

H-2B Stakeholder Webinar Filing Tips

September 14, 2018

Filing Tips & General Reminders

- H-2B Application Preparation and Submission
- Notice of Deficiency (NOD) Responses
- Recruitment Reports
- General Reminders

Preparing the H-2B Application

H-2B applications must be filed with:

- Complete Form ETA-9142 and appropriate appendices (current Appendix B)
- Copy of the job order that is submitted *concurrently* to the State Workforce Agency (SWA)
- Valid Prevailing Wage Determination (PWD), Form ETA-9141
- Copies of all contracts/agreements with any recruiter or agent engaged in the recruitment of H-2B workers
- **Both** • If not using a foreign labor recruiter, employer must still provide a statement indicating that at the time of filing or will receive a NOD
- Contact information of all persons and entities hired by or working for the recruiter or agent, including any “sub” agents or employees of such persons and entities (if applicable)
- Within 75-90 day window before the requested start date of need (unless approved for a waiver of the filing timeline)

**Items in purple font to be discussed in more detail in this presentation*

Preparing the H-2B Job Order

- Make sure the job order contains the minimum content requirements under 20 CFR 655.18. Many NODs are issued for incomplete job order content.

Job Order Content Requirements	Regulatory Citation
Employer's name and contact information	655.18 (b)(1)
Indication job is temporary, full-time, and number of openings	655.18 (b)(2)
Description of job duties, requirements, and qualifications	655.18 (b)(3)
Geographic area of employment	655.18 (b)(4)
Wage offer or range of applicable wage offers	655.18 (b)(5)
Availability of overtime and wage offer <i>(if applicable)</i>	655.18 (b)(6)
Provision of on-the-job training <i>(if applicable)</i>	655.18 (b)(7)
Statement that a single workweek will be used in computing wages due	655.18 (b)(8)
Frequency of pay	655.18 (b)(9)

Preparing the H-2B Job Order

Job Order Content Requirements	Regulatory Citation
Provision of board, lodging, or other facilities <i>(if applicable)</i>	655.18 (b)(10)
Statement of all deductions from the worker's paycheck	655.18 (b)(11)
Inbound transportation/daily subsistence <i>(if applicable, lodging)</i>	655.18 (b)(12)
Outbound transportation/daily subsistence <i>(if applicable, lodging)</i>	655.18 (b)(13)
Provision of daily transportation <i>(if applicable)</i>	655.18 (b)(14)
Statement on reimbursement of visa, border, and related fees	655.18 (b)(15)
Provision of any tools, supplies, and equipment at no cost	655.18 (b)(16)
Three-fourths guarantee <u>(not required due to 2017 Omnibus Act)</u>	655.18 (b)(17)
Instruct applicants to contact nearest office of the SWA	655.18 (b)(18)

A job order checklist with sample language is available at https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Job_Order_Checklist.pdf

Tips for Preparing the Job Order

- Many SWA job order systems/forms do not have dedicated fields for the required content (e.g., start/end dates of work, can only enter up to 25 openings)
 - Use a free text field (e.g., job description) or contact the SWA for assistance on how to complete the job order form
- Be aware of any character size limitations that may exist in some SWA job order systems/forms, prohibiting inclusion of the necessary assurances
 - Contact the SWA immediately and ask what minimum language can be entered

Tips for Preparing the Job Order

- Job orders for employers of a mobile workforce (e.g., forestry, carnivals) must state that optional housing will be offered at no cost to the worker
- Job orders for jobs where any housing conditions are for the benefit of the employer, such as live-in nannies, must also state that housing will be provided at no cost to the worker

Tips for Preparing the Job Order

■ Notes: Provision of Board/Lodging or Other Facilities

- If an employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, these provisions must be listed in the job order, *including the associated cost* of each. Employers of mobile workforces (i.e., tree planting, carnival workers) must cover the cost of lodging to the extent such costs would reduce pay below the offered wage for area of intended employment.

■ Examples:

- **If lodging is primarily for the employer's benefit and convenience (always, in the cases of mobile workforces):** "The employer will pay the cost of lodging to the extent such costs would reduce pay below the offered wage rate for the area of intended employment."
- **If lodging is not primarily for the employer's benefit and convenience:** "Dormitory-style shared lodging is available in employer-owned housing at a rate of \$25 per person per week."

Prevailing Wage Determination

- The H-2B application must be filed with a valid PWD — Form ETA-9141, See 20 CFR 655.15
 - Only exception is for filings approved for a waiver of the filing time requirements due to Emergency Situations
- Applications filed without a valid PWD or request for emergency processing will be returned without review
 - “Valid” means issued, unexpired, and matches the job for which the H-2B application is being filed
- Applications without a valid PWD that request emergency processing, *but are denied processing*, will be returned without review

Prevailing Wage Determination

- Employers may not add locations to the H-2B application that are not covered by the PWD
- Employers should allow 60 days for the PWD to be issued
- Employers that request an emergency waiver of the filing time due to waiting for a PWD, where the Form ETA-9141 was not filed at least 60 days before the start date of need, will not be approved for emergency processing on this basis
- Plan ahead!

