

**Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2A Final Rule Published February 12, 2010
Round One
March 2010**

On February 12, 2010, the Department of Labor (Department) published in the Federal Register a Final Rule governing the labor certification process and enforcement mechanisms required under the H-2A temporary agricultural worker program (the 2010 Final Rule). The 2010 Final Rule strengthens worker protections for both U.S. and foreign workers and ensures overall H-2A program integrity. These FAQs are provided to assist employers, workers, and other interested parties in interpreting the 2010 Final Rule as it goes into effect.

General Principles

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

Answer: The 2010 Final Rule is the result of the Department's review of the policy decisions underlying the 2008 Final Rule. The Department's review of the 2008 Final Rule focused on the process for obtaining certifications, the method for determining the H-2A Adverse Effect Wage Rate (AEWR), and the protections afforded to both the temporary foreign workers as well as the domestic agricultural workforce. This review led to the conclusion that some changes to the 2008 Final Rule were desirable.

Question: What are the major changes in the new rule?

Answer: The 2010 Final Rule improves worker wages and protections while allowing employers to obtain temporary workers in a reasonable timeframe. The 2010 Final Rule returns to the use of the USDA Farm Labor Survey (FLS) as a methodology for determining the AEWR, providing more timely and accurate data on the average wages of farm and livestock workers and resulting in increased wages of U.S. workers. The 2008 Final Rule used the BLS Occupational Employment Statistics Survey, which does not actually survey farmers and resulted in a substantial reduction of farmworkers' wages (approximately \$1.02 per hour across the program). The 2010 Final Rule also reinstates the critical role of the State Workforce Agencies (SWAs), in partnership with the Department, in both the review and supervision of recruitment based on state expertise in local labor market conditions and recruitment patterns. Finally, it increases program integrity through strengthened audit, revocation, and debarment procedures, and financial penalties.

Transition

Question: What kind of transition period is in the Final Rule?

Answer: The 2010 Final Rule does not provide for a transition period. The 2010 Final Rule will apply to all applications filed on or after March 15, 2010.

Question: What if I filed an application before the effective date of the rule? Will I need to re-file?

Answer: No. Employers who filed their applications before the effective date of the 2010 Final Rule will have their applications adjudicated under and governed by the 2008 Final Rule procedures.

Question: I filed an application for temporary labor certification before the 2010 Final Rule was effective. What rule will apply?

Answer:

1. Employers who filed with DOL before March 15, 2010, and have a start date of need before June 1, 2010, will be processed in accordance with the 2008 Final Rule's transition procedures.
2. Employers who filed with DOL on or after March 15, 2010, and have a start date of need before June 1, 2010, will be processed in accordance with the 2010 Final Rule's emergency procedures.
3. Employers with a start date of need on or after June 1, 2010, will be processed in accordance with the 2010 Final Rule's normal procedures.

Special Procedures

Question: Will the current special procedures for sheepherders, custom harvesters, and other unique agricultural occupations continue under this Final Rule?

Answer: Yes. The regulation explicitly states that such special procedures will continue.

Pre-filing Activities

Question: Does the 2010 Final Rule require employers to begin recruiting U.S. workers before filing their applications with the Department?

Answer: Yes. An employer participating in the H-2A program will be required to initiate pre-filing recruitment 75 to 60 days before the employer's first date of need by

submitting its job order to a SWA serving the area of intended employment as required under 20 CFR 655.121.

Question: What form should I use to submit my job order to the SWA?

Answer: The employer should use the Agricultural and Food Processing Clearance Order, ETA Form 790 (the job order). Employers may download a PDF copy of the form from the Office of Foreign Labor Certification (OFLC) web site:
<http://www.foreignlaborcert.doleta.gov/form.cfm>

Question: What wage rate should I list on my job order?

Answer: Under the 2010 Final Rule, an employer in the H-2A program is required to offer, advertise, recruit at and pay the highest of the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate (if an employer is subject to a collective bargaining agreement (CBA)), or the Federal or State minimum wage rate, in effect at the time work is performed, for every hour or portion of an hour worked during a pay period, except where a special procedure is approved for an occupation or specific class of agricultural employment. Therefore, the employer must list the highest of these applicable rates. If an employer lists the AEWR and the SWA, before accepting the job order for intrastate clearance, determines that another applicable wage rate is higher, the SWA will issue to the employer a Notice of Deficiency directing the employer to modify its job order to reflect the higher applicable wage rate. Each employer who is subject to a CBA must attach a copy of the CBA to its job order.

