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H-2A and H-2B Labor Certification Programs
Requirements, Filing Tips & Best Practices

October 25, 2018

American Agricultural Law Association

PHELPS DUNBAR, LLP

H-2A and H-2B Labor Certification Programs
Webinar Briefing Outline

- I. Overview of Department of Labor's OFLC
- II. Program Workload Trends & Regulatory Authority
- III. Program Requirements, Filing Tips & Best Practices
 - Step 1: Obtain a Prevailing Wage
 - Step 2: Submit a Job Order to SWA
 - Step 3: Submit Application to DOL-OFLC
 - Step 4: DOL-OFLC Processing of Application
 - Step 5: Issuance of Final Determination
- I. Helpful Tips for Responding to H-2A Audit Examinations
- II. Resources for Checking Processing Times

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Understanding the H-2A and H-2B Programs



Briefing Section I

Overview of Department of Labor's
Office of Foreign Labor Certification

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Understanding the H-2A and H-2B Programs

Overview of the Immigration Process

- Step 1** Obtain a labor certification from the **Department of Labor**
 - Requires conducting a labor market test with the State Workforce Agency where work will be performed
- Step 2** Obtain an approved petition from the **DHS United States Citizenship and Immigration Service** for a specific number of workers under H-2A or H-2B visa classification
- Step 3** After receiving USCIS petition approval, workers will apply with one of the **Department of State** visa-issuing consulates abroad for an H-2A or H-2B visa
- Step 4** After receiving the visa from a DOS consulate, workers arrive at a port of entry where **DHS's Customs and Border Protection** officers verify eligibility for admission and length of stay

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Department of Labor

Office of Foreign Labor Certification - Overview

- Through a delegation from the Secretary of Labor, OFLC administers employment-based immigration programs
 - “Employment-based” means that an employer and not the foreign worker is filing an application
- OFLC certifies to DHS-USCIS and DOS that:
 1. There are not sufficient U.S. workers who are able, willing, qualified, and available for the requested positions; and that the
 2. Employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers

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Department of Labor

Office of Foreign Labor Certification - Overview

- OFLC receives and processes employer-filed applications through National Processing Centers
- OFLC programs are divided, by visa classification, into two major types:

Immigrant Non-Immigrant

Atlanta Processing Center Chicago Processing Center

Permanent (PERM) Program H-1B, H-1B1, E-3 Skilled Occupations Visas

“Green Card” H-2A Temporary Agricultural Visa

H-2B Temporary Non-Agricultural Visa

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Understanding the H-2A and H-2B Programs



Briefing Section II Program Workload Trends & Regulatory Authority

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Department of Labor: H-2A Program Visa Program Features & Workload Trends

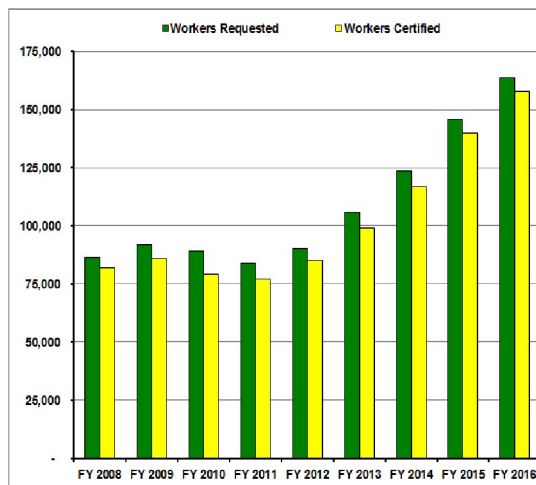
H-2A Program Features

- 8,373 applications processed during FY 2016 *
- 96% certification rate
- Peak season (Dec-Apr; July-Oct)
- Pre/Post-filing labor market test

Select Economic Sectors

- Sheep and Cattle Ranching
- Christmas Trees/Logging
- Wheat Harvesting
- Tobacco, Fruits and Vegetables
- Migratory Beekeeping

* Data available through September 3, 2016



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Department of Labor: H-2A Program

Current Regulatory Authority

- 20 CFR 655, Subpart B (effective March 15, 2010)
<https://www.foreignlaborcert.doleta.gov/h-2a.cfm>
- Department published a Final Rule establishing special procedures for the herding or production of livestock on the range (effective November 16, 2015)
 - Implementation website for all factsheets, small business handbook, FAQs, and technical assistance materials at
https://www.foreignlaborcert.doleta.gov/h-2a_herders.cfm

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Department of Labor: H-2B Program

Visa Program Features & Workload Trends

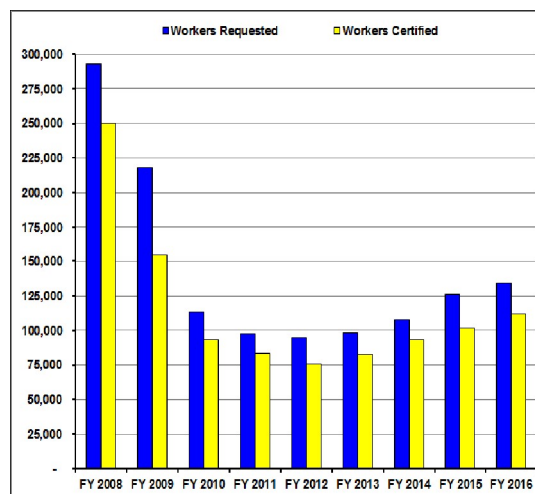
H-2B Program Features

- 6,876 applications processed during FY 2016 *
- 82% certification rate
- Peak season (Dec-Feb; July-Aug)
- Post-filing labor market test

Select Economic Sectors

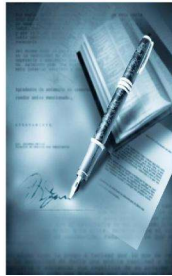
- Landscaping/Reforestation
- Resort Hotels/Restaurants
- Construction
- Amusement/Recreation
- Horse Racing/Ski Resorts
- Seafood (*shrimp, crabs, oysters*)

* Data available through September 3, 2016



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Understanding the H-2A and H-2B Programs



