FREQUENTLY ASKED QUESTIONS
H-2B PROCESSING

PREPARING THE APPLICATION

Does the USDOL have a checklist that H-2B stakeholders can use to verify that all the required information and documentation is included in the H-2B application?

Yes. Please visit our website to download a copy of the *H-2B Stakeholder Filing Tips* sheet at http://www.foreignlaborcert.doleta.gov/h-2b.cfm

What form do I use for "returning" H-2B workers?

H-2B labor certification program requirements do not distinguish between returning foreign workers and first-time (i.e., new) foreign workers. For purposes of labor certification, an employer must prepare and submit to the Department of Labor Form ETA 750, Part A, and go through the same process for all H-2B workers. Employers whose certifications are approved by DOL identify returning workers when filing their non-immigrant worker petitions with the Department of Homeland Security, United Stated Citizenship and Immigration Services (USCIS), to exempt those workers from the H-2B annual numerical cap.

Who is authorized to make changes to the ETA Form 750, Part A?

Employers, attorneys, and/or agents are authorized to make modifications to the ETA Form 750, Part A, as long as each modification is initialed and dated on the original form. If the employer is represented by an attorney, the attorney must file a Notice of Appearance (G-28) with the application package. If the employer's agent files, the "Authorization of Agent of Employer" portion of the ETA Form 750 must be signed. Having established such individual is the employer's authorized representative, an attorney or agent may make representations on the ETA Form 750, Part A, as long as the attorney or agent initials and dates each modification on the original form.

Is it permissible for an employer to file a single application that will cover all his temporary employees during the entire period of need where the work will be performed in disparate states, e.g., in California and Florida?

No. Training and Employment Guidance Letter (TEGL) 21-06, Section III, states that an employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, with the State

Workforce Agency (SWA) serving the area of intended employment. Section VII further notes that a temporary labor certification is valid only for the number of aliens, the occupation, 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. The area of intended employment means the area within normal commuting distance of the place of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA) (including a multistate MSA, *see below*), then any place within the MSA is deemed to be within normal commuting distance. In the circumstance described above, the employer must file two (2) separate applications for temporary labor certification; one with the California SWA and one with the Florida SWA.

What defines a Metropolitan Statistical Area (MSA)?

MSAs are geographic entities defined by the U.S. Office of Management and Budget for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measures by commuting to work) with the urban core. For more information on MSAs, please visit the U.S. Census Bureau at http://www.census.gov/population/www/estimates/metroarea.html

Assuming we have more than one (1) work site location within an MSA and different prevailing wage rates exist, which rate do we write on the ETA Form 750, Part A, and use in subsequent advertising for recruiting U.S. workers?

In this circumstance, the employer shall offer the highest prevailing wage across all the states and counties covered by the MSA on the ETA Form 750, Part A.

Assuming we have more than one (1) work site location within an MSA that cross SWA jurisdictions, where do we file the H-2B application?

Although the foreign workers may be working in multiple states within the MSA, the employer should 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. In accordance with Section IV.C of TEGL 21-06, 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).

When completing the ETA 750 form(s), specifically item #7, how should we indicate the multiple locations within the MSA?

To be consistent with the guidance provided in TEGL 21-06, the employer should do the following:

(1). Under Item #7, list the work site address where the employment will begin, since this should correspond to the SWA where the application is initially filed;
(2). Under Item #7, write the phrase "see addendum for additional worksites within MSA"; and
(3). Attach an addendum to the ETA Form 750, Part A, which includes a listing of all the worksite locations.

With regard to the required supporting documentation to support Item 18b, should this documentation be filed with the initial ETA 750, or is this information that is not needed and/or reviewed until the final determination. For example, is it sufficient to send all of the supporting documentation with the final application, which also will include advertising and recruitment efforts?

In accordance with TEGL 21-06, Section III.D, every H-2B application must include supporting evidence and documentation that justifies the chosen standard of temporary need. The entry made by the employer on Item 18b is an integral part of justifying that the nature of the employer's need is temporary. Such supporting evidence and documentation must be submitted to the State Workforce Agency along with: (a) two (2) originals of the ETA Form 750, Part A, signed and dated by the employer; (b) documentation of any efforts to advertise and recruit U.S. workers prior to filing the application, which can be described in Item 21 of the ETA Form 750, Part A; and (c) a detailed temporary need statement. No variance to this application filing requirement will be granted.

Is it permissible for an employer to file a single application where multiple worksites are located within a Metropolitan Statistical Area (MSA) and the worksites <u>do not</u> cross SWA jurisdictions?

Yes. Training and Employment Guidance Letter (TEGL) 21-06, Section III, states that an employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, with the State Workforce Agency (SWA) serving the <u>area of intended employment</u>. The "area of intended employment" means the area within normal commuting distance of

the place of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), then any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. In the circumstance describe above, the employer may file a single application that covers all of the worksite locations within a MSA within the jurisdiction of the same SWA.

Important Note: If the SWA determines that different prevailing wages exist for the occupation being requested for certification within the MSA, then the employer shall offer the highest prevailing wage across all the cities/counties covered by the MSA on the ETA Form 750, Part A.

