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**ADVISORY: FOREIGN LABOR CERTIFICATION
TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 21-06, Change 1**

**TO: OFLC-NATIONAL PROCESSING CENTER DIRECTORS
STATE WORKFORCE AGENCY ADMINISTRATORS**

FROM: EMILY STOVER DeROCCO
Assistant Secretary



**SUBJECT: Procedures for H-2B Temporary Labor Certification in
Non-Agricultural Occupations**

1. **Purpose.** To modify certain procedures under TEGL 21-06 for State Workforce Agencies and ETA National Processing Centers to process H-2B labor certification applications. H-2B visas are for temporary employment in non-agricultural occupations.
2. **References.** Immigration and Nationality Act (INA) sec. 101(a)(15)(H)(ii)(b), 20 Code of Federal Regulations (CFR) Parts 652 and 655; 8 CFR 214.2(h)(6); and Training and Employment Guidance Letter (TEGL) 21-06: Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations.
3. **Background.** The H-2B non-immigrant visa program permits employers to hire foreign workers to come temporarily to the United States and perform temporary non-agricultural services or labor on a one-time, seasonal, peakload, or intermittent basis. The H-2B visa classification requires the Secretary of Homeland Security to consult with appropriate agencies before admitting H-2B non-immigrants. Homeland Security regulations require the intending employer first to apply for a temporary labor certification from the Secretary of Labor advising the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) as to whether qualified U.S. workers are available and whether the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers, or a notice that such certification cannot be made, prior to filing an H-2B visa petition with USCIS.

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On April 4, 2007, the Department issued TEGL 21-06, which updated procedures for State Workforce Agencies (SWAs) and ETA National Processing Centers (NPCs) to use in the processing of temporary labor certification applications under the H-2B program. The Department then held two public briefing sessions in Chicago and Atlanta on May 1 and May 4, 2007, respectively, to inform employers and other stakeholders of the updated processing guidance contained in TEGL 21-06. Employers and other stakeholders who attended those public briefing sessions raised important questions and concerns with regard to the effective implementation of TEGL 21-06 by the SWAs and NPCs. The purpose of this document is to outline certain modifications to TEGL 21-06 as a formal response to issues raised during the public briefing sessions and improve the processing of H-2B applications by the SWAs and NPCs.

4. **Modifications to Procedures for H-2B Applications.** Attachment A contains certain modifications to procedures, originally issued under TEGL 21-06, the SWAs and NPCs must use in making temporary labor certification determinations under the H-2B program. More specifically, sections IV and V of Attachment A contain modifications that remind employers and other stakeholders of the right to request review of a SWA prevailing wage determination by the NPC; provide notification that the NPCs will no longer accept incomplete applications for processing from the SWAs; establish a process for the NPC Certifying Officers to issue a Request for Information (RFI) in certain circumstances; outline the conditions under which the NPC Certifying Officers may grant a partial temporary labor certification to the employer; and advise the employer of the right to file a new application in circumstances where the NPC Certifying Officer issues a notice that a certification is denied. The modifications contained in Attachment A replace and supersede the prior corresponding operating procedures issued under TEGL 21-06.
5. **Effective Date.** This guidance applies to all pending and new temporary labor certification applications received by the SWAs on or after June 1, 2007.
6. **Action Required.** NPC Directors and SWA Administrators are requested to provide Center and SWA staff involved in the processing of H-2B applications with a copy of these procedures.
7. **Inquiries.** Questions from State Workforce Agency staff should be directed to the appropriate NPC Certifying Officer.
8. **Attachment.**

Attachment A: Procedures for H-2B Certification of Temporary Non-Agricultural Occupations (Revised June 2007)

ATTACHMENT A

Procedures for H-2B Certification of Temporary Non-Agricultural Occupations (Revised June 2007)