Briefing Section III

Program Requirements, Filing Tips & Best Practices

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Department of Labor: H-2A and H-2B Programs Comparing Wage Setting Requirements

H-2A Agriculture H-2B Non-Agriculture

STEP 1: Obtain Prevailing Wage

- Employer obtains minimum wage information from OFLC website
- Offer, advertise in recruitment, and pay the highest of the following:
 1. Adverse Effect Wage Rate (AEWR)
 2. Prevailing Hourly Wage or Piece Rate
 3. Collective Bargaining Wage
 4. Federal or State Minimum Wage
- Employer begins preparing a job order on the Form ETA-790 and H-2A application package

Recommended Timeframe: Between 90 and 75 days before work start date

- Employer obtains prevailing wage from OFLC NPWC (Form ETA – 9141)
- Offer, advertise in recruitment, and pay the highest of the following:
 1. Prevailing Wage
(e.g., BLS-OES mean wage, acceptable employer survey, CBA)
 1. Federal, State or Local Minimum Wage
- Employer begins preparing a job order and the H-2B application package

Recommended Timeframe: Between 150 and 135 days before work start date

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H-2A Agriculture Program Wage Setting Requirements

Hourly AEWRs

- Based on U.S. Department of Agriculture's (USDA) Farm Labor Survey
- Annual weighted average hourly wage for field and livestock workers (combined)
- Wage rates are statewide based on USDA regions
- For current AEWRs, visit the OFLC Agricultural Online Wage Library at:

<https://www.foreignlaborcert.doleta.gov/adverse.cfm>

STATE	2016 AEWRS
Alabama	\$10.59
Arizona	\$12.25
Arkansas	\$10.59
California	\$11.89
Colorado	\$11.27
Connecticut	\$13.74
Delaware	\$13.44
Florida	\$10.70
Georgia	\$10.89
Hawaii	\$12.44
Idaho	\$11.74
Illinois	\$12.07
Indiana	\$12.07
Iowa	\$12.27
Kansas	\$13.40
Kentucky	\$10.81

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H-2A Agriculture Program Wage Setting Requirements

Prevailing Wage

- The wage (hourly, weekly) determined by the SWA to be prevailing in the local, regional, or statewide area

Prevailing Piece Rate

- The amount that is paid to workers in the crop or commodity per piece (e.g., bin, pallet, bushel) determined by the SWA to be prevailing in the local, regional, or statewide area
- For current prevailing wages, visit the OFLC Agricultural Online Wage Library at: <http://www.foreignlaborcert.doleta.gov/aowl.cfm>

Task	Wage	Reporting Period
Ballroom	\$13.01 Per Hour	07/04/2014
Balancing	\$12.21 Per Hour	07/07/2015
Balancing	No Posting LL	09/19/2014
Shovel/Gr	\$14.03 Per Month 221	07/04/2014
Ballroom	\$12.21 Per Hour	12/20/2013
Shov. Eric Shaver	\$2.82 Per Hour	01/08/2013
Shov. Wood Parker	No Posting LL	01/08/2013
Shov. Wood Parker	\$9.20 Per Hour	01/08/2013
Shov. Wood Parker	No Posting LL	01/08/2013
SHEEPHERDS AND GOATHERDS OCCUPATIONS	\$14.22 Per Month Plus Room and Board	01/08/2013
Wheat/Grain Harvest, Custom Combine Operator	\$6.20 Per Hour	01/08/2013
Wheat/Grain Harvest, Tractor Driver	No Posting LL	01/08/2013
Naval Trng. Harvest	No Posting LL	04/20/2013
Cut Pines Harvest	No Posting LL	11/18/2014
Harvesting Harvest	No Posting LL	11/18/2014
Calery Harvest	No Posting LL	04/16/2014
Cut/Pines Harvest	\$9.00 Per Hour	04/16/2014
Bushel Harvest	\$9.20 Per Hour	04/16/2014
Bushel Harvest	\$9.20 Per Hour	04/16/2014

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H-2A Agriculture Program Wage Setting Requirements

- Questions about minimum wage requirements should be directed to the SWA at the time of placing the job order
- If the USDA hourly AEWB **and/or** the SWA prevailing wage or piece rate is adjusted during a work contract period **and** is now the highest applicable minimum wage in effect at the time work is performed, the employer must pay that higher wage

Important Reminders:

- Annual updates to the USDA hourly AEWBs are published in the Federal Register some time during the month of December
- Remember that the **monthly** AEWB for occupations involved in the **herding or production of livestock** will also be published in the Federal Register in December and become effective January 1, 2016

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H-2A Agriculture Program Sample Wage Offers on Form ETA-790

- Make sure wage offer(s) **match** the Form ETA-9142A in each of the crops and commodities

17. Wage Rates, Special Pay Information and Deductions / Tarifa de Pago, Información Sobre Pagos Especiales y Deducciones (Rebajas)							
Crop Activities	Hourly Wage	Piece Rate / Unit(s)	Special Pay (bonus, etc.)	Deductions*	Yes/Sí	No	Pay Period / Período de Pago
Cultivos	Salario por Hora	Pago por Pieza / Unidad(es)	Pagos Especiales (Bono, etc.)	Deducciones			/ /
Apple Harvest	\$11.74	\$1.00 per 1-1/8 BU. Box		Social Security / Seguro Social	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Weekly / Semanal
Orchard Labor	\$11.74			Federal Tax / Impuestos Federales	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Apple Packing	\$11.74			State Tax / Impuestos Estatales	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Bi-weekly / Quincenal
				Meals / Comidas	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
				Other (specify) / Otro (especifica)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Monthly/Mensual
							<input type="checkbox"/>

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H-2B Non-Agriculture Program Wage Setting Requirements

