

Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2B Final Rule Published on February 21, 2012
Round One
April 2012

On February 21, 2012, the Department of Labor published in the Federal Register a Final Rule amending its regulations governing the certification of employment of nonimmigrant workers in temporary or seasonal nonagricultural employment and the enforcement obligations applicable to employers of H-2B workers and U.S. workers similarly employed. These FAQs are provided to assist employers, workers, and other interested parties in interpreting the 2012 Final Rule as it goes into effect.

General

1. Why is the Department of Labor changing the current regulations, which were published in 2008?

The Department determined for a variety of reasons that a new rulemaking effort was necessary for the H-2B program. These policy-related reasons include the need to expand opportunities for U.S. workers, to address a lack of understanding of program obligations and evidence of violations of program requirements, and to strengthen worker protections.

Final Rule Implementation and Transition

2. When I file an H-2B application under the 2012 Final Rule and my start date of need is before October 1, 2013, do I need to submit documentation demonstrating I have a temporary need?

An employer with a start date of need before October 1, 2013 **is not required to obtain the pre-approved H-2B Registration but** must submit a statement of temporary need by completing Section B of the ETA Form 9142 sufficient to demonstrate its temporary need. We strongly recommend that employers also provide supporting documentation substantiating the statement of temporary need with the *Application for Temporary Employment Certification* (H-2B application). The employer's documentation should demonstrate that the job opportunity is bona fide, full-time (35 hours or more per week), and qualifies as non-agricultural; that the need for the services or labor to be performed is temporary in nature; and that the number of worker positions and period of need being requested for certification are justified.

Examples of documents that can assist an employer in justifying temporary need include, but are not limited to, the following:

- Monthly invoices from previous calendar years showing work will be performed for each month during the requested period of employment;
- Annualized and/or multi-year work contracts or work agreements showing the dates when work will commence and end and work will be performed for each month during the requested period of employment; or
- Summarized monthly payroll reports in the occupation from previous calendar years showing total workers employed, total hours worked, and total earnings received (separately for full-time permanent and temporary employment)

Important Note: If the employer does not include supporting documentation with its H-2B application and the Certifying Officer determines that the statement of temporary need alone is insufficient to substantiate the temporary need, the Certifying Officer may issue a Notice of Deficiency and request that the employer provide supporting documentation demonstrating that it has a temporary need for the services or labor to be performed.

H-2B Program Participation Requirements

3. What are the threshold criteria for participating in the H-2B program?

In order to participate in the H-2B program, an applicant must be an employer possessing a valid Federal Employer Identification Number (FEIN) that has a place of business (i.e., physical location) in the United States and a means by which it may be contacted for employment. The employer's job opportunity must be for one or more openings for full-time, non-agricultural employment within a specified area(s) of intended employment. Moreover, the employer applicant must establish that its need for non-agricultural services or labor is temporary in nature, regardless of whether the underlying job is permanent or temporary.

4. Since the regulations permit an employer to seek H-2B workers for full-time employment only, what constitutes full-time employment under the 2012 H-2B Final Rule?

Under the 2012 Final Rule, full-time employment means 35 hours or more of work per week. An employer or industry practice of labeling a job opportunity as "full-time" but, in fact, offering less than 35 hours of work per week does not constitute full-time employment under the 2012 Final Rule. Employers are and will continue to be required to accurately represent the actual number of hours per week associated with the job opportunity, recruit U.S. workers on the basis of those hours, and pay for all hours of work. Therefore, if an employer routinely offers workers 40 or more hours of work per week in the requested job opportunity, that should be disclosed. Full-time employment is measured by the number of hours of work offered per week, and job opportunities

offering less than 35 hours of work per week are not permitted under the 2012 Final Rule.

5. Since the regulations permit an employer to seek H-2B workers for temporary employment only, what constitutes a temporary need for workers under the 2012 H-2B Final Rule?

An employer must establish that its need for non-agricultural services or labor is temporary in nature, which means the need is for a limited period of time and, as defined by the Department of Homeland Security (DHS), will “end in the near, definable future.” See 8 CFR 214.2(h)(6)(ii)(B). The DHS categorizes and defines temporary need into the following four standards:

1. One-time occurrence: The employer must establish the following:
 - 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
 - It has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

2. Seasonal need: The employer must establish the following:
 - The services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature
and
 - The period(s) of time during each year in which it does not need the services or labor.

Important Note: The employment is not seasonal if the period during which the services or labor is not needed is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees.

3. Peakload need: The employer must establish the following:
 - It regularly employs permanent workers to perform the services or labor at the place of employment
and
 - 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
 - The added temporary staff will not become a part of the employer's regular operation.

4. Intermittent need: The employer must establish the following:
 - It has not employed permanent or full-time workers to perform the services or labor
but

- Occasionally or intermittently needs temporary workers to perform the services or labor for short periods.

Under the 2012 Final Rule, an employer's temporary need justified on either a seasonal, peakload, or intermittent basis will be limited to 9 months or less in duration. An employer's temporary need justified on a one-time occurrence basis can be approved for up to 3 years.