I. General Provisions

- A. The regulations of the United States Citizenship and Immigration Service (USCIS), 8 CFR Part 214.2(h)(6), apply to employers who wish to import non-agricultural workers to perform services or labor in temporary jobs within the United States (U.S.). Section 214(c)(1) of the Immigration and Nationality Act (INA) requires the Department of Homeland Security (DHS) to consult with appropriate agencies of the government before granting H-2B petitions.
- B. USCIS regulations state that employers who file H-2B petitions (except for temporary employment on Guam) must include a certification from the DOL stating that qualified workers are not available in the U.S., and the foreign worker's employment will not adversely affect the wages and working conditions of similarly employed U.S. workers.
- C. The H-2B non-immigrant program permits employers to hire foreign workers to perform temporary non-agricultural work within the U.S. on a one-time occurrence, seasonal, peakload, or intermittent basis (8 CFR 214.2(h)(6)(ii)(B)).
- D. The DOL regulations at 20 CFR Part 655, Subpart A – Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging or Registered Nurses in the United States (H-2B Workers), governs the labor certification process for temporary employment in the U.S. under the H-2B classification, and requires that the Regional Administrator (now National Processing Center (NPC)) Certifying Officer of the Employment and Training Administration (ETA) issue temporary labor certifications on behalf of the Secretary of Labor.
- E. An H-2B temporary labor certification is advisory to USCIS and, where the employer is notified by the NPC Certifying Officer that certification is denied or cannot be made, the employer may submit countervailing evidence, according to 8 CFR Part 214.2(h)(6)(iv)(E), directly to USCIS. **There is no provision for reconsideration or appeal of the determination made by the DOL through the NPC Certifying Officer.**

II. Standards for Determining the Temporary Nature of a Job Opportunity Under the H-2B Classification

- A. A job opportunity is considered temporary under the H-2B classification if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. It is the nature of the employer's need, not the nature of the duties, that is controlling (Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982)).
- B. Part-time employment does not qualify as employment for temporary labor certification under the H-2B program. Only full-time employment can be certified.
- C. The Federal regulations at 8 CFR Part 214.2(h)(6)(ii) state that the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. If

there are unforeseen circumstances where the employer's need exceeds one year, a new application for temporary labor certification is required for each period beyond one year. However, an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted.

- D. The employer's need for temporary non-agricultural services or labor must be justified to the NPC Certifying Officer under one of the following standards: (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need.
1. **One-Time Occurrence.** The petitioner must establish that either (1) 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 (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker (s);
 2. **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 is of a recurring nature. 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;
 3. **Peakload Need.** The petitioner must establish that (1) 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 (2) the temporary additions to staff will not become a part of the petitioner's regular operation; or
 4. **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.

III. Application Filing Procedures

- A. An employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, Offer of Employment portion of the Application for Alien Employment Certification with the State Workforce Agency (SWA) serving the area of intended employment. If the application includes worksite locations within a Metropolitan Statistical Area (MSA) covering multiple SWAs, the employer may submit a single application to the SWA where the employment will begin. In those instances where the employment crosses NPC jurisdictions as well, the NPC that has jurisdiction over the SWA where the employment will begin shall process the application.

The U.S. Census Bureau maintains a current listing of all MSAs as well as maps by state at the following Web site: <http://www.census.gov/population/www/estimates/metroarea.html>

- B. An association or other organization of employers is not permitted to file master applications on behalf of its membership under the H-2B program;

- C. Job contractors typically supply labor to one or more employers as part of signed work contracts or labor services agreements. The temporary or permanent nature of the work to be performed in such applications will be determined by examining the job contractor's need for such workers, rather than the needs of its employer customers;
- D. Every H-2B application shall include:
1. Two (2) originals of the ETA Form 750, Part A, Offer of Employment portion of the *Application for Alien Employment Certification*, signed and dated by the employer. Part B, Statement of Qualifications of the Alien, is not required to be completed;
 2. Documentation of any efforts to advertise and recruit U.S. workers prior to filing the application with the SWA;
 3. A detailed statement explaining (a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer's request for the services or labor meets one of the standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. This statement of temporary need must be submitted separately on the employer's letterhead with signature. A labor shortage, however severe, does not alone establish a temporary need. One of the four temporary need standards must be satisfied;
 4. Supporting evidence and documentation that justifies the chosen standard of temporary need must be submitted. Examples of supportive evidence or documentation for the most common standards of seasonal and peakload need include, but are not limited to, the following:
 - a. Signed work contracts, letters of intent from clients, and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need on the ETA Form 750, Part A, Item 18b. This type of documentation will demonstrate the employer's need for the work to be performed is tied to a season(s) of the year and will recur next year on the same cycle;
 - b. Annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need on the ETA Form 750, Part A, Item – 18b.;
 - c. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system. Employers should be prepared to provide the documents utilized to generate the summarized monthly payroll reports if requested by the NPC Certifying Officer.