Emergency Processing Requests

- Approval of an emergency processing request eliminates the requirement that an application be filed with a valid PWD
 - A draft Form ETA-9141 should be submitted with H-2B application if one is not already pending at the National Prevailing Wage Center
- Approval of an emergency processing request also eliminates the requirement that an application be filed at least 75 days before the start date of need

Emergency Processing Requests

- Requires “good and substantial cause” — 20 CFR 655.17
 - May include, but not limited to, “[s]ubstantial loss of U.S. workers due to Acts of God or a similar unforeseeable man-made catastrophic event that is wholly outside of the employer’s control; unforeseeable changes in market conditions; or Pandemic health issues”

Preparing the H-2B Application

- Ensure all required fields on Form ETA-9142B (fields marked with an asterisk on form) are completed prior to submission:
 - Complete Form ETA-9142 and appropriate appendices (current Appendix B)
 - Copy of job order being submitted concurrently to the SWA
 - Valid PWD
- Remember, the wage offer must meet or exceed the highest prevailing wage when there are multiple worksites that have different prevailing wages. Do not automatically offer the wage from the main worksite.

Preparing the H-2B Application (cont'd)

- Copies of all contracts/agreements with any recruiter (or agent) to engage in the recruitment of H-2B workers
 - If not using a foreign labor recruiter, the employer still must provide a statement indicating that at the time of filing or will receive a NOD
- Contact information of all persons and entities hired by or working for the recruiter (or agent), including any “sub” agents or employees of such persons and entities (if applicable)

Preparing the H-2B Application (cont'd)

- Complete and meaningful temporary need statement
 - Make sure the type of temporary need selected is appropriate for the business and the need
 - Lack of U.S. workers does not equate to temporary need
 - A new contract for an employer in the business of securing new contracts to provide services does not necessarily create a temporary need
- Start the Statement of Temporary Need in Section B.9 of the Form ETA-9142B. Start with an explanation of the temporary need, not company background information. If/when out of room, use “see attached,” and complete the statement on a separate sheet, properly named and uploaded.

Establishment of Temporary Need

- **Below** is what is assessed to determine temporary need:
 - **One-time occurrence.** The petitioner must establish that it:
 - Has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future; or
 - Has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.
 - **Seasonal need.** The petitioner must establish that the services or labor:
 - Is traditionally tied to a season of the year by an event or pattern; and
 - Of a recurring nature.
 - NOTE: The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

Establishment of Temporary Need (cont'd)

- **Peakload need.** The petitioner must establish that it:
 - Regularly employs permanent workers to perform the services or labor at the place of employment; and that it
 - Needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand; and that the
 - Temporary additions to staff will not become a part of the petitioner's regular operation.
- **Intermittent need.** The petitioner must establish that it:
 - Has not employed permanent or full-time workers to perform the services or labor; but
 - Occasionally or intermittently needs temporary workers to perform services or labor for short periods.

General Filing Tips

- Ensure all data is internally consistent — *no conflicting statements between fields and documents*
- Make sure all applicable data (the dates of need, number of workers requested, worksite locations) match between the job order and Form ETA-9142B
- Review application package carefully and ensure all required documents are included or uploaded electronically
- Strongly encourage electronic filing of applications
- For more efficient processing, upload separate electronic documents for each document type (e.g., job order, agent agreement) rather than one large file

General Filing Tips

- If you use template language for applications and receive a NOD that results in a need to revise the language, be sure to change your template language to avoid ongoing NODs for the same reason
- For itinerant occupations (Special Procedures), include *exact itinerary locations* in Section F.c.7a of Form ETA-9142B, not merely BLS areas
- Occupations involving special procedures must submit other required documents (e.g., itineraries)

General Filing Tips

- Ensure number of workers and period of employment requested represent a bona fide business need
 - Requesting a start date of based on “expected government delays” is not acceptable
 - Requesting a start date of need on additional “cushion time” is not acceptable
 - A start date of need that is influenced by H-2B cap considerations is acceptable if there is a bona fide business need for workers and available work to do during the dates requested
 - Example: An employer’s start date of need historically has been September 1. The employer is now seeking a start date of need of October 1 due to the cap. This is fine and should be disclosed in the application.

General Filing Tips

- Changes to the period of employment (start or end dates), especially more than two weeks, must be accompanied with an explanation, and the Certifying Officer (CO) may request supporting documents
- Additional documents for job contractors:
 - A completed Form ETA-9142B Sections C & 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 in the Form ETA-9142B Section B.9
 - Copy of an executed contract between the job contractor and employer-client
- Do not name a specific foreign worker in the Statement of Temporary Need or in the application. You will be asked to remove this in a NOD.

Tips on NOD Response

- Submit documentation *in the format requested*
- Submit *explanations* of the data or explanations as to whether/why the data may not demonstrate your actual need
 - Example: Anticipated business growth. Provide detailed explanation.