General Filing Tips

- **DO NOT WAIT!** Please file your request for a prevailing wage determination as soon as practically possible
- As of July 1, 2016, the validity period for prevailing wage determinations will be issued to June 30, 2017
- Under the 2016 DOL Appropriations Act, the term “private survey” include (1) government surveys not conducted or issued by DOL, and (2) non-government surveys conducted by private individuals or organizations who are *bona fide third parties*
- Employer-provided surveys must provide the single arithmetic mean of wages paid to all workers in the occupational classification within the area of intended employment, regardless of skill level, experience, education, and length of employment
 - **Reminder:** Where the survey provides only a median, not an arithmetic mean, a median wage is acceptable

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H-2B Non-Agriculture Program Wage Setting Requirements

Job Descriptions: Be Thorough, Yet Concise

- **DO** be concise, but adequately thorough to avoid RFI and expedite processing
- **DON'T** include information unrelated to job duties and unnecessary to determine the skill, knowledge, and experience requirements for the job
 - Do not include “worker notice” statements that detail the workweek, pay schedule, age requirements, or other details unrelated to the duties and qualifications required to perform them
 - Do not include statements about lodging
 - Do not restate the legal requirements outlined in the regulation
 - Just because something is needed for advertising does not mean it has to be in the PWD job duties

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H-2B Non-Agriculture Program Wage Setting Requirements

Job Descriptions: Be Thorough, Yet Concise

- **DO** include **relevant** facts about the **nature and extent** of each duty
 - Descriptions of the size/scope of trenching work must be sufficient to permit a determination of whether the work is hazardous
 - Descriptions of food preparation/handling duties must be sufficient to permit a determination of the type of food and whether the worker cooks and/or serves the food
 - Cook hamburgers, French fries and chicken patties using a repetitive process
 - Cook menu items according to recipe
 - Assemble sandwiches and serve to customer at counter
 - Serve premade foods/beverages to customers at counter and accept payment
 - What and where loading/unloading of products or commodities is occurring
 - Unload bags of crawfish from truck
 - Unload finished table legs from lathe
 - Load boxes of shingles onto pallet then onto the warehouse shelves using a forklift

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H-2B Non-Agriculture Program Wage Setting Requirements

Survey Samples: Survey the Necessary Area

- **DO** survey all, or a randomized sample of all, employers of workers within the **entire** *Area of Intended Employment* (AIE)
 - AIE = Area within normal commuting distance of the place of employment. Includes **any place** within the Metropolitan Statistical Area (MSA) encompassing the worksite. Locations outside the MSA **may** be included if they and the worksite are near the MSA border. 20 CFR 655.3
- **DON'T** expand the surveyed area beyond the AIE without explaining necessity (must be in survey documents)
 - Area may be expanded if insufficient # of employers (<3)
 - OR insufficient # workers (<30) in the occupation, are available in the AIE

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H-2B Non-Agriculture Program Wage Setting Requirements

Survey Samples: Survey the Necessary Area

□ **DO** describe the extent of expansion and explain that the expansion was (must be in survey documents):

1. No greater than necessary to meet the 30 worker/3 employer sample size requirement
2. Limited to areas contiguous with (immediately surrounding) the AIE (“**Incremental, tailored expansion**”)

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H-2B Non-Agriculture Program Wage Setting Requirements

Survey Samples: Describe the Wage Sample

- **DO** include all required types of pay in the wage sample
 - **Required Types** = Base rate, piece rate, production bonus, tips, incentive pay, and several others listed in the ETA-9165 instructions
 - Reported as an hourly rate
- **DO** describe the method used to convert piece rate/bonus pay to hourly survey wage

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H-2B Non-Agriculture Program Wage Setting Requirements

Survey Samples: Describe the Wage Sample

- An easy way to meet the wage sample requirements is to use the Total Compensation Method
- All types of pay (e.g., *base*, *piece*, *tips*) for all workers divided by hours worked by all workers to earn that compensation.

Employer	Workers	Compensation	Hours
A	5	\$8,272.08	802
B	7	\$11,189.18	918
C	23	\$42,002.76	3678
D	19	\$38,890.72	3344
E	4	\$8,042.66	794
Total		\$108,397.40	9536
Hourly Rate		\$11.37 per hour	

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H-2B Non-Agriculture Program Wage Setting Requirements

Form ETA-9165: Avoid Common Errors

- DON'T confuse the universe size with the sample size
 - The universe is the number of firms employing workers and may be an estimate.
 - The sample size is the number of employers asked to provide information and is a subset of the universe

Example: The surveyor has determined there are about 600 firms who employ similarly employed workers and surveys were sent to 75 of them. Of the 75 who received surveys, 26 gave usable results.

- Universe (E.1) = 600
- Sample Size (E.4) = 75
- Data from Employers (E.9) = 26

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H-2B Non-Agriculture Program

Wage Setting Requirements

Form ETA-9165: Avoid Common Errors

- **DO** ensure you have listed the correct AIE surveyed in [Field D.3](#), Form ETA-9165
 - List the counties within normal commuting distance from the work address
 - It is acceptable to list the MSA where the worksite(s) is located in a MSA since any place within the MSA is deemed by the regulation to be within normal commuting distance of the place of intended employment

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Department of Labor: H-2A and H-2B Programs

Comparing SWA Job Order Filing Requirements

H-2A Agriculture H-2B Non-Agriculture

STEP 2: Submit Job Order to State Workforce Agency

- | | |
|---|--|
| <ul style="list-style-type: none">• Submits Form ETA-790 and informs SWA of intent to file a <u>future</u> application for H-2A workers• Job order must meet the content requirements at 20 CFR 653 Subpart F and 20 CFR 655.122• SWA reviews job order, notifies <i>employer</i> of deficiencies <u>within 7 calendar days</u> OR if acceptable, begins in-state recruitment• Request that State Agency inspect housing for farmworkers (if applicable) | <ul style="list-style-type: none">• Submits job order and informs SWA that a <u>concurrent</u> application for H-2B workers has been filed• Job order must meet the content requirements at 20 CFR 655.18 and any state-specific requirements• SWA reviews job order and notifies the <i>OFLC Chicago NPC</i> of any deficiencies <u>within 6 business days</u>• MUST have a valid prevailing wage determination to prepare wage offer(s) |
|---|--|