Examples of insufficient documentation: Work contracts with no clear start and/or termination date and contracts with temporary workers. Applications supported solely by weather charts, event calendars, hotel occupancy rates, or annual/quarterly tax reports (e.g., IRS Form 941) will not be sufficient to prove a temporary need. Staffing charts, graphs, or other documentation, which do not correspond with the requested period of need on the ETA Form 750, Part A, Item – 18b, will also not be sufficient to prove a temporary need.

- E. To allow for enough time for the recruitment of U.S. workers and sufficient time for processing by the states and NPCs, the SWAs shall advise employers to file requests for temporary labor certification at least 60 days before the worker(s) is needed in order to receive a timely determination;
- F. Unless the NPC Certifying Officer specifies otherwise, the SWA shall return to the employer any request for temporary labor certification filed by the employer more than 120 days before the worker(s) is needed and advise them to re-file the application no more than 120 days before the worker(s) is needed. This is necessary since the availability of temporary U.S. workers changes over short periods of time and an adequate test of the labor market cannot be made during a longer period;
- G. More than one worker may be requested on the ETA Form 750, Part A, Item 18a, if they are to do the same type of work on the same terms and conditions, in the same occupation, in the same area(s) of intended employment during the same period. The total number of workers requested by the employer must also be specified in the advertisement and the job order required under Section IV of these instructions;
- H. If the employer's representative files the application, the employer must sign the "Authorization of Agent of Employer" statement on the ETA Form 750, which authorizes the agent to act on the employer's behalf. An attorney must file a Notice of Appearance (Form G-28) naming the attorney's client(s). The employer is fully responsible for the accuracy of all representations made by the agent on the employer's behalf; and
- I. When the job opportunity requires work to be done at multiple locations either within the jurisdiction of the SWA or within a MSA that covers multiple SWAs, the application must include the names and physical addresses of each location. This requirement also applies to job contractors filing H-2B applications.

IV. SWA Processing Instructions

- A. The SWA shall review the job offer for completeness. A job opportunity containing a wage offer below the prevailing wage will not be accepted. The SWA shall determine the prevailing wage, guided by the regulation at 20 CFR 656.40 and in accordance with Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Non-agricultural Immigration Programs, Revised May 9, 2005 (http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

In accordance with Section IV of the Prevailing Wage Determination Policy Guidance, an employer that disagrees with the prevailing wage determination is afforded one opportunity to provide supplemental information to the SWA or to request review by the NPC Certifying Officer.

- B. If the application is incomplete or the job offer is less than full-time, offers to pay a wage below the prevailing wage, contains unduly restrictive job requirements or a combination of duties not normal to the occupation, or has terms and conditions of employment which otherwise inhibit the effective recruitment and consideration of U.S. workers for the job, or is otherwise unacceptable because it does not comply with DOL policies, the SWA shall advise the employer to correct the deficiencies before commencing the recruitment.

The SWA shall communicate deficiencies in the application by fax, electronic mail, or any other means to assure expedited overnight delivery. In addition, the SWA shall advise the employer or the employer's authorized representative that failure to respond to the SWA notification, or failure to correct all of the deficiencies set forth in the notification for the application will result in the case being closed and processing discontinued.

