

Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2A Temporary Agricultural Foreign Labor Certification Program
2010 Final Rule, Round 5
February 2012

Pre-Filing: ETA Form 790

Question: Is there information which must be listed in the ETA Form 790 and the ETA Form 790 Attachments that some employers may not realize is essential?

We frequently see problems in the following areas and would like to remind employers to include the information noted below in the ETA Form 790:

- Item 2 - Worksite location(s) and directions must be clear and complete
- Item 3 - Housing location(s) and directions must be clear and complete. If the employer is providing rental or public accommodations, an assurance must be submitted stating that all rental or public accommodations will meet all local, State or Federal housing standards
- Item 14 - Referral instructions must include the name of the employer's point of contact, phone number and the hours when the person can be contacted regarding an application or interview
- Item 15 – Job specifications must include as much detail as possible
- Item 16 – Indicate all deductions to be made from the worker's paycheck. Note that while employers are required by law to deduct Federal and Social Security taxes in all States, in some States employers are not required to deduct for State taxes.
- Item 17 – The employer must state the minimum amount of daily subsistence (meals costs) in Item 17 of ETA Form 790 or in the ETA Form 790 Attachments. The current minimum amount is available on the OFLC Web site at http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm

Question: What assurance must I make regarding the wage rate paid to my workers and how should I list the assurance on the ETA Form 790 or Attachments?

The employer must identify the specific wage rate offered in Item 16 of the ETA Form 790. In addition, in almost all cases, the employer must specifically state the following assurance in Item 16 of the ETA Form 790 or the ETA Form 790 Attachments: "The employer will pay the highest of the Adverse Effect Wage Rate (AEWR), the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time work is performed." Only an employer subject to an approved special procedure for an occupation or specific class of agricultural employment may be required to provide a different assurance.

Simply stating a regulatory citation is not acceptable, as the ETA Form 790 and Attachments serve to fully apprise a worker of the job offered. The worker should not have to look up a regulatory provision to understand the terms and conditions of employment.

Question: How often must workers receive their paychecks? Do I have to identify the frequency of pay on the ETA Form 790 or Attachments?

Answer: By regulation, the employer must pay workers at least twice monthly, or according to the prevailing practice in the area of intended employment, whichever is more frequent. The Office of Foreign Labor Certification (OFLC) has established the Agricultural Employment Practice Survey Library, which makes prevailing practice information available to employers. This library is available on our website at http://www.foreignlaborcert.doleta.gov/aowl_survey_pdf.cfm.

The employer must identify the specific frequency of pay applicable to the job opportunity in Item 16 of the ETA Form 790, or in the ETA Form 790 Attachments. Simply stating the regulatory citation or the general rule is unacceptable, as the ETA Form 790 and Attachments serve to fully apprise a worker of the terms and conditions of employment.

Job Offers, Assurances and Obligations

Job Qualifications and Requirements

Question: Last year the CO asked me to reduce the experience requirement I listed on my *Application for Temporary Employment Certification*. How can I tell whether my proposed experience requirement is acceptable?

Each job qualification and requirement listed on the *Application for Temporary Employment Certification* and used to recruit U.S. workers must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. The Office of Foreign Labor Certification (OFLC) has established the Agricultural Employment Practice Survey Library, which makes acceptable experience requirements available to employers. This library is available on our website at http://www.foreignlaborcert.doleta.gov/aowl_survey_pdf.cfm. The information provided in the library is collected through the State Workforce Agencies (SWAs), typically through surveys of employers to determine current practices. Surveyed employers are asked to report the basic acceptable experience necessary to perform the job, as this is consistent with the standard applied to employers seeking H-2A workers for testing the U.S. labor market.

SWAs conduct employer surveys on the acceptability of job requirements during the course of each year. Employers are strongly encouraged to check this webpage for any updates prior to preparing and submitting an agricultural job offer under the H-2A program.

Transportation and Daily Subsistence

Question: For the purposes of travel-related payments/reimbursements, what costs are the employer's responsibility?

When an employer is unable to find sufficient workers locally to perform the work it requires, bringing a worker to the employer's worksite benefits the employer and, therefore, the costs associated with the worker's travel to the employer's worksite are the employer's responsibility. By regulation, an employer is responsible for providing, paying in advance, or reimbursing a worker for the reasonable costs of transportation and daily subsistence between the employer's worksite and the place from which the worker comes to work for the employer, if the worker completes 50 percent of the work contract period, and upon the worker completing the contract, return costs. Where a worker must travel to obtain a visa so that the worker may enter the U.S. to come to work for the employer, the employer must pay for the transportation and daily subsistence costs of that part of the travel as well. The Department has traditionally interpreted the regulation to require the employer to assume responsibility for the reasonable costs associated with the worker's travel, including transportation, food, and, in those cases where it is necessary, lodging.