Employers should note that if they pay workers on a piece rate basis and at the end of the pay period the worker's earnings for that pay period, if re-calculated on an hourly-basis, would result in an hourly wage that is below the required hourly wage, the employer must guarantee to pay the worker an additional amount bringing the worker's wages for that pay period up to the amount the worker would have been paid at the required hourly wage rate.

Question: Will the employer be required to pay the AEWR?

Answer: Yes, if the AEWR is the highest applicable wage rate. In most cases the published AEWR will be the correct baseline wage. However, sometimes the prevailing wage for the crop and location or the CBA wage rate or the Federal or State minimum wage rates will be higher than the AEWR, in which case the employer must pay the higher rate. If an employer wishes to pay a piece-rate, it must nevertheless guarantee that workers will be paid a minimum equal to the appropriate hourly wage.

Question: Will we be sending our wage requests to your new National Prevailing Wage and Helpdesk Center (NPWHC)?

Answer: No. The 2010 Final Rule does not require employers participating in the H-2A program to obtain a wage rate separate from completing and submitting a job order to the SWA.

Question: What wage should I list on my work contracts?

Answer: The wage rate listed on the work contract must be the same wage rate as the rate listed on the job order and approved by the SWA. If the employer intends to sign work contracts before the SWA accepts the job order for intrastate clearance and the SWA subsequently directs the employer to modify the wage rate listed on the job order, the employer will be required to also modify its work contracts to reflect the approved wage rate. The employer may contact its local SWA to inquire whether a wage rate higher than the AEWR is applicable to its job order.

Question: Will employers subject to the 2010 Final Rule be obligated to adjust the approved wage rate if the wage rates increase during the contract period?

Answer: Yes. All employers in the H-2A program are required to offer, recruit at and pay the highest applicable wage rate. An H-2A employer who has filed an application under the 2010 Final Rule will be required to adjust to a higher wage at any time between the date on which it submits its job order to the SWA and/or signs a work contract (whichever is earlier) until the end of the contract period.

This applies only to applications filed under the 2010 Final Rule. Employers who filed applications under the 2008 Final Rule will continue to apply that rule's wage rates and principles (i.e., must pay the wage rate at the time of recruitment).

If the Department publishes a new AEWR and the new AEWR is higher than the approved wage rate listed on the employer's job order and/or work contract, the employer will be required to adjust the offered wage to the higher AEWR. Similarly, if an applicable prevailing wage is increased during the contract period and the Department notifies employers of the increase, all employers whose approved wage rate (listed on the job order and/or work contract) is lower than the new prevailing wage will be required to adjust to the higher prevailing wage rate. The Department's notification will state the effective date of the wage increase upon which all affected employers will be required to adjust to the higher wage.

Question: If the offered wage on my certification is the AEWR, and the AEWR goes down during the period of the work contract can I pay the lower AEWR in effect at the time the work is performed?

Answer: 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. An employer may pay a lower AEWR (assuming the AEWR decreases and that it is still the highest rate) only if the employer clearly

discloses in the job order that if the AEWR decreases, the employer will pay to the highest of the rates in effect at the time the work is performed.

Question: May an employer require productivity standards if the work is paid on a piece-rate basis?

Answer: Yes. If the employer pays by the piece rate and specifies the productivity standard in the job offer. Any productivity standard required by an employer may be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for an H-2 temporary labor certification after 1977, such standards must be no more than those normally required by other employers for the activity in the area of intended employment at the time the employer filed its first application.

Question: May an employer appeal a wage determination in the H-2A program?

Answer: Not directly. The H-2A regulations do not contain a provision for appealing wage determinations. However, if the SWA and the employer do not agree on the correct wage that must be offered, and the employer complies with all requirements of the 2010 Final Rule (described more fully below) the Certifying Officer (CO) at the Chicago NPC ultimately may make the determination on the wage that must be offered. If the matter is not resolved with the CO, the employer may follow the appeal procedures in the 2010 Final Rule and request an appeal from either a Notice of Deficiency or a Final Determination denying the employer's application.

Question: What do I do if the SWA doesn't accept my job order in time or I cannot reach an agreement with the SWA on the necessary changes to the job order?

