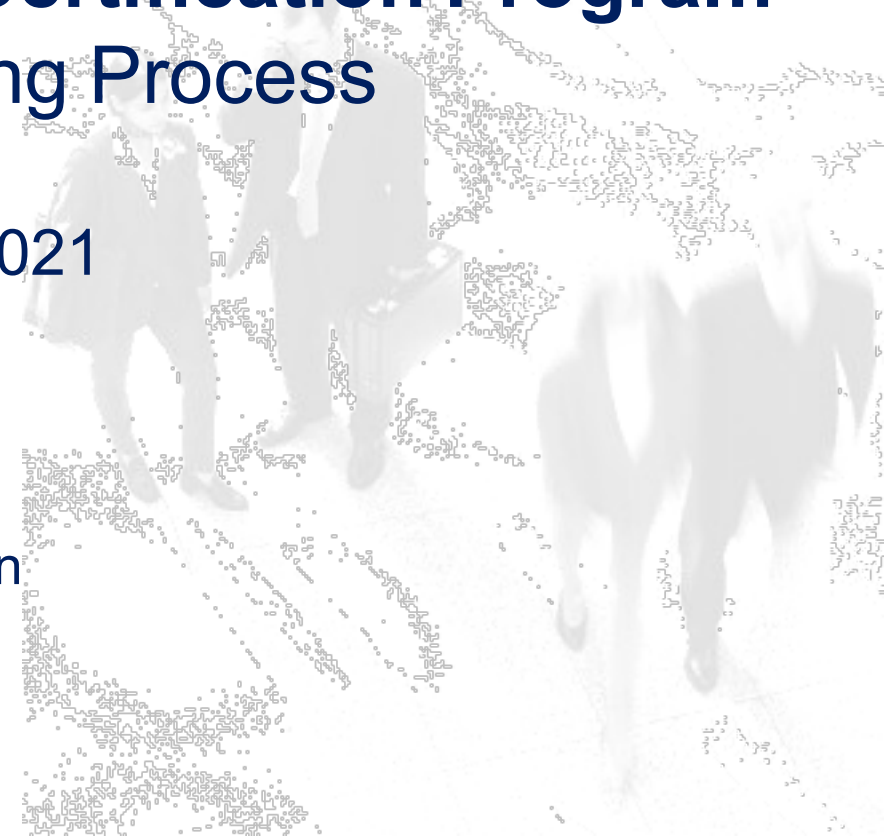




H-2B Temporary Labor Certification Program Application Filing Process

December 2021

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



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H-2B Visa Program

Overview of the Immigration Process



Step 1



Obtain a labor certification from the **Department of Labor (DOL)**
– Requires conducting a labor market test with the State Workforce Agency (SWA) where work will be performed

Step 2



Obtain an approved petition from the **Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS)** for a specific number of workers under the H-2B visa classification

Step 3



After receiving USCIS petition approval, workers will apply with one of the **Department of State (DOS)** visa-issuing embassies or consulates abroad for an H-2B visa

Step 4



After receiving the visa from DOS, workers arrive at a port of entry where **DHS's Customs and Border Protection** officers verify eligibility for admission and length of stay

H-2B Visa Program

Current Regulatory Authority



Departments of Labor and Homeland Security jointly published two regulatory actions effective on April 29, 2015

- Interim Final Rule (IFR): Temporary Non-Agricultural Employment of H–2B Aliens in the United States

<https://www.govinfo.gov/content/pkg/FR-2015-04-29/pdf/2015-09694.pdf>

- Final Rule: Wage Methodology for the Temporary Non-Agricultural Employment in the H–2B Program

<https://www.govinfo.gov/content/pkg/FR-2015-04-29/pdf/2015-09692.pdf>

H-2B Visa Program

DOL Administrative Authority



A Temporary Labor Certification (TLC) granted by DOL serves as advice to DHS regarding whether . . .