TEMPORARY NEED

Please clarify the difference between seasonal and peakload. We have a landscaping business, which requires more workers in the spring, summer, and fall. Are we seasonal or peakload?

Your need is peakload. If your business completely shuts down for the winter, your need for the services to be performed would be seasonal.

Are employers required to submit the summarized monthly payroll report to substantiate a seasonal or peakload need under the H-2B visa classification?

No. As stated in Training and Employment Guidance Letter (TEGL) 21-06, each H-2B application must contain supporting evidence or documentation that justifies the chosen standard of temporary need. Employers may submit any combination of evidence or documentation, and examples of acceptable 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.; or

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.

The types of supporting evidence/documentation listed under Section III.D.4 of TEGL 21-06 is not exhaustive, but rather suggestive of the types of acceptable evidence/documentation the Department of Labor would recommend employers use in substantiating their temporary need. For example, if the employer chooses to substantiate his/her temporary seasonal or peakload need for foreign workers based solely upon letters of intent from clients, then the SWA should accept such evidence as the official documentation supporting the H-2B application.

Do we have to provide all the documents listed TEGL 21-06, e.g., contracts, letters of intent, invoices, and payroll reports? How many supporting documents are necessary in order to establish a need for foreign workers with respect to monthly invoices, contracts and letters of intent?

The documents listed in TEGL 21-06 constitute examples of supportive evidence or documentation for the most common standards of seasonal and peakload need. These documents can best provide adequate documentation of a seasonal or peakload need because they are most likely to contain the information that demonstrates the need is temporary. The TEGL provides indications of what information must be in each document in order to provide the necessary proof. Most importantly, all of these documents need to have dates of service that correspond to the period of need stated on the ETA 750. Each case must be analyzed based on its own documentation, but every case will be reviewed to see if the documents supporting the statement of temporary need contain the basic indicators of a true temporary need. In many cases, employers can use a combination of the documents listed in the TEGL supplemented with any other documents that are appropriate for their industry, such as hotel occupancy and staffing reports, in order to draw a complete picture that will show seasonality or peakload need.

How many letters of intent, contracts, or monthly invoices do we send to prove our need? If we have 150 invoices, does DOL want them all?

The employer must submit documents that adequately demonstrate the temporary need. If that is accomplished with three invoices that show the nature of a seasonal need for the months required and for the number of employees requested, then the employer need only provide three. If, on the other hand, the need for the total number of months and employees requested can only be documented through 150 invoices, then the application should include all 150. In most cases, a sample set of work contracts or invoices can demonstrate the need for the requested months and employees.

What documents should a new company provide if they have no records for temporary need such as payroll records or invoices from the previous year?

The documentary list is not exhaustive and an employer is not required to provide every item on the list. An employer may submit any combination of documentation necessary, as long as the documents sufficiently show the temporary nature of the need. See TEGL 21-06, Part III (D)(4). A new business might not have employee records to provide from the previous year, but should have signed contracts or letters of intent from clients sufficiently detailed to clearly show that work will be performed for each month during the requested period of the need stated on the ETA Form 750. Ancillary documents such as newspaper articles, promotional materials, and official Visitor Bureau's documents might be added to the documents to augment the showing of the temporary need in the case of new businesses. However, the documentation of the business' own activities is essential to show the need for services of H-2B workers.

If we did not receive our approval this year until May, but needed the workers in March, and could not open until we received our workforce, how will we be able to prove our need next year for March?

The employer is encouraged to indicate that its previous year's workers arrived late due to NPC delays in processing cases on its temporary needs statement. The employer must also submit supporting documentation from previous years to prove its standard of need.

Are payroll reports required for all positions in the facility or company or just for the position for which H-2B workers are requested?

The Department only requires payroll reports to demonstrate the temporary need for the specific job opportunity being requested on the ETA Form 750, Part A.

Should we include American workers, other foreign workers (non-H-2B) and H-2B workers in the temporary column of the payroll summary reports?

Yes, all temporary full-time workers, including U.S. temporary workers, non H-2B foreign workers, and H-2B workers should be included in the payroll summary reports under the temporary column.

ADVERTISING AND RECRUITMENT

Are employers required to submit a sample advertisement to the SWA for approval prior to publication in a newspaper of general circulation?

No. Pre-approval of the employer's job advertisements is an unnecessary step and causes excessive delays in SWA processing. Once the SWA is satisfied (i.e., following correction of all deficiencies) that the employer's job opportunity, as written on the ETA Form 750, Part A, is offering at least the prevailing wage, does not contain unduly restrictive job requirements or a combination of duties not normal to the occupation or terms and conditions that inhibit the effective recruitment and consideration of U.S. workers, the employer is then responsible for complying with the newspaper advertising and recruiting instructions issued by the SWA and the Department's policies and procedures set forth in TEGL 21-06, Section IV. If it is determined that the job opportunity contained requirements or conditions which preclude consideration of U.S. workers or which otherwise prevented their effective recruitment, the NPC Certifying Officer will deny the temporary labor certification. In making such a determination, the NPC Certifying Officer will consider all information disclosed on the ETA Form 750, Part A, the content of the employer's newspaper advertisements, and the disposition of all referrals of qualified U.S. workers on the recruitment report.