Regulatory Timeframe: Between 75 and 60 days before work start date

Regulatory Timeframe: Between 90 and 75 days before work start date

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H-2A Agricultural Program

Preparing the Form ETA-790 – General Requirements

- Employer's job opportunity must . . .
 - Offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers
 - Not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2A workers
 - Offer job qualifications and requirements that are 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
 - CO or SWA may require employer to submit documentation substantiating the appropriateness of any qualification contained in the ETA Form 790

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H-2A Agricultural Program

Tips for Preparing the Form ETA-790

- Make sure the job order contains the minimum content requirements under 20 CFR 655.122(d)

Minimum Benefits, Wages, and Working Conditions	Regulatory Citation(s)
Provision of Housing	655.122(d)
Provision of Workers' Compensation	655.122(e)
Provision of Tools, Supplies, and Equipment	655.122(f)
Provision of Meals or Cooking Facilities	655.122(g)
Provision of Transportation and Daily Subsistence	655.122(h)
Three-Fourths Guarantee	655.122(i)
Hours/Earnings Records, Rates and Frequency of Pay	655.122(j) through (m)
Abandonment or Termination for Cause	655.122(n)
Contract Impossibility	655.122(o)
Required Deductions from Worker's Pay	655.122(p)
Work Contract or ETA Form 790 and attachments	655.122(q)

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H-2A Agricultural Program

Tips for Preparing the Form ETA-790

- Make sure the expected start and end dates of work and the number of workers requested match the Form ETA-9142A
 - Identify all housing units for workers including -
 - Clear and legible directions to each housing location
 - Description of the housing and type (e.g., rental/public accommodation, labor camp, 2-story wood frame barracks) -
 - Capacity of the housing unit, if available
 - For rental housing or other public accommodations, employer must provide a signed and dated assurance from the housing operator that identifies the applicable housing standards (e.g., local, state, federal) and that the housing unit(s) meet those standards

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H-2A Agricultural Program

Tips for Preparing the Form ETA-790

- Make sure the job description/requirements match the Form ETA-9142A and are normal and accepted by non-H-2A employers in the same or comparable occupations and crops

16. Job description and requirements / Descripción y requisitos del trabajo:

All applicants must be able, willing and qualified to perform the work described in this job description and must be available for the entire period of employment specified in Box 9 on Page 1. This work order is for qualified people to perform the duties of general orchard work and harvesting produce in an apple orchard. Workers must have the knowledge and ability to prune, thin and train apple trees, and be willing to work in varied weather conditions – during harvest as high as 90 degrees with damp fall mornings. Workers must be able to handle and climb a 20 foot ladder repetitively while carrying an apple picking bucket which is harnessed over the workers shoulders. Other duties will include picking rocks to prepare soil for planting, training and pruning apple trees, driving tractor, picking up brush from orchard floor, repairing broken bins, and planting and watering trees. Workers may work in a packing house and drive truck to remove apple bins from the outlying orchards at harvest time. The employer will provide 1 day of training and allow 2 days of work for the worker to reach production standards. When harvesting apples, productivity must be at least 60 1-1/8 bushel boxes per 7 hours worked with no more than 5% bruising for fresh market. Work requires long periods of standing, bending and kneeling. Workers must be able to lift and carry up to 50 pounds and be available to work Monday through Saturday. Employer will furnish to workers without cost all tools and equipment required to perform duties assigned. Worker will be given 30 minutes for lunch. Beginning and ending times will vary depending on the conditions in the orchard. Workers must be able to take directions in simple English.

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H-2A Agricultural Program

Tips for Preparing the Form ETA-790

IF the employer identifies certain job requirements, make sure that the appropriate boxes in Fields 16a and 16b are completed and match

- a. Is previous work experience preferred? / Se prefiere previa experiencia? Yes / Si No
numero de meses de experiencia: 1

Best Practice: Good example of how the employer matched up the job description narrative with the responses to some of the fields in 16b, Form ETA-790

b. Check all requirements that apply:

- Certification/License Requirements / Certificación/Licencia Requisitos
- Driver Requirements / Requisitos del conductor
- Employer Will Train / Empleador entrenará o adiestrará
- Extensive Sitting / Estar sentado largos ratos
- Exposure to Extreme Temp. / Expuesto a Temperaturas Extremas
- Lifting requirement / Levantar o Cargar 50 lbs./libras
- Repetitive Movements / Movimientos repetitivos

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H-2A Agricultural Program

Tips for Preparing the Form ETA-790

Productivity standards

- Cannot be tied to an hourly rate of pay
- Be careful of language in job orders that appear to create production standards that are vague and not clearly understood (e.g. *perform work in a timely and proficient manner*)
- Regulation requires that production standards must be no more than those normally required (*at the time of the first H-2A application*) by other employers for the activity in the area of intended employment
- Generally, production standards for employers who use the H-2A program cannot be increased in subsequent filing years
- More information on the use of production standards can be found in Round 9 FAQs posted on October 2015 at [https://www.foreignlaborcert.doleta.gov/pdf/H-2A FAQ Round9.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2A%20FAQ%20Round9.pdf)

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H-2A Agricultural Program

Tips for Preparing the Form ETA-790

- If you need more space to explain the terms and conditions of employment, please use an attachment that is **clearly labeled and reference the ETA Form 790 item number**
- Best practice example:

FORM ETA 790 ATTACHMENTS

ATTACHMENT I

JOB ORDER NUMBER 426895

The employer assures that the working conditions comply with applicable Federal and State minimum wage, child labor, farm labor contractor registration and other employment-related laws.

