the SWA determines the wage rate listed on my job order is lower than the H-2A program requirement?

The SWA will assess the wage for compliance as part of its initial review of the job order. If the SWA determines that the employer's wage rate is too low, the SWA will issue a Notice of Deficiency directing the employer to modify its job order to reflect the higher applicable wage rate.

Important Note: If the employer uses a contract distinct from the job order, it must list the same wage rate as the rate listed on the job order and approved by the SWA. If the employer intends to sign work contracts before the SWA accepts the job order for intrastate clearance and the SWA subsequently directs the employer to modify the wage rate listed on the job order, the employer will be required to also modify its work contracts to reflect the approved wage rate.

SWA Processing

9. What happens after I submit my job order?

Upon receipt in the electronic filing system, the OFLC NPC will transmit Form ETA-790/790A electronically to the SWA serving the area of intended employment (AIE) for review. If the job opportunity is located in more than one State within the same AIE, the NPC will transmit a copy of the electronic job order to one of the SWAs with jurisdiction over the place(s) of employment for review in accordance with the filer's pre-submission selection.

The SWA has 7 calendar days after receiving an employer's job order to accept the job order for intrastate clearance or to notify the employer that the job order is deficient. If the SWA determines that the job order does not meet all of the regulatory and program requirements, the SWA must issue a Notice of Deficiency listing the job order deficiencies that must be corrected before the job order can be accepted. The employer will have 5 calendar days to respond to the SWA and correct the noted deficiencies. If the employer timely corrects the deficiencies, the SWA will send the employer a Notice of Acceptance within 3 calendar days after receiving the employer's response, and promptly place the job order in intrastate clearance. However, if the employer does not adequately correct the deficiencies, or fails to submit a timely response to the SWA, the SWA will issue a Notice of Denial.

Important Note: If the SWA does not receive an employer's response to a Notice of

Deficiency within 12 calendar days after the notification was issued, the SWA will notify the employer in writing that the job order is deemed abandoned, and the employer will be required to submit a new job order to the NPC.

10. How can I ensure that my job order is processed as quickly as possible?

An employer can minimize processing time by ensuring that its job order is complete and accurate, and by responding promptly and completely to any request(s) from the SWA during job order processing.

11. What do I do if the SWA doesn't accept my job order in time or I cannot reach an agreement with the SWA on the necessary changes to the job order?

Where an employer has not been able to resolve the deficiencies regarding its job order with the SWA, the employer may use the emergency filing procedures under 20 CFR 655.134 to submit its Form ETA-9142A, *H-2A Application for Temporary Employment Certification*, and job order to the NPC for review so long as:

1. The employer timely submitted the job order and after documented efforts to solicit a response from the SWA received no response within prescribed SWA processing times; or
2. The employer timely submitted the job order and after receiving a Notice of Deficiency, timely and in good faith submitted information aimed to correct the noted deficiencies, but the SWA did not respond to the employer's submission within 3 days of the receipt of the employer's submission, or by the 46th day before the employer's first date of need, whichever is later; or
3. The employer timely submitted the job order and after receiving a Notice of Deficiency, timely and in good faith submitted information aimed to correct the noted deficiencies, but the SWA did not consider the employer's timely submission sufficient to accept the job order and issued a Notice of Denial within 3 days after receipt of the employer's submission or by the 46th day before the employer's first date of need, whichever is later.

Withdrawal Requests

12. May I withdraw a job order?

Yes. An employer may withdraw a job order submitted in connection with a future H-2A application if the employer no longer plans to file an *H-2A Application for Temporary Employment Certification*. However, the employer is still obligated to comply with the terms and conditions of employment contained in the job order with respect to all workers recruited in connection with that job order.

To request withdrawal, the employer must submit a request in writing to the NPC identifying the job order and stating the reason(s) for the withdrawal. To request withdrawal through an electronic filing user account, the employer must identify the Form ETA-790/790A to be withdrawn, select the "withdrawal" option, and upload the employer's written statement regarding the reason(s) for the withdrawal. Alternatively, the employer may submit a written request for withdrawal to the NPC at tlc.chicago@dol.gov, with the words "H-2A Withdrawal Request" and the full H-2A case number contained in the subject line of the email.