- C. When commencing recruitment, the SWA shall prepare a job order, using the information on the application, and place it into the SWA job bank system for 10 calendar days. During this period, the SWA should refer qualified applicants who contact the local offices and those in its active job files. If the application indicates that work will be performed in multiple locations within a MSA and one or more locations are outside the jurisdiction of the SWA, the SWA shall clear the job order for 10 calendar days with the appropriate state(s) where the work is to be performed and accept for referral to the employer qualified applicants from the state(s).
- D. During the 10-day posting of the job order, the employer shall advertise the job opportunity in a newspaper of general circulation for 3 consecutive calendar days or in a readily available professional, trade or ethnic publication, whichever the SWA determines is most appropriate for the occupation and most likely to bring responses from U.S. workers. If the job opportunity is located in a rural area that does not have a newspaper with a daily edition, the employer shall use a daily edition with the widest circulation in the nearest urban area or such other publication as determined by the SWA.
- E. The employer advertisement must:
1. Identify the employer's name, location(s) of work, and direct applicants to report or send resumes to the SWA for referral to the employer by disclosing the SWA contact information and job order number;
 2. Describe the job opportunity with particularity, including duties to be performed, work hours and days, rate of pay, and the duration of the employment;
 3. State the employer's minimum job requirements;
 4. Offer wages, terms, and conditions of employment which are not less favorable than those offered to the alien and are consistent with the nature of the occupation, activity, and industry; and
 5. State the job is "temporary" and include the total number of job openings the employer intends to fill.

- F. The employer shall document that union and other recruitment sources, appropriate for the occupation and customary in the industry, were contacted and either unable to refer qualified U.S. workers or non-responsive to the employer's request. Such documentation must be signed by the employer.
- G. The employer shall provide the SWA with copies of newspaper pages (e.g., tear sheets) or other proof of publication (e.g., affidavit of publication, invoices or other electronic verification) furnished by the newspaper for each day the advertisement was published. In addition, the employer shall submit to the SWA a written, detailed recruitment report that is signed by the employer. The written recruitment report must:
 - 1. Identify each recruitment source by name;
 - 2. State the name, address, and telephone number and provide resumes (if submitted to the employer) of each U.S. worker who applied for the job; and
 - 3. Explain the lawful job-related reason(s) for not hiring each U.S. worker.
- H. After the recruitment period, the SWA shall send the application, results of recruitment, prevailing wage findings, and all other supporting documentation to the appropriate NPC Certifying Officer. The NPC Certifying Officers will not accept incomplete applications for processing from the SWA even with assurances from the employer or the employer's representative that documentation will be forthcoming. The NPC Certifying Officers will remand incomplete applications back to the SWA.
- I. Based on the results of the employer's and SWA recruitment efforts, the NPC Certifying Officer shall determine whether there are other appropriate sources of workers from which the employer should have recruited in order to obtain qualified U.S. workers. If further recruitment is warranted, the NPC Certifying Officer shall return the application to the SWA with specific instructions for additional recruitment.

V. NPC Temporary Labor Certification Determinations

- A. The NPC Certifying Officer shall determine whether to grant or deny the temporary labor certification or to issue a notice that such certification cannot be made based on whether or not:
 - 1. The nature of the employer's need is temporary and justified based on a one-time occurrence, seasonal, peakload, or intermittent basis. To determine this, the NPC Certifying Officer shall take into account the duration of the employment opportunity identified on the ETA Form 750, Part A, the employer's statement of temporary need, and all evidence and documentation submitted with the application intended to substantiate the chosen standard of temporary need.
 - 2. Qualified U.S. workers are available for the temporary job opportunity.
 - a. To determine if a U.S. worker is available, the NPC Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense, if the

prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses;

- b. The NPC Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, can perform the duties involved in the occupation as customarily performed by other U.S. workers similarly employed and is willing to accept the specific job opportunity; and
 - c. To determine if U.S. workers are available for job opportunities that will be performed in more than one location, workers must be available in each location on the dates specified by the employer.
3. The employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. To determine this, the NPC Certifying Officer shall consider such factors as local or regional labor market information, special circumstances of the industry, organization, and/or occupation, the prevailing wage rate for the occupation in the area of intended employment, and prevailing working conditions, such as hours of work; and
 4. The job opportunity contains requirements or conditions which preclude consideration of U.S. workers or which otherwise prevent their effective recruitment, such as:
 - a. The job opportunity is vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage or the job is at issue in a labor dispute involving a work stoppage;
 - b. The job opportunity's terms, conditions, and/or occupational environment are contrary to Federal, state, or local law;
 - c. The employer has no location within the U.S. to which domestic workers can be referred and hired for employment;
 - d. The employer will not pay a wage or salary for the job to be performed;
 - e. The job's requirements are unduly restrictive or represent a combination of duties not normal to the occupation; or
 - f. The employer has not recruited U.S. workers according to DOL policies and procedures.
- B. In situations where the application appears to be ineligible for temporary labor certification because the employer has not met its burden of providing adequate documentation/evidence or where a specific DOL policy was not complied with by the employer, the NPC Certifying Officer has the authority to issue one Request for Information (RFI), in writing, to the employer or the employer's authorized representative. When issued by the NPC Certifying Officer, the RFI shall:
1. Specify the reason(s) why the documentation/evidence submitted is not sufficient to grant temporary labor certification;