A. CLARIFICATIONS OF ITEMS ON FORM ETA 790

Item 17 – Wage Rates, Special Pay Information and Deductions:

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H-2A Agricultural Program

Tips for Preparing the Form ETA-790

- Disclose the current amounts for transportation and daily subsistence payments to workers located at:
[http://www.foreignlaborcert.doleta.gov/meal travel subsistence.cfm](http://www.foreignlaborcert.doleta.gov/meal%20travel%20subsistence.cfm)
- Proofread documents prior to submission for errors and inconsistencies
- Ensure all required information on the ETA Forms 790 are **completed** prior to submission
- Ensure the form is signed and dated by the employer;
NOT the employer's authorized agent or attorney
 - Electronic signature of the employer on the Form ETA-790 is acceptable

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H-2B Non-Agricultural Program

Preparing the Job Order – General Requirements

- A completed job order must be submitted to the SWA at the same time the employer submits the H-2B application
- Employer must inform the SWA that the job order is being placed in connection with a concurrent application for H-2B workers
- If the anticipated worksites are located in more than one State within the area of intended employment, the employer may submit the job order to any one of the SWAs having jurisdiction over the those worksites

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H-2B Non-Agricultural Program

Preparing the Job Order – General Requirements

- Employer's job opportunity must . . .
 - Offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers
 - Not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2B workers
 - Offer job qualifications and requirements that are bona fide and consistent with the normal and accepted qualifications and requirements imposed by employers that do not use H-2B workers in the same occupations and area of employment
 - CO may require employers to submit documentation substantiating the appropriateness of any job qualification and/or requirement

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H-2B Non-Agricultural Program

Tips for Preparing the Job Order

- Many SWAs maintain job order systems that permit employers to place job orders using “self-service”, while others require “staff-assistance” and use a standard job order form
- Regardless of the method, the employer **must** apprise the SWA or otherwise provide notification that the job order is being placed in connection with an H-2B application
- If the SWA form does not have a dedicated field to indicate “H-2B”, then provide notification using an “open text field” or when transmitting (e.g., email) the job order

Best Practice Tip: Contact the SWA early in the process to understand how to submit a job order and/or obtain a copy of the SWA's standard job order form. Make sure the SWA has the capability to make modifications on your behalf, in the event certain job order content is not regulatory compliant.

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H-2B Non-Agricultural Program

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 inquire as to what minimum language can be entered

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H-2B Non-Agricultural Program

Tips for Preparing the Job Order

- Make sure the job order contains the minimum content requirements under 20 CFR 655.18

Job Order Content Requirements	Regulatory Citation	
State the employer's name and contact information	655.18	(b)(1)
Indicate 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)
State a single workweek will be used in computing wage due	655.18	(b)(8)
Specify the frequency of pay	655.18	(b)(9)

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H-2B Non-Agricultural Program

Tips for Preparing the Job Order

Job Order Content Requirements	Regulatory Citation	
Provision of board, lodging, or other facilities <i>(if applicable)</i>	655.18	(b)(10)
State 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)
State 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 (not required due to 2016 Omnibus Act)	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](https://www.foreignlaborcert.doleta.gov/pdf/H-2B%20Job%20Order%20Checklist.pdf)

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H-2B Non-Agricultural Program Best Practice Example Job Order

Employer's name	Job Description
655.18 (b)(1)	Vail Corporation is looking to fill Advanced Housekeeper positions in Eagle County (Vail, Avon, Beaver Creek, Edwards), Colorado. This is a temporary, full-time peak load position & we are looking to fill 100 job openings for employment from November 23, 2016 to April 10, 2017.
Geographic location of employment 655.18 (b)(4)	Duties: Clean & maintain guest accommodations. Make beds & change linens; clean bathrooms; dust furniture, pictures, window ledges & shelves; vacuum carpeted areas & remove trash. Stock guest rooms with amenities such as bottled water, towels & tissues. Clean common areas such as lobbies, hallways, bathrooms & recreation areas. Report damage to guest rooms. Report lost items. Maintain carts, linen rooms & housekeeping equipment & supplies in a neat & orderly fashion. May also help with turndown service. Comply with all resort policies, procedures & standards of operation. Comply with OSHA standards for chemical handling.
Indication position is temporary, full-time, number of openings, and expected start and dates of work 655.18 (b)(2)	Requirements: Must be able to lift 50 lbs. Must be able to stand for extended periods of time. Must have a minimum of 1 year of housekeeping experience.
Detailed job description, duties and requirements 655.18 (b)(3)	Terms & Conditions of Employment: \$12.65/hr, at least 35hrs/wk, Mon-Sun, 8:00 A.M to 5:00 P.M. (schedule varies). Overtime is available as needed. Overtime rate of pay is at least \$18.98 per hour.
Wage offers, including overtime, and full-time hours 655.18 (b)(5) and (b)(6)	

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H-2B Non-Agricultural Program Best Practice Example Job Order

Inbound transportation 655.18 (b)(12)	Transportation: From the place from which the worker has come to work, whether in the U.S. or abroad, to the place of employment, if the worker completes 50% of the work contract period, the employer will provide advance payment for transportation and subsistence (including meals and, to the extent necessary, lodging) from the place of recruitment to the place of
Outbound transportation 655.18 (b)(13)	Upon completion of the work contract or where the worker is dismissed earlier, employer will provide or pay for worker's reasonable costs of return transportation and subsistence back home or to the place the worker originally departed to work, except where the worker will not return due to subsequent employment with another employer. The amount of transportation payment or reimbursement will be equal to the most economical and reasonable common carrier for the distances involved. Daily subsistence will be provided at a rate of \$12.09 per day during travel to a maximum of \$51.00 per day with receipts.
Disclosure of daily subsistence amount 655.18 (b)(12) and (b)(13)	Three-fourths guarantee: The employer guarantees to offer work for hours equal to at least three fourths of the workdays in each 12-week period of the total employment period.
3/4th Guarantee <i>(not required due to 2016 Omnibus)</i> 655.18 (b)(17)	Tools, equipment & supplies: The employer will provide workers at no charge all tools, supplies, & equipment required to perform the job.
Provision of tools, equipment, and supplies 655.18 (b)(16)	

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H-2B Non-Agricultural Program Best Practice Example Job Order