Answer: Under the 2010 Final Rule, the SWA has 7 calendar days after receiving an employer's job order to accept the job order for intrastate clearance or to notify the employer that the job order is deficient. If, after receiving a timely-filed job order, the SWA determines that the job order does not meet all of the regulatory and program requirements, the SWA must issue a Notice of Deficiency listing the job order deficiencies that must be corrected before the job order can be accepted. The employer will have 5 calendar days to respond to the SWA and correct the noted deficiencies. If the employer timely corrects the deficiencies, the SWA will send the employer a Notice of Acceptance within 3 calendar days after receiving the employer's response, and promptly place the job order in intrastate clearance. If the employer does not adequately correct the deficiencies, or fails to submit a timely response to the SWA, the SWA will issue a Notice of Denial.

Where the employer has not been able to resolve the deficiencies regarding the job order with the SWA, the employer will be able to use the emergency filing procedures under 20 CFR 655.134 to submit its application and job order directly to the Chicago NPC so long as:

1. The employer timely submitted the job order and after documented efforts to solicit a response from the SWA received no response by the 46th day before the employer's first date of need; or
2. The employer timely submitted the job order and after receiving a Notice of Deficiency timely and in good faith submitted information aimed to correct the noted deficiencies, but the SWA did not respond to the employer's submission within 3 days of the receipt of the employer's submission, or by the 46th day before the employer's first date of need, whichever is later; or
3. The employer timely submitted the job order and after receiving a Notice of Deficiency timely and in good faith submitted information aimed to correct the noted deficiencies, but the SWA did not consider the employer's timely submission sufficient to accept the job order and issued a Notice of Denial within 3 days after receipt of the employer's submission or by the 46th day before the employer's first date of need, whichever is later.

Question: May I continue to rely on the SWA to verify the employment eligibility of the applicants it refers to my job opportunity?

Answer: Under the Immigration and Nationality Act (INA), the employer is responsible for verifying the employment eligibility of all of its hires. Department of Homeland Security (DHS) regulations do not require State agencies to verify the employment eligibility of job applicants they refer to employers but do permit employers to rely on employment verification voluntarily performed by a State employment agency under certain limited circumstances. Under the 2008 Final Rule the Department required the SWAs to perform I-9 verification on all applicants being referred to job openings for which H-2A workers were sought. Under the 2010 Final Rule, the SWAs will no longer be required to conduct I-9 employment eligibility verification of job applicants referred to job opportunities for which H-2A workers are sought. Employers should carefully examine the requirements under the INA and the DHS regulations to ascertain their obligations and ensure compliance with respect to employment eligibility verification.

Filing

Question: What is the required time frame for filing an H-2A temporary labor certification application?

Answer: An employer must submit an application no later than 45 days before the employer's first date of need.

Question: How do I file an application for a temporary labor certification in the H-2A program?

Answer: Under the 2010 Final Rule, as under the 2008 rule, the Department requires employers participating in the H-2A program to file hard copy applications. The employer should send the completed and signed Application, the SWA-approved job order and required supporting documentation (as discussed in more detail below) by U.S. mail or courier directly to the Chicago NPC at the following address:

U.S. Department of Labor
Employment and Training Administration
Chicago National Processing Center
536 South Clark Street,
Chicago, IL 60605 -1509

In the future, the Department may develop an electronic filing system for the H-2A program in which case it will notify the interested public through a notice in the *Federal Register*.

Question: What form should I use to file my application?

Answer: An employer must use the *Application for Temporary Employment Certification* ETA Form 9142 and Appendix A.2. Employers may download the required forms in PDF format from the OFLC web site:
<http://www.foreignlaborcert.doleta.gov/form.cfm>.

Question: What supporting documentation do I have to submit with my Application?

Answer: As a general matter, the employer must submit along with its Application the SWA-approved job order (ETA Form 790), unless a specific exception applies.

In addition, the employer is required to submit several documents prior to certification – these documents may be submitted at the time the application is filed. If the employer does not have the documentation ready at the time it submits the application, the employer will be directed by the Notice of Acceptance to submit each of these documents before certification may be granted.

1. Proof that the employer's housing is in compliance with applicable program requirements. See 20 CFR 655.122(d)
2. Proof of workers' compensation insurance coverage as required under new section 20 CFR 655.122(e).
3. A written and signed recruitment report on the date specified by the CO in the Notice of Acceptance.

In addition, employers should note that if an employer is listing specific job qualifications on its job order and/or application, the CO has the authority, through a Notice of Deficiency, to request that the employer provide documentation evidencing the appropriateness of these job qualifications. See 20 CFR 655.122(b). However, an

employer may choose to submit the justification for any qualifications required for the position at the time it files the application.