1. A qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity; and
2. A foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers

DHS regulations also require DOL to “*determine the prevailing wage applicable to an application for temporary labor certification...*” 8 CFR 214.2(h)(6)(iii)(D)

H-2B Visa Program

DOL Administrative Authority



Employment and Training Administration (ETA) Office of Foreign Labor Certification (OFLC)

- TLC determinations are made by the OFLC Administrator within the ETA who, in turn, may delegate this authority to a designated National Processing Center (NPC) Certifying Officer (CO)

<https://www.dol.gov/agencies/eta/foreign-labor>

Wage and Hour Division (WHD)

- Investigates and enforces the terms and conditions of employment in the H-2B temporary labor certification

<https://www.dol.gov/agencies/whd/immigration/h2b>

H-2B Visa Program

General Overview



- Enable U.S. employers to hire nonimmigrant workers to perform temporary nonagricultural labor or services
- The nature of the employer's need for the services to be performed must be temporary and qualify under one of the following standards defined by DHS:
 - One-time occurrence
 - Seasonal
 - Peakload
 - Intermittent

Important Reminder: Additional DHS guidance on temporary need is at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/guidance-on-temporary-need-in-h-2b-petitions>

H-2B Visa Program

General Overview



- Major steps involved for an employer to obtain a TLC
 - STEP 1** Employer requests a prevailing wage determination (PWD) for the job opportunity and area of intended employment
 - STEP 2** Employer submits a job order to SWA serving the area of intended employment
 - STEP 3** Employer submits an H-2B application and all supporting documentation to OFLC for processing
 - STEP 4** OFLC reviews H-2B application and, where requirements are met, authorizes recruitment for U.S. workers
 - STEP 5** OFLC issues a TLC determination

H-2B 101 Presentation Recording: <https://www.youtube.com/watch?v=XJ-B3sJ5-VWw>



H-2B Visa Program



Section I

Application Filing Process

H-2B Visa Program

Application Filing Process



- The application filing window opens on January 1, 2022, at 12:00 a.m. Eastern Time
- On January 1, 2, and 3, 2022, the Office of Foreign Labor Certification (OFLC) will accept all timely filed applications containing an April 1, 2022, or later start date of need (i.e., three-day filing window)

H-2B Visa Program

Application Filing Process



- On January 4, OFLC will randomize **all** applications with 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 Visa Program

Application 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 Visa Program

Application Filing Process and FLAG System



- Employers and their authorized representatives can set up FLAG system accounts at <https://flag.dol.gov>
- Registered users are able to complete profiles, manage network users, and access other helpful tools to allow differentiated levels of access for point of contacts and other authorized users
- All communications regarding the processing of applications, supporting documentation, and case status updates are updated real-time in the FLAG system account
- The FLAG system also maintains a dedicated webpage that provides employers with up-to-date processing times for each immigrant and nonimmigrant visa program administered by OFLC at <https://flag.dol.gov/processingtimes>

H-2B Visa Program

Application Filing Process and FLAG System



- Continuously enhance functionality to improve customer service and application processing
- 2021 Enhancements:
 - New “Messaging Center” capability pushes OFLC decisions real-time to external FLAG accounts without relying on e-mail.
 - Customers can quickly upload responses to OFLC decisions within the FLAG account and view application documents.
 - Case re-assignment feature allows customers to better manage applications under OFLC review within their FLAG system account network.