<p>Single workweek guarantee and frequency of pay 655.18 (b)(8) and (b)(9)</p>	<p>Miscellaneous: The employer will use a single workweek as its standard for computing wages due; The pay period is every two weeks; The employer will make all payroll deductions required by law and will not make any deductions, which are not required by law; The employer will reimburse an H-2B worker in the first work week for all visa, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H-2B worker. Subsidized housing is available at a cost of \$372.00 to \$641.00 depending on the unit type (i.e., number of beds in the unit and the number of people living in the unit). The worker is responsible for paying the subsidized housing cost each month. Monthly rent is not deducted from the workers' pay.</p> <p>Employer Contact Information: Vail Corporation; Attn: HR, 390 Interlocken Crescent, Broomfield, CO 80021.</p> <p>How To Apply: Inquiries, applications, indications of availability, and/or resumes may be sent to the Colorado State Workforce Agency's Edwards Workforce Center, which serves Eagle County, Colorado at: 0069 Edwards Access Rd., #11B, Edwards, CO 81632 and reference job #6659555 or submit an application online at: https://www.connectingcolorado.com</p>
<p>Statement of deductions from worker's pay 655.18 (b)(11)</p>	
<p>Reimbursement of border, visa, and related fees 655.18 (b)(15)</p>	
<p>Provision of board, lodging, or other facilities 655.18 (b)(10)</p>	
<p>Employer contact information 655.18 (b)(1)</p>	
<p>Instructions on how to apply 655.18 (b)(18)</p>	

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Department of Labor: H-2A and H-2B Programs Comparing Application Filing Requirements

H-2A Agriculture H-2B Non-Agriculture

STEP 3: Submit Application to DOL-OFLC

<ul style="list-style-type: none"> • U.S. mail or electronic iCERT System FY 2016 = 79% employers filed electronically <p>Basic H-2A application</p> <ul style="list-style-type: none"> ✓ Form ETA-9142A and Appendix A ✓ Form ETA-790 (job order) ✓ Workers' compensation coverage (if available) ✓ Housing inspection report (if available) ✓ Farm labor contractor license (if applicable) ✓ Additional documentation for H-2A labor contractors (e.g., surety bond, executed work contracts with local growers) <p>Statutory Timeframe: No later than 45 days before work start date</p>	<ul style="list-style-type: none"> • U.S. mail or electronic iCERT System FY 2016 = 93% employers filed electronically <p>Basic H-2B application</p> <ul style="list-style-type: none"> ✓ Form ETA-9142B and Appendix B ✓ Copy of job order placed with State Agency ✓ Form ETA-9141 issued by OFLC-NPWC ✓ Agreements with agents/foreign recruiters ✓ Lists of names/locations of foreign recruiters ✓ Additional documentation for job contractors and employers requiring farm labor contractor license (e.g., reforestation employers) <p>Regulatory Timeframe: Between 90 and 75 days before work start date</p>
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H-2A and H-2B Programs

General Filing Tips & Issues

- Ensure all required fields on the ETA-9142A/B are completed prior to submission
- Review your application package carefully and ensure all required documents are included or uploaded electronically
 - Use a “checklist cover sheet” that identifies all items submitted for processing with your application package
 - For more efficient processing, upload separate electronic documents for each document type (e.g., job order, agent agreement) rather than one large file
- Provide legible copies of supporting documentation - this is a particular problem with contractor documents (e.g., FLC registrations, H-2A surety bonds)

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H-2A and H-2B Programs

General Filing Tips & Issues

- Try to file your job order and application as early as the regulatory timeframes permit
- In H-2B, employer must have a valid prevailing wage determination issued by the NPWC; otherwise application will be rejected
- Make sure the dates of need, number of workers being requested for certification, and worksite locations match between the job order and Form ETA-9142A/B
- If using a template to submit applications and the CO issues a Notice of Deficiency (NOD) impacting your template, employers must amend the template to avoid a continuation of the same NOD for each application

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H-2A and H-2B Programs

General Filing Tips & Issues

- Ensure the size of workforce and period of employment (*i.e.*, *start and end dates of work*) requested for H-2A or H-2B certification represents a bona fide business need
- Requesting a start date of work based on “expected government delays” is not acceptable
- Changes to the period of employment (start or end dates), especially more than 2 weeks, must be accompanied with an explanation and the CO may request supporting documents
- In H-2B, job contractors need to demonstrate through documentation its OWN temporary need, not just the need of its employer-client, and can only file based on a seasonal need or a one-time occurrence

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H-2A Agricultural Program

Application Filing Checklist (*non-emergency situation*)



Employer will submit the following documents:

- ETA 9142A
- Appendix A - signed and dated copy of original
- Copy of Form ETA-790/all attachments submitted to the SWA
- Itinerary of worksites (*if applicable*)
- Workers compensation coverage
 - SWA housing inspection report(s) or other documentation demonstrating rental/public accommodation housing meets standards and sufficient to house all workers
 - Agent agreement/documentation demonstrating authority to represent the employer and MSPA registration (*if applicable*)

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H-2A Agricultural Program Application Filing Checklist (*non-emergency situation*)



Additional documentation for H-2A labor contractors:

- Name and location of each fixed-site employer, expected start and end dates of work, and a description of the crops and activities
- Copy of fully-executed work contracts with each fixed-site employer
 - Copy of MSPA FLC Certificate of Registration, where required, identifying the specific FLC activities
 - Proof of ability to discharge financial obligations by submitting an original surety bond document
 - Where the fixed-site employer will provide housing or transportation to workers, proof that . . .
 - Housing complies with applicable standards and has been certified by the SWA
 - Transportation complies with applicable Federal, State, or local laws and regulations

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H-2A Agricultural Program Filing Tips for H-2A Labor Contractors

H-2A Labor Contractors must . . .