6. I am a job contractor or staffing company. Which standards of temporary need can my company use to demonstrate temporary need under the 2012 H-2B Final Rule?

A job contractor, filing as a joint employer with its employer-client, is afforded the opportunity to prove it has a temporary need for services or labor. Under the 2012 Final Rule, a job contractor is only permitted to seek certification if it can demonstrate through documentation its own temporary need (not its employer-client's temporary need) using only the seasonal or one-time occurrence standards. A job contractor will not be permitted to demonstrate temporary need using the intermittent or peakload standards.

Pre-Filing Requirements

7. What, if anything, is the employer required to do before filing an application under the H-2B Program under the 2012 Final Rule?

Before filing an *Application for Temporary Employment Certification* (H-2B application), an employer must obtain a prevailing wage determination (PWD), which must be valid on the date the H-2B application and job order is filed with the OFLC Chicago NPC. Additionally, for employers with a start date of need on or after October 1, 2013, the employer is required to obtain a valid H-2B Registration from the OFLC Chicago NPC prior to filing the H-2B application and job order.

Important Note: Unlike under the 2008 Final Rule, the 2012 Final Rule does not require the employer to conduct pre-filing recruitment. Instead, employers are required, and will be directed by the OFLC Chicago NPC, to conduct recruitment after filing the H-2B application and job order. However, when filing the H-2B application, the employer must concurrently file the job order with the State Workforce Agency serving the area of intended employment where work will be performed.

8. Does the 2012 Final Rule require employers to begin recruiting U.S. workers before filing their applications with the Department?

No. The 2012 Final Rule requires an employer to engage in recruitment after it files the H-2B application and receives notification from the OFLC Chicago NPC that its H-2B application and job order has been approved through the issuance of a Notice of Acceptance Letter.

Application and Job Order Filing and Processing

9. What supporting documentation do I need to file with the ETA Form 9142 *Application for Temporary Employment Certification*?

An employer must include the following documents when filing an ETA Form 9142 *Application for Temporary Employment Certification* (H-2B application) with the OFLC Chicago NPC:

- ETA Form 9142 and Appendix B.1
 - Must submit under original signature
 - Include the prevailing wage determination case number from the ETA Form 9141
 - If the start date of need is on or after October 1, 2013, include the approved H-2B registration number from the ETA Form 9155
- Copy of the job order concurrently submitted to the State Workforce Agency
- If the employer is represented by an attorney or agent, then submit a document verifying the attorney or agent's authority to represent the employer (e.g., attorney G-28 or agent agreement)
- If the employer, or its authorized attorney or agent, engages or plans to engage any agent(s) or recruiter(s) in the international recruitment of H-2B workers, then the following additional documents are required:
 - Copies of all contracts/agreements with any agent and/or recruiter engaged in international recruitment of H-2B workers (which must prohibit the agent/recruiter from charging the workers fees, using the language set forth in 20 CFR 655.20(p)).
 - A listing of the identity and location of all subcontractors (i.e., persons and entities) hired by or working for the agent or recruiter, and any agents or employees of those subcontractors, who recruit H-2B workers.
- If the employer and/or agent is engaged in farm labor contracting activities, a copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration that is valid for the entire period of certification

Important Note: Remember, if the employer has a start date of need before October 1, 2013, the employer is not required to first obtain an approved H-2B Registration, but must submit a statement of temporary need (Section B, ETA Form 9142) and should include with the H-2B application any supporting documentation necessary to justify its temporary need.

Employers seeking temporary labor certification for occupations involving special procedures (e.g., reforestation, entertainers) must submit other required documents (e.g., itineraries) with the H-2B application.

10. How can an employer be sure it is using the most current version of the *Application for Temporary Employment Certification*, Form ETA 9142?

The current version of the *Application for Temporary Employment Certification*, ETA Form 9142 and Appendix B.1, is available on our Web site. Employers may download this and other the required forms in PDF format from our Web site at <http://www.foreignlaborcert.doleta.gov/form.cfm>.

Important Note: Under certain circumstances, a form on our Web site at <http://www.foreignlaborcert.doleta.gov/form.cfm> may appear to be nearing expiration, based on the "Expiration Date" appearing in the upper left hand corner of the form. Be assured that we have undertaken the required steps to ensure continued validity of such a form; the forms on our Web site at <http://www.foreignlaborcert.doleta.gov/form.cfm> are the current forms and are valid for use until expired, in which event they will be immediately removed from our Web site.

Special Procedures

11. Will the current special procedures continue under this Final Rule?

Yes. As stated in the 2012 Final Rule, the Department sees no need to upset the settled expectations of employers who have relied upon special procedures for many years, at least to the extent they do not conflict with the 2012 regulations. To the extent that current special procedures are in conflict with these regulations, the 2012 regulations will take precedence. The Department is in the process of reviewing and updating special procedures applicable to the H-2B program. The public will be advised if and when new special procedures are available.