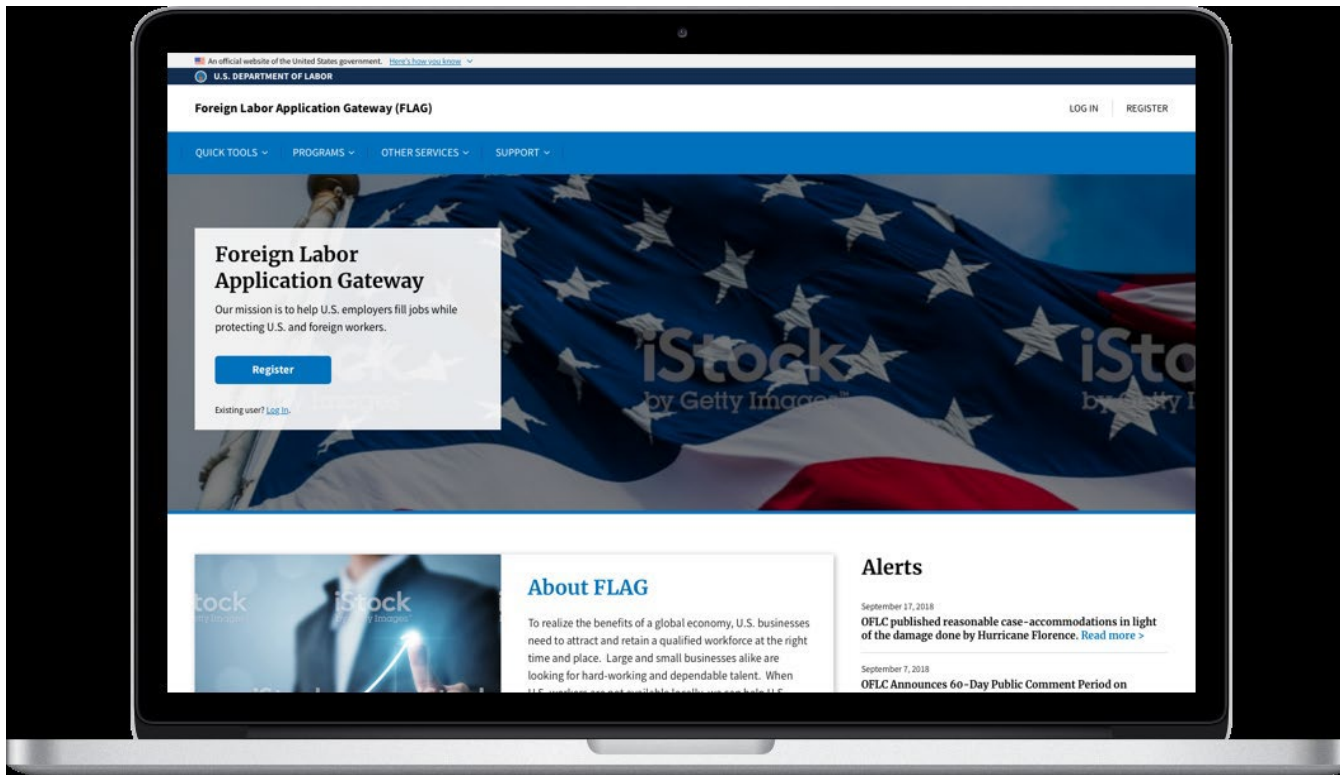
Please go to the FLAG System (<https://flag.dol.gov/>) for more detailed information on these enhancements, including a user guide and video demonstration: <https://flag.dol.gov/announcement/2021-08-16>

H-2B Visa Program

FLAG Resources



Access additional help and resources via the FLAG webpage <https://flag.dol.gov>, where users can get help, access videos and tutorials, set up an account, and report technical problems



H-2B Visa Program

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 10, 2022

Sample

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

H-2B Visa Program

Application Filing Process – 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, initialed and dated copy of the original form (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)

Important Reminder: Employers should provide certified translations of any contracts or agreements which are not in English to assure timely processing.

H-2B Visa Program

Application Filing Process – What to File



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 the original form 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



H-2B Visa Program



Section II

Helpful Hints and Reminders

H-2B Visa Program

Helpful Hints and Reminders



Form ETA-9142B (H-2B Application)

- Employers must complete all required fields and upload all required and relevant supporting documentation (e.g., *Appendix B*, MSPA registration i.e. Farm Labor Contractor/Employee (FLC/E) documents, job contractor agreement/contract, etc.)
- Both the signature on the *Appendix B* must be a wet (pen/ink) signature, as well as the initials on each attestation
- Section A of *Appendix B* should not be completed if the employer is not represented by an agent or attorney

Good Practice:

- The employer's signature on the Appendix B should be **original** and dated concurrently with an application.