- Organize housing and transportation for worker crews well in advance of filing the job order
- Provide documentation that rental or other public accommodation housing complies with the applicable local, State, or Federal housing standards
- Prepare for the time it will take to obtain and/or renew Farm Labor Contractor (FLC) documents with Wage and Hour
- All worksites listed on the ETA Form 9142 and ETA Form 790 must be within the same area of intended employment
- Applications and job orders containing worksites covering multiple areas of intended employment will not be accepted

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H-2B Non-Agricultural Program Application Filing Checklist (*non-emergency situation*)



Employer will submit the following documents:

- ETA 9142B
- Appendix B - signed and dated copy of original
- Copy of the job order concurrently submitted to the SWA
- Copy of Form ETA-9141 Prevailing Wage Determination
 - Agent agreement/documentation demonstrating authority to represent the employer (if applicable)
 - Copies of all contracts/agreements with any agent and/or recruiter engaged in international recruitment of H-2B workers
 - If not using a foreign labor recruiter, employer must still provide a statement indicating that at the time of filing
 - 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)

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H-2B Non-Agricultural Program Application Filing Checklist (*non-emergency situation*)



Required documents (continued)

- Occupations involving special procedures must submit other required documents (e.g., itineraries)
- Copy of MSPA registration for the employer or agent (if applicable)



Additional documents for **job contractors**

- A completed 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 on the ETA 9142B Section B.9
- Copy of an executed contract between the job contractor and employer-client

Important Reminder: Employers should provide certified translations of any contracts or agreements which are not in English to assure timely processing

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Department of Labor: H-2A and H-2B Programs

Comparing Application Processing Procedures

H-2A Agriculture H-2B Non-Agriculture

STEP 4: DOL-OFLC Processing of Application

- Reviews for completeness, obvious errors or inaccuracies, and compliance with program requirements
- Issues Notice of Deficiency or Acceptance

Statutory Timeframe: Within 7 days

- If deficiency is issued, employer has 5 business days to respond (*regulatory*)
- If application is accepted, employer positively recruits for U.S. workers
- Employer submits recruitment report and other required documents not provided at the time of filing
 - State Agency submits housing inspection report (*if applicable*)

- Reviews for completeness, obvious errors or inaccuracies, and compliance with program requirements
- Issues Notice of Deficiency or Acceptance


Regulatory Timeframe: Within 7 business days

- If deficiency is issued, employer has 10 business days to respond (*regulatory*)
- If application is accepted, employer positively recruits for U.S. workers
- Employer must submit recruitment report when all positive recruitment is completed

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H-2A and H-2B Programs

Important Reminders about DOL-OFLC Processing

- Strongly encourage electronic filing of applications – FY 2016, approximately 85% filed electronically
- OFLC consistently uses email, NOT “snail-mail”, to communicate with employers and their representative
-  Employers can electronically upload required documentation at the time of filing and at any point during processing in response to a Notice of Deficiency or Acceptance
- All final labor certification decisions are made available to the public through the iCERT System’s Labor Certification Registry at <http://icert.doleta.gov>

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H-2A and H-2B Programs iCERT System: Document Upload Enhancement

- On August 26, the iCERT System was enhanced to permit the submission of electronic documentation at the time of filing and while the H-2A or H-2B application is pending review
- Enhancement is intended to minimize delays associated with connecting employer documentation to a pending H-2A or H-2B application and to provide more flexibility in submitting documentation in response to Notices of Deficiency or Acceptance
- To obtain information on how to use this new enhancement, please download the iCERT Quick Start Guide at: <https://www.foreignlaborcert.doleta.gov/pdf/H-2A-H-2B-ElectronicDocumentUpload-iCERT.pdf>

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H-2A and H-2B Programs iCERT System: Helpful Tips for Using Document Upload

Best Practice Tips:

- Avoid uploading one large file for multiple documents
- If multiple documents are uploaded for a single document type, use a sequence number to order them
- Filenames should clearly describes the document and include a case number or employer name and a date in the filename (e.g., EmployerName_RR_09102016.PDF)
- **DO NOT** upload electronic documents and then send a duplicate copy via email, fax, or US mail

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Department of Labor: H-2A and H-2B Programs Comparing Positive Recruitment Requirements

H-2A Agriculture H-2B Non-Agriculture

STEP 4: DOL-OFLC Processing of Application *(continued)*


- | | |
|---|--|
| <ul style="list-style-type: none"> • Places 2 print advertisements in local area • Contacts employees from prior year • Conducts out-of-state recruitment (<i>not more than 3 states</i>) • Additional recruitment can be ordered at the discretion of the Certifying Officer • Positive recruitment must occur <u>no later than 3 days before the start date of work</u> • Recruitment report can be submitted by the date specified in the Notice of Acceptance | <ul style="list-style-type: none"> • Places 2 print advertisements in local area • Contacts employees from prior year • Contacts bargaining representative or post notice of filing for <u>15 consecutive business days</u> • Additional recruitment can be ordered at the discretion of the Certifying Officer (<i>e.g., unions, CBOs, areas of substantial unemployment</i>) • Recruitment report can be submitted once all advertising steps are completed |
|---|--|

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Department of Labor: H-2A and H-2B Programs Comparing Issuance of Final Determinations

H-2A Agriculture H-2B Non-Agriculture

STEP 5: Issuance of Final Determination

- | | |
|--|--|
| <ul style="list-style-type: none"> • Grant labor certification as long as all program requirements are met <p>Statutory Timeframe: 30 days before start date of work</p> <ul style="list-style-type: none"> • Certified Form ETA-9142A issued on "blue security paper"  Employer submits a signed and dated copy of Appendix A to USCIS (<i>i.e., "wet signature" no longer required</i>) • Employer must consider U.S. workers <u>until 50 percent of the certified period of work has elapsed</u> | <ul style="list-style-type: none"> • Grant or deny labor certification after receiving and reviewing the report of employer's recruitment efforts <p>Timeframe: None required by statute or regulation</p> <ul style="list-style-type: none"> • Certified Form ETA-9142B issued on "blue security paper" • Employer submits a signed and dated copy of Appendix B to USCIS • Employer must consider U.S. workers <u>until 21 days before start date of work</u> |
|--|--|

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H-2A and H-2B Programs

General Filing Tips & Issues

- **H-2B Amendments to start date of need:** Regulation allows a “minor” (up to 14 days) amendment to the start date of need. *Remember the H-2B cap!*
 - Can only be requested prior to the issuance of a final determination and must receive written approval from the CO
Post-certification amendments of any kind are prohibited
- **H-2A/H-2B recruitment reports:** Prepare them correctly - Employer must “prepare” the recruitment report
 - Must not be on attorney/agent letterhead and not signed by attorney/agent
 - Ensure all required content for recruitment reports are included, particularly the source(s) of recruitment and disposition of each U.S. worker who applied