2. Indicate the specific DOL policy(ies) with which the employer does not appear to have complied; and
3. Advise the employer that a written response must be sent within no later than seven (7) calendar days of receiving the RFI and must be transmitted by a method that ensures receipt by the Certifying Officer the next business day, which may include fax, electronic mail, or overnight delivery.

Upon receipt of a response to the RFI or expiration of the stated deadline for receipt of the response, the NPC Certifying Officer will review the existing application as well as any supplemental materials submitted by the employer or the employer's representative and issue a final determination.

- C. If the NPC Certifying Officer issues a notice that a certification is denied or cannot be made, the Final Determination letter shall:
 1. Detail the reasons why certification cannot be made. The Certifying Officer is not required to accept determination by the SWA concerning the acceptability of the application;
 2. If applicable, address the availability of U.S. workers in the occupation as well as the prevailing wages and working conditions of similarly employed U.S. workers in the occupation;
 3. Indicate the specific DOL policy(ies) with which the employer should have, but does not appear to have, complied; and
 4. Advise the employer of the right to submit countervailing evidence directly to USCIS or to file a new application in accordance with specific instructions provided by the NPC Certifying Officer.
- D. If the NPC Certifying Officer issues a temporary labor certification, it shall be for the entire duration of the temporary employment opportunity identified on the ETA Form 750, Part A, beginning no earlier than the date certification was granted. If extraordinary circumstances establish a need that requires the non-agricultural services or labor for more than one year, a new application must be filed for the period past one year;
- E. If one or more U.S. workers were hired or unlawfully rejected by the employer or the employer's application and supporting documentation and/or evidence does not substantiate a temporary need for workers for the entire period of need identified on the original ETA Form 750, Part A, the NPC Certifying Officer has the authority to issue a partial certification for only those job opportunities that remain unfilled by qualified U.S. workers, and/or for only the period of need that is supported by the available documentation or evidence; and
- F. The date on the temporary labor certification shall be the beginning and ending dates of certified employment with the beginning date of certified employment not earlier than the date certification was granted.

VI. Document Transmittal

- A. After making a temporary labor certification determination, the NPC Certifying Officer shall notify the employer, in writing, of the final determination;
- B. If certification is granted, the NPC Certifying Officer shall send the certified application containing the official temporary labor certification stamp and a Final Determination letter to the employer or, if appropriate, the employer's agent or attorney. The Final Determination letter shall direct the employer to submit all documents together with the employer's petition to the appropriate USCIS Office;
- C. If a notice is issued that certification has been denied or cannot be made, the NPC Certifying Officer shall return one copy of the *Application for Alien Employment Certification*, ETA Form 750, supporting documents, and the Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney.

VII. Appeal of Notice that a Certification Cannot be Made

- A. The finding by the NPC Certifying Officer, that a certification cannot be made, is the final decision of the Secretary of Labor and is **advisory** to the USCIS. **There is no provision for reconsideration or appeal of the decision within DOL;**
- B. In accordance with the USCIS regulations at 8 CFR Part 214.2(h)(6)(iv)(E), the employer may submit countervailing evidence directly to the USCIS that qualified persons in the U.S. are not available, that the employer's need for the duties to be performed is represented as temporary, that wages and working conditions of U.S. workers will not be adversely affected, and that the DOL's employment policies were observed.

VIII. Validity of Temporary Labor Certifications

A temporary labor certification is valid only for the number of aliens, the area of intended employment, the specific occupation and duties, the period of time, and the employer specified on the *Application for Alien Employment Certification*, ETA Form 750.