H-2B Visa Program

Helpful Hints and Reminders

Form ETA-9142B, Temporary Need

- Statement of Temporary Need must be included in Section B.8
- An attachment should only be included if additional space is needed
- “See Attached” with no explanation in Section B.8 will result in a Notice of Deficiency (NOD)

Good Practice:

- Be attentive to type of need requested so that it aligns with the description of the employer’s need, e.g. seasonal need, peakload need, intermittent need, or one-time occurrence

H-2B Visa Program

Helpful Hints and Reminders



Multiple Filings

- Multiple filings by the same employer will be reviewed to ensure they support distinct job opportunities
 - Slight differences in dates of need does not automatically make the job opportunities distinct
- Depending on totality of factors, a new/different need for workers may result in a finding of permissible different job opportunities
 - Employer should provide information in both (all) filings that explains this, if applicable

REMINDER!

- Only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. *20 CFR 655.15(f)*

H-2B Visa Program

Helpful Hints and Reminders



Multiple Filings, Cont'd

- Multiple filings may also be determined as present by the Department when, facially, the employer names are distinct
 - OFLC uses the Single Employer Test to determine whether two or more nominally separate entities are sufficiently intertwined such that they should be treated as a single employer. The test involves a fact-intensive consideration of four key factors:
 - Common ownership
 - Common management
 - Interrelated operations
 - Centralized control of labor relations or personnel practices

H-2B Visa Program

Helpful Hints and Reminders



Multiple Filings, Cont'd

- No one factor of the Single Employer Test is determinative
 - Whether two or more entities may be treated as a single employer depends on all the circumstances of the application, and is characterized by the absence of an arm's length relationship among seemingly independent companies

REMINDER!

- Filings for the same job opportunity by employers who are determined to functionally be a single employer are handled under the provisions of 20 CFR 655.15(f), prohibiting multiple filings for the same job opportunity

H-2B Visa Program

Helpful Hints and Reminders



Multiple Filings, Cont'd

- If multiple filings are identified, the application filed first in time will be the one permitted to proceed
- Example: Employer files an application on January 1, 2022 at 12:05 a.m. and files a 2nd application on January 2, 2022 at 10:00am. Once randomization is conducted, the 1st application is assigned Group C and the 2nd application is assigned Group A. When Group A cases are being processed, the employer will receive a NOD to withdraw this application filed second in time. The OFLC will consider the **first application filed in timestamp order** - irrespective of randomization group assignments
- Employer may not separate filings according to 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 Visa Program

Helpful Hints and Reminders



Multiple 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 Visa Program

Helpful Hints and Reminders



Returning a Labor Certification

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

- Email the Chicago NPC at 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

Good Practice:

- Good example of email language: “Acme Company will not use the certification for H-400-1234-56789 due to the H-2B cap being reached”.

H-2B Visa Program

Helpful Hints and Reminders



Returning a Labor Certification, Cont'd

- 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 receives a certification and files a second application for the same worker positions with a later start date (e.g., the portion of need after the next visa cap release), the employer can return the certification as a part of the new filing. It should be clearly marked as its own PDF attachment

Caution!

- 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 Visa Program

Helpful Hints and Reminders



Changing Dates of Need

- 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
 - If successfully supported, for repeating needs, the new period of need will be expected to be the new norm and must be supported by contracts/payroll in future seasons
- Such a change to filing patterns simply as an accommodation to the cap will not be acceptable

H-2B Visa Program

Helpful Hints and Reminders

Wages

- Employer must offer the highest wage of all work sites (non-special procedure cases)