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H-2A and H-2B Programs

General Filing Tips & Issues

Clearly identifies each positive recruitment step and the date(s) that each was conducted

Provides aggregate summary of recruitment results

Re: H2B: H-400-16209-888211 Recruitment Report

Dear Certifying Officer,

As requested, we are presenting the US workers recruitment activities and results, as follows:

Recruitment Activities:

- Job Order # 10279470 posted with the Florida Department of Economic Opportunity
- Newspaper advertisements published in *The Palm Beach Post* (a newspaper of general circulation in our area) on August 14, 2016 (Sunday) & August 15, 2016 (Monday)
- Notice of Job Opportunity posted from August 9, 2016 and until and including August 24, 2016 in 2 conspicuous places accessible to all employees (Location 1 - in the employee break room; Location 2 - in the kitchen). **NOTE:** We are open every day of the week, therefore our regular business days are Monday through Sunday.
- We have no former US workers eligible for solicitation to return to the job

Recruitment results as of August 31, 2016:

- 4 (four) local job seekers contacted as a result of application / referral and the recruitment summaries are enclosed

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H-2A and H-2B Programs

General Filing Tips & Issues

Supporting details of the recruitment effort clearly shows each U.S. worker who applied and disposition

Applicant Name	[REDACTED]
Application date	7/31/2016
Applicant contact information	[REDACTED]
Disposition	Not Hired
Employer's lawful job-related reasons for not hiring the applicant	Candidate did not acknowledge or respond to our contact (phone & email) attempts

Notice disposition of U.S. applicant still pending, so a partial certification would occur in this instance

Applicant Name	[REDACTED]
Application date	8/30/2016
Applicant contact information	[REDACTED]
Disposition	TBD - Candidate's application is very recent, and as of this date there has been no response to our contact attempts. Should the candidate respond, an interview will be conducted.
Employer's lawful job-related reasons for not hiring the applicant	

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H-2A and H-2B Programs

General Filing Tips & Issues

- Employer or authorized attorney/agent will receive a certified Form ETA-9142A/B printed on “blue security paper”
- Please verify that Section K and the “footer” on each page of the Form ETA-9142A/B is complete and accurate

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.

Certifying Officer

Department of Labor, Office of Foreign Labor Certification

07/30/2015

Determination Date (date signed)

H-400-15211-634659

Case number

Full Certification

Case Status

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H-2A Agriculture Program

REMINDER: Issuance of Final Determination

- In the H-2A program, DOL issues a final determination 30 days before the start date of work as long as all program requirements are met
- Common reason(s) for delaying the H-2A final determination is the employer or authorized representative not providing . . .
 - Proof of valid workers' compensation coverage
 - Housing documentation for farmworkers
 - Valid farm labor contractor licenses
 - Valid surety bond for labor contractors
 - Recruitment report
- DOL provides employers with additional time to submit required documents to obtain certification, rather than issue a denial forcing employers to choose between filing an appeal or new application

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H-2A and H-2B Programs

General Filing Tips & Issues

Post-Certification Recruitment Obligations

- Employers must continue to cooperate with the SWA in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies for the job opportunity
 - H-2A until 50 percent of the certified period of work has elapsed
 - H-2B until 21 days before start date of work
- Employer must continue to update the initial recruitment report submitted to the CO for certification throughout the entire recruitment period
- Employer must sign and date the final written recruitment report and be prepared to submit it when requested by the CO in the event of an audit examination or other request from the Department

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H-2A and H-2B Programs

General Filing Tips & Issues

- Pay the required H-2A certification fees in full and timely (*within 30 days after the certified is issued*)
- Maintain all documents supporting the certification for a period of 3 years
- Report the termination or separation of workers in a timely manner (*no later than 2 working days*)
- Ensure the workforce and period of employment requested for certification represent bona fide business need (*e.g., claiming expected government delays is not an acceptable justification*)

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Understanding the H-2A and H-2B Programs



Briefing Section IV

Helpful Tips for Responding
to H-2A Audit Examinations

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Department of Labor: H-2A Program

Helpful Tips – Responding to Audit Examination

- Conducted on certified H-2A applications only
- Applications selected within the sole discretion of the Certifying Officer (CO)
- CO will issue a Notice of Audit Examination Letter containing the following:
 - Documentation retained by the employer or other information regarding the certified application
 - A date no more than 30 days in which the CO must receive the documentation
 - Notice that failure to comply with the audit process may result in revocation of the certified application or program debarment from future filings

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Department of Labor: H-2A Program

Helpful Tips – Responding to Audit Examination

- Read the Notice of Audit Examination (NOAE) letter carefully and respond to all items requested
 - NOAE letters change periodically to request documentation where a Request for Supplemental Information was previously necessary
- Where employer did not use the certification, responsive documentation is still required such as . . .
 - Proof of conducting positive recruitment
 - Updated recruitment report
 - Explanation of how full-time work was accomplished without use of H-2A workers

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Department of Labor: H-2A Program

Helpful Tips – Responding to Audit Examination

- Only one extension (up to 14 days) will be granted per audit examination, not per letter issued during the audit process
 - An additional extension may be granted in extenuating circumstances which should be detailed in the extension request
- Submit what you have now, let the Chicago NPC know what is missing and why, and send the remaining documents as soon as practically possible
- Responses that are mere “statements” from the employer affirming program compliance must be supported by objective documentation or evidence
- The reason(s) for “late start” and/or “early end” to work must be explained and documented

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Department of Labor: H-2A Program

Helpful Tips – Responding to Audit Examination

- Submit translations of documentation in English, particularly work contracts outside of the certified job order/application
- Ensure the newspaper advertisements contain all minimum content required by 20 CFR 655.152
- Make sure all of the required information for newspaper advertisements is clearly visible on copies submitted.
 - Dates of publication and name of newspaper must be clearly visible and legible
- Provide evidence that the newspaper advertisements were actually published
 - Submission of an unpaid invoice showing merely the “cost” for the newspaper advertisement is not acceptable

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