Are employers required to advertise on a Sunday in circumstances where the SWA has recommended a newspaper with a daily circulation?

No. TEGL 21-06, Section IV, contains no requirement that the employer advertise on a Sunday. The Department only requires the employer to 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.

Is it necessary that a union be contacted in every instance when engaging in recruitment with the State Workforce Agency (SWA)?

No, it is not necessary in every instance to contact a union to solicit potential U.S. workers for a job opportunity. Unions should be contacted only if they exist for the occupation being requested for temporary labor certification. TEGL 21-06, Section IV, states the employer shall document that union and other recruitment sources, appropriate for the occupation and customary to the industry, were contacted and either unable to refer qualified U.S. workers or non-responsive to the employer's request. If no union exists for the occupation, the employer should indicate this under Item 19 of the ETA Form 750, Part A, regardless of whether the employer was requested to contact a union by the SWA.

Many newspapers have gone to electronic tear-sheets. Are these acceptable?

Electronic tear-sheets provide too much potential for fraud. The employer must provide either the actual page from the newspaper, which shows the name of the newspaper, the ad, and the date it ran (a copy is acceptable as long as all three things can fit on one page without folding over any part of the newspaper) or an affidavit from the newspaper confirming the date the ad ran and the exact wording that appeared in the ad.

Is an employer required to engage in advertising and recruitment prior to submitting an H-2B application with the State Workforce Agency?

No. As stated in Training and Employment Guidance Letter (TEGL) 21-06 under Section III, D.2, every H-2B application shall include "documentation of any efforts to advertise and recruit U.S. workers prior to filing the application with the SWA." The employer can meet this application filing requirement by completing Item 21 of the ETA Form 750, Part A, and Application for Alien Employment Certification. If the employer has engaged in advertising and recruitment efforts prior to submitting the ETA Form 750, then Item 21 should clearly describe those efforts (e.g., dates and length of advertising, referrals received) by recruitment source. If additional space is needed, the employer may attach a separate document with the application.

In circumstances where the employer has not made any efforts to advertise and recruit prior to submitting the H-2B application, the employer should provide such notification in Item 21 and indicate that the employer is waiting for and will comply with supervised recruitment instructions from the SWA. Therefore, although the employer is not required to engage in advertising and recruitment prior to submitting the H-2B application, the employer must complete Item 21 of

the ETA Form 750, Part A, as instructed above, in order to fulfill the application filing requirement under Section III, D.2.

Regarding advertising efforts, would we need to advertise in each specific county/state within the MSA, or is it sufficient to advertise with ONE NEWSPAPER that covers all States within the MSA where the employees will be employed during the peak season?

In accordance with Section IV.D of TEGL 21-06, during 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. The phrase "a newspaper" explicitly refers to a single newspaper of general circulation. In the circumstance described above, the SWA should recommend a newspaper with the widest circulation that covers the MSA.

Is it permissible for multiple employers to recruit for U.S. workers using a single newspaper advertisement?

Training and Employment Guidance Letter (TEGL) 21-06, Section III, states that an employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, with the State Workforce Agency (SWA) serving the area of intended employment. An association or other organization of employers is not permitted to file master applications on behalf of its membership under the H-2B program. Section VII further notes that a temporary labor certification is valid only for the number of aliens, the occupation, 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. In the vast majority of cases, it is not permissible for multiple employers to use a single newspaper advertisement to recruit for U.S. workers, since the locations, wages, job duties and requirements, and/or periods of employment differ among employers. Such a situation is inconsistent with the Department's policies preventing, a bona fide test of the labor market and the effective recruitment of U.S. workers.

However, in circumstances where multiple employers are each filing separate H-2B applications and the occupation, duties to be performed, location(s) of work, job requirements, rate of pay, duration of employment, work hours and days, and State Workforce Agency (SWA) to which U.S. workers will be referred are all identical, it is permissible for multiple employers to use a single newspaper advertisement, as long as the information contained in the advertisement meets all the requirements for advertising contained in TEGL 21-06, Section IV.E. In this limited circumstance, the SWA must post a job order to advertise the job

opportunity for each employer, and the single newspaper advertisement must clearly show the name of each employer, the total number of job openings to be filled, and the SWA job order number for each employer (see example below). Please note that each employer's individual ETA Form 750 A must comport and be consistent with the information provided in the employer's advertisement. Advertisements that do not clearly show these items will be rejected and the cases will be denied.

Sample Newspaper Advertisement – For Illustrative Purposes only

Temporary Positions Available
Racehorse Groom
2-1-2007 thru 10-15-2007
Monmouth Park Racetrack, New Jersey

This portion of the advertisement should describe the job opportunity with particularity, including duties to be performed, work hours and days, rate of pay, the duration of the employment, and the minimum job requirements.

Send resume to:
Name of State Workforce Agency
SWA Address 1
City, State, Zip Code

Attention to any of the following:
Employer #1 No. of Openings SWA Job Order No. #1
Employer #2 No. of Openings SWA Job Order No. #2
Employer #3 No. of Openings SWA Job Order No. #3
…
etc.