4. Prevailing wage: (based on the primary worksite location. See Item 6 below for details). For H-1B, H-1B1, E-3, and PERM only, this wage is based on the minimum job requirements for the position. \$ 14 .29	
a. Per: (Choose only one) <input checked="" type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year	b. OES Wage level: <input type="checkbox"/> I <input type="checkbox"/> II <input type="checkbox"/> III <input type="checkbox"/> IV <input type="checkbox"/> OES Mean <input checked="" type="checkbox"/> N/A
c. Prevailing wage source (Choose only one): <input checked="" type="checkbox"/> OES (All Industries) <input type="checkbox"/> OES (ACWIA, does not apply to H-2B) <input type="checkbox"/> CBA <input type="checkbox"/> DBA <input type="checkbox"/> SCA <input type="checkbox"/> Alternate Survey <input type="checkbox"/> Professional Sports League Rules or Regulations	d. If "Survey" in question 4c, specify the name of the survey:
5. Prevailing wage: (based on the primary worksite location. See Item 6 below for details). For H-1B, H-1B1, E-3, and PERM only. This wage is based on the alternative job requirements for the position (does not apply to H-2B). \$ N/A	
a. Per: (Choose only one) <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year	b. OES Wage level: <input type="checkbox"/> I <input type="checkbox"/> II <input type="checkbox"/> III <input type="checkbox"/> IV <input type="checkbox"/> OES Mean <input type="checkbox"/> N/A
c. Prevailing wage source (Choose only one): <input type="checkbox"/> OES (All Industries) <input type="checkbox"/> OES (ACWIA) <input type="checkbox"/> CBA <input type="checkbox"/> DBA <input type="checkbox"/> SCA <input type="checkbox"/> Alternate Survey <input type="checkbox"/> Professional Sports League Rules or Regulations	d. If "Survey" in question 5c, specify the name of the survey:
6. The wage is based on the following BLS Area (Metropolitan or Non-Metropolitan Statistical Area):	
7. The highest PWD out of all H-2B worksites for which a prevailing wage determination was requested: \$ 14 .29 per hour.	
8. Additional Notes Regarding Wage Determination: <p style="text-align: center;">Please See Addendum</p>	
9. Determination date: 6/14/2021	10. Expiration date: 9/12/2021

H-2B Visa Program

Helpful Hints and Reminders



Job Order (JO)

- Make sure Employer's contact information is included
- Confirm with the SWA that the JO is identified as temporary, not permanent
- 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
- Information submitted on ETA-9142B and JO must match:
 - E.g. Dates of need, Number of workers, F.d – Daily Transportation, Overtime Available, On-the-Job Training, Employer-Provided Tools, Board/Lodging, Special requirements, Named multiple worksites on *Appendix A*
- 90-75 calendar days before the start Date of Need, the employer must concurrently submit the JO to the SWA when the H-2B application is filed with OFLC

H-2B Visa Program

Helpful Hints and Reminders



Appendix A

- *Appendix A* must be complete, particularly in applications with additional work sites for occupations, such as carnival, brush clearing, and forestry
- A separate itinerary is not acceptable
 - If a separate itinerary is submitted, the employer will receive a NOD and the Chicago NPC will be required to conduct the data entry in order to obtain a complete and accurate *Appendix A*. This will take time and will delay further processing of the case.
 - Incorrect wages listed on *Appendix A* and incorrect start dates of need (dates / year).

H-2B Visa Program

Helpful Hints and Reminders



Appendix A, Cont'd

- City field must be completed; this field may not be blank
- Employer should enter “multiple cities and towns” in the *Appendix A* when there are multiple locations within one county

IMPORTANT!

Unanticipated worksites are not permissible; all worksites (MSA/county) must be identified in the filing and must be supported by a PWD

H-2B Visa Program

Helpful Hints and Reminders



- Upload NOD responses and Recruitment Reports to the "My Cases" table in the employer's FLAG System account
- DO NOT send a duplicate response to the OFLC Chicago NPC Help Desk, as this might create delays with processing your application
- Monitor case processing dates on the OFLC website; OFLC Chicago NPC will not respond to case status inquiries on cases that are within normal timing parameters
- Once the NOA is issued, OFLC posts the job order on <https://seasonaljobs.dol.gov> in "active" status until 21 days before the start Date of Need. Employer must provide a means by which U.S. applicants may contact the employer to apply for the job opportunity

H-2B Visa Program

Helpful Hints and Reminders



Recruitment Report Requirements

- The name of each recruitment activity or source
- The name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application.
- Clear indication whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined
- Confirmation that former U.S. employees were contacted, if applicable, and by what means
- Confirmation that the bargaining representative was contacted, if applicable, and by what means, or that the employer posted, for 15 consecutive business days, the job opportunity to all employees in the job and area in which the work will be performed by the H-2B workers
- If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker

H-2B Visa Program

Helpful Hints and Reminders



Recruitment Report Requirements, Cont'd

- The employer must prepare, sign, and date the recruitment report. OFLC will accept electronic signatures that comply with the standards contained in the E-Sign Act, accessible here: <https://www.govinfo.gov/content/pkg/PLAW-106publ229/pdf/PLAW-106publ229.pdf>
- Where recruitment was conducted by a job contractor or its employer-client, both joint employers must sign the recruitment report
- The Recruitment Report must be submitted by the date specified in the NOA
- The Recruitment Report must indicate the name of the employer as indicated on the Form ETA 9142B

H-2B Visa Program

Helpful Hints and Reminders



Recruitment Report, Cont'd

- Employers should verify with the SWA that the JO was opened by the SWA in the area of intended employment, and obtain the JO Number

IMPORTANT – PLAN AHEAD!

Employers might need to register with the SWA in the state where the work will be performed. Some states (e.g. LA) require out-of-state employers to be “registered” with state authorities to access the SWA’s website. Some states (e.g. MD) have public websites which provides the names and status of employers licensed or registered in the state.

H-2B Visa Program

Helpful Hints and Reminders



Recruitment Report, Cont'd

- An employer should act timely in contacting U.S. applicants and allow a reasonable period of time for the U.S. applicants to respond to the employer before submitting a recruitment report
- Submission of the recruitment report to OFLC can only occur after the job opportunity has been posted for 15 consecutive business days after the date of the NOA. Delays in adjudication are caused by employers who submit recruitment reports earlier. In these situations, OFLC will reject the recruitment report and the employer must refile the recruitment report timely.

H-2B Visa Program

Helpful Hints and Reminders



Recruitment Report, Cont'd

- If an employer seeks to electronically post the notice of the job opportunity as an upload to a website, it should be accessible by the employer's employees; and, contain typical employee notices, e.g. wage and hour notices, complaints for discrimination
- An employer should act timely in contacting U.S. applicants, and allow a reasonable period of time for the U.S. applicants to respond, before submitting a recruitment report

IMPORTANT!

- The employer must continue to update the recruitment report throughout the recruitment period. In a joint employment situation, either the job contractor or the employer-client may update the recruitment report
- The updated report must be signed, dated and must be made available upon request by DOL.
- The report must be maintained for three years post-certification

H-2B Visa Program

Helpful Hints and Reminders



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
 - Note!* It is not necessary to file a new application
- To request an extension, the employer should submit a request with details as to the reason an extension is needed
 - A request for extension must be related to weather conditions or other factors beyond the control of the employer that could not have been reasonably foreseen (*20 CFR 655.60*)
- Supporting documentation must be included, if applicable
- A request for an extension is submitted **by email** to TLC.Chicago@dol.gov

H-2B Visa Program

Helpful Hints and Reminders



Extension of a Certification, Cont'd

- 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: 4/1/2021-9/15/2021
 - Extension Requested: 9/16/2021-10/15/2021
 - Extension Letter Dates: **4/1/2021-10/15/2021**

H-2B Visa Program

Additional Resources



- FLAG System Support
 - Contact Login.gov at <https://www.login.gov> for technical issues with account creation, signing in, or changing Login.gov settings.
 - Contact DOL FLAG Helpdesk for any technical problems filing applications at <https://flag.dol.gov/support/contact>

- H-2B Prevailing Wage Support
 - Contact OFLC NPWC Helpdesk for any questions related to processing prevailing wage requests at fic.pwd@dol.gov

- H-2B Program Support
 - Contact OFLC H-2B Program Helpdesk for any questions related to the processing of H-2B applications at tlc.chicago@dol.gov

H-2B Visa Program

Additional Resources



- Visit the OFLC website and “Subscribe” for e-mail updates
<https://www.dol.gov/agencies/eta/foreign-labor>



Programs

Announcements