Additional requirements apply to associations, H-2ALCs and agents, as explained below:

Associations. If filing a master application, associations must list on the Application (or attachment to the Application) the names, addresses, total number of workers needed, crops and agricultural work performed for each employer who will employ H-2A workers under the master application. See 20 CFR 655.131(b). If the association is filing as an agent (instead of as a joint employer), the association must obtain and submit each member's signature for the particular Application.

H-2A Labor Contractors. Labor contractors seeking to file H-2A applications (H-2ALCs) must submit the name and location of each fixed-site agricultural business to which the H-2ALC will provide H-2A workers, the expected beginning and ending dates of employment on each fixed site and a description of the crops and activities the workers will be performing on each site. The H-2ALC must submit copies of signed contracts with each fixed-site agricultural business to which it is providing H-2A workers and if those fixed-site businesses are providing housing and transportation to the workers, proof that the housing and transportation are in compliance with program regulations. See 20 CFR 655.132.

The H-2ALCs must also provide a copy of a valid Farm Labor Contractor (FLC) Certificate of Registration, if the H-2ALC is considered an FLC within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). In addition, an H-2ALC must provide proof that it is able to meet its financial obligations under the H-2A program by submitting an original surety bond as required by 29 CFR 501.9.

Agents. In addition, an agent must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer. This required document must be submitted with the application and is in addition to Sections E and I on ETA Form 9142 and Appendix A.2. Finally, an agent must submit a copy of a valid FLC Certificate of Registration, if required under MSPA. See 20 CFR 655.133.

Question: Since I will be submitting supporting documentation before certification, will I still need to keep certain documents after I receive a labor certification?

Answer: Yes. In addition to providing supporting documentation before certification, each employer participating in the H-2A program is required to retain certain documentation for a period of 3 years from the date of certification. The document retention requirements may be found under the new section 20 CFR 655.167.

Question: Can I file one H-2A application for work that will take place in multiple work locations?

Answer: Yes. An employer's application may cover multiple work locations within an area of intended employment so long as they are within reasonable commuting distance from a place of the job opportunity for which the employer is seeking certification. If an employer belongs to an association, under the 2010 Final Rule the association may file a master application on behalf of the employer and its other members. A master application may cover multiple areas of intended employment and multiple work locations so long as: all workers covered by the application belong to the same occupation or will perform comparable work for the employer-members; the application reflects a single date of need for all workers; and all employer-members covered by the application are located in at most two contiguous states. Master Applications can only be filed by Associations acting as joint employers with their members. Finally, if the employer is an H-2A Labor Contractor (H-2ALC), the employer may file a single application covering multiple work locations within one area of intended employment.

Question: I represent an association whose members are applying for H-2A workers. One member has the same start date of need as all other members, but has a different end date for the work contract. Can that member be included on the master application or must it file an individual application?

Answer: Only associations filing as joint employers with their employer-members may file master applications. An employer who receives workers through a master application filed by an association must have the same initial date of need, i.e. the same start date, as all other employers listed in the master application. However, the employers' end dates may contain slight variances depending on their need for workers. Regardless of whether the employers covered by a master application have the same or different end dates of need, an association filing a master application must specify each employer's period of need on: the job order, i.e. the Agricultural and Food Processing Clearance Order ETA Form 790; the Application for Temporary Employment Certification, ETA Form 9142, and/or any attachments thereto; and the newspaper advertisements.

Question: Can I file one H-2A application which involves an itinerary?

Answer: Unless an employer belongs to a group or occupation to which special procedures apply, itineraries involving work in more than one area of intended employment are not permitted.

Question: How can I appeal a refusal to accept my application or a denial of my application?

Answer: If an employer wishes to appeal the CO's issuance of a Notice of Deficiency before certification, the employer must within 5 days of the receipt of the Notice of Deficiency file by facsimile or other means normally assuring next day delivery a written request for an expedited administrative review or a de novo administrative hearing to the Chief Administrative Law Judge of the Department of Labor and simultaneously

serve the CO. If an employer wishes to appeal the CO's issuance of a Final Determination letter denying the temporary labor certification, the employer must within 7 calendar days of the receipt of the Final Determination letter file a written request by facsimile or other means normally assuring next day delivery with the Chief Administrative Law Judge of the Department of Labor and simultaneously serve the CO. See sections 20 CFR 655.141 and 655.164.

Validity Period

Question: Can the H-2A labor certification be valid for more than one year under the new rule?

Answer: Each H-2A labor certification is valid for the period of employment provided on the application. In order to qualify for a temporary labor certification, the employer's period of need, including any subsequently granted extensions, may not exceed one year except in extraordinary circumstances.