If not provided by the employer, the amount an employer must pay for transportation and, where required, lodging must be no less than (and is not required to be more than) the most economical and reasonable costs. Moreover, the employer is responsible for those costs necessary for the worker to travel to the worksite if the worker completes 50 percent of the work contract period, but is not responsible for unauthorized detours or unnecessary costs, and if the worker completes the contract, return transportation and subsistence costs. For example:

- The employer is not responsible for the cost of a worker's lodging when the worker chooses to arrive earlier than required for a visa appointment at the U.S. Consulate. If the appointment is so early in the morning, that the worker could not reasonably be expected to travel to the consulate that same day, the employer will be liable for the cost of lodging the night before the appointment.
- The employer is responsible for the cost of a worker's lodging where, after the worker attends a required appointment at the U.S. Consulate, the worker must remain nearby overnight while waiting for the U.S. Consulate to issue the visa.

- The employer is responsible for the cost of a worker's lodging from the time the worker leaves the U.S. Consulate to the time he arrives at the worksite. The employer is also responsible for the worker's return transportation and subsistence costs upon the worker completing the work contract.

The amount an employer must pay for food is at least as much as the employer would charge the worker for providing the worker with three meals a day during employment and no more than a maximum amount established annually based on the standard rate for the Continental United States (CONUS) for meals and incidental expenses as published by General Services Administration (GSA). The current minimum and maximum amounts for meals and incidental expenses are available on the OFLC website at http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm.

Please note that the FLSA applies independently of H-2A and imposes obligations on employers regarding the payment of wages.

Positive Recruitment and Hiring of U.S. Workers

Question: The Notice of Acceptance I received instructs me to place advertisements in other States. What job order number and State Workforce Agency (SWA) contact information should I put in the advertisements?

All advertisements should contain the same job order number. The job order number in all advertisements is the job order number the SWA serving the area of intended employment (the order holding office) assigns to the employer's ETA Form 790.

It has been our practice to accept a statement in out-of-state advertisements directing prospective applicants to apply for the job opportunity at the nearest local office of the SWA. This statement, combined with the employer's own contact information listed in the advertisement, provide sufficient contact information for an applicant to connect with the job opportunity. The employer is not required to research and identify in the advertisement the specific SWA name or contact information for the local out-of-state SWA office.

Post-Certification

Question: I received a certification, but the number of workers certified is less than the number I requested. Why has this happened?

The Certifying Officer (CO) may issue a partial certification, reducing the number of H-2A workers, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*. The number of requested workers will be reduced for each U.S. worker that is able, willing and qualified to fill the

position and who was not rejected for a lawful job-related reason. The number of workers certified on the application will also be reduced when the number of requested workers exceeds the capacity of the pre-occupancy housing inspection conducted by the State Workforce Agency (SWA). When issuing a partial certification, the CO includes an enclosure that fully details the specific reason for the partial certification.

Question: The new annual Adverse Effect Wage Rate (AEWR) has been published and the AEWR applicable to my job opportunity has gone down. What am I required to pay?

The employer is required under the regulations to offer, advertise, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed upon collective bargaining wage, or the Federal or state minimum wage, in effect at the time the work is performed. Where the new AEWR is still the highest rate, an employer may pay the new, lower AEWR. If, however, the new AEWR is lower than the prevailing hourly wage or piece rate, the agreed upon collective bargaining wage, or the Federal or State minimum wage in effect, the highest of those wage rates will become the employer's new minimum wage rate requirement.

Question: How can I obtain a duplicate certified ETA Form 9142?

An employer cannot obtain a duplicate certified ETA Form 9142. A request for a duplicate certified ETA Form 9142 may only be made by the U.S. Citizenship and Immigration Services (USCIS) to DOL at the discretion of USCIS. Generally, USCIS will not make a request for a duplicate certified ETA Form 9142 unless the employer can establish there are extenuating circumstances beyond its control which caused the initial certification to become unavailable.

Employers requesting that USCIS obtain a duplicate certified ETA Form 9142, should include on the top of the I-129, Petition for Nonimmigrant Worker, a cover sheet (preferably highlighted with colored paper) stating the following: NO TEMPORARY LABOR CERTIFICATION, REQUEST FOR DUPLICATE, DO NOT REJECT.

On the cover sheet, the following information should also be included:

1. Attorney or agent name, if applicable;
2. Employer's name; and
3. ETA case number.

In addition to the coversheet, proper fee, signature and all required supporting documents, the employer must provide the reason(s) that the original ETA Form 9142 cannot be submitted and evidence to support its claim.

Once USCIS receives the duplicate certified ETA Form 9142, USCIS will contact the employer and/or his representative via a Request for Evidence (RFE) in order to secure the employer's signature on the duplicate certification.

DOL WILL NOT SEND THE DUPLICATE CERTIFIED ETA FORM 9142 TO THE EMPLOYER. DOL WILL SEND IT ONLY TO USCIS.