Tips on NOD Response (cont'd)

- Do not flood Chicago National Processing Center (Chicago NPC) with paper. If Chicago NPC cannot decipher or understand the documentation or the volume is unreasonable, the application may be denied.
- When uploading a NOD response, be sure to upload to the pending application. Many employers file a new application while intending to submit a NOD response. This creates a new issue of a duplicate application.
- If unsure how to do this, can also email the NOD response to the TLC Help Desk

H-2B Recruitment

- Employer-Conducted Recruitment — once Notice of Acceptance (NOA) has been issued:
 - Place two print advertisements in local area — one on a Sunday
 - Contact employees from prior year
 - Contact bargaining representative, if applicable, or post notice of filing for 15 consecutive business days
 - Additional recruitment can be ordered at the discretion of the CO (e.g., unions, community-based organizations, areas of substantial unemployment)
 - Recruitment report can be submitted once all advertising steps are completed

H-2B Program

- Recruitment Tips
 - Two print advertisements in local area — Print advertisements **MUST** be placed (and run) within 14 calendar days from the date the NOA was issued
 - Contact bargaining representative or post availability of the job opportunity for 15 consecutive business days — Make sure the posting contains all the *required content* — see 20 CFR 655.41
 - Additional recruitment can be ordered at the discretion of the CO (e.g., unions, community-based organizations, areas of substantial unemployment)

Recruitment Reports

- The Recruitment Report (RR) can be submitted once all advertising steps are completed
- The employer must prepare the RR – must be signed and dated
 - Must not be on attorney/agent letterhead and not signed by attorney/agent
- Ensure all required content for RR are included, particularly the resource(s) of recruitment and final disposition of each U.S. applicant)
 - Any applicants that have not yet been interviewed, etc., do not have a completed disposition
- If the employer has self-reduced the number of H-2B workers sought due to earlier hiring of returning workers, clearly state so on the RR

Recruitment Reports (cont'd)

- Employers are encouraged to upload the Recruitment Report directly to the pending application in iCert
 - Do not upload the recruitment report and also email it to the TLC Help Desk
 - Do not upload a copy of your NOA with your recruitment report. It is not needed.
- Make sure all required information is contained in the recruitment report
- Make sure the recruitment report is uploaded to the correct application, especially when you have multiple applications for the same employer pending

H-2B Final Determination

- The Department of Labor will grant or deny labor certification after receiving and reviewing the report of employer's recruitment efforts
 - **Timeframe**: *None required by statute or regulation*
 - Certified Form ETA-9142B issued on "blue security paper"
 - Employer submits a signed and dated copy of Appendix B to United States Citizenship and Immigration Services (USCIS)
 - Appendix B will not be part of certification on blue security paper. Employer will complete the footer section itself, mirroring what is on the blue security paper
 - Employer must continue to consider U.S. worker applicants until 21 days before start date of work

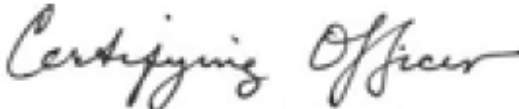
H-2B Certification

- Employer or authorized attorney/agent will receive a certified Form ETA- 9142B printed on “blue security paper”
- Please verify that Section K and the “footer” on each page of the Form ETA-9142B is complete and accurate
 - Notify TLC.Chicago@dol.gov of any errors spotted – mark it Urgent & for CO

K. U.S. Government Agency Use (ONLY)

Pursuant to the provisions of Section 101 (a)(15)(h)(ii) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. By virtue of the signature below, the Department of Labor hereby acknowledges the following:


This certification is valid from 08/12/2015 to 12/30/2015.



Department of Labor, Office of Foreign Labor Certification

07/30/2015

Determination Date (date signed)



Case number

Full Certification
Case Status

H-2B Post-Certification Issues

- H-2B regulations prohibit any amendments post-certification. Be sure your filing is accurate and does not contain errors before you submit it!
- If a change to an application that was requested while the application was pending does not appear on the certification, notify the Chicago NPC immediately, marked urgent and for the attention of the CO
- If you need to make a new filing due to an earlier certification being impacted by the H-2B cap, you must return the prior certification to the Chicago NPC or, if submitted to USCIS, then submit proof of filing with USCIS, accompanied by correspondence from USCIS that petition will not be processed

- OFLC uses email to communicate with employers and their representatives. Only certifications are sent by hard copy
 - Be sure to check your spam folders and email settings so that you receive the Department's official communications
 - Send inquiries to TLC.Chicago@dol.gov – provide case number
- Please check the OFLC website for processing time. Status inquiries on applications that are pending normally draw resources away from case processing so please only submit an inquiry if an application is beyond the published processing time.

- Employers can electronically upload required documentation at the time of filing, in response to a NOD, or with recruitment results following a NOA
 - Upload documents separately and title them as specifically as possible
 - Do NOT submit documents both via email to TLC and by direct upload in iCERT. This may slow processing.
 - Ensure you are uploading documents to a pending application and not submitting a new application in error

Disclaimer

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