Kansas Department of Commerce
Workforce Services
Policy and Procedures Manual

Policy Number: 6-04-00

Originating Office: Workforce Services

Subject: Foreign Labor Certification: H-2A, H-2B Non-Immigrant and Prevailing Wage Determinations

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Programs: Foreign Labor Certification Program

Purpose: To transmit current policy regarding the Foreign Labor Certification H-2A and H-2B Non-Immigrant Programs, and Prevailing Wage Determinations.

Action: Disseminate this policy to all interested parties.

Contact: Questions should be directed to workforcesvcs@ks.gov , (785) 296-0607 TTY: (785) 296-3487

Foreign Labor Certification H-2 A Non-Immigrant Program

References: As a condition for receiving funds the state agrees to accept responsibilities under Sections 101(a)(15)(H)(i)(b) and 212(n), Sections 101(a)(15)(H)(ii)(a) and 218, and Section 212(a)(5)(A) of the Immigration and Nationality Act (Act), under the United States Citizenship and Immigration Services (USCIS) regulations at 8 CFR 214.2(h)(6) under Sections 101(a)(15)(H)(ii)(b) and 214(c) of the Act, under Section 221 of the Immigration Act of 1990, and under Department of Labor (DOL) regulations at 20 CFR Parts 655 100-199, 29 CFR Parts 501, 780, and 788 and CFR 653.501 intrastate and interstate recruitment of farm workers.; 20 CFR Part 658, Subpart E (20 CFR 658.400658.426) cover the complaint and appeals procedures; 20 CFR Part 653, Subpart F and 20 CFR Part 654, Subpart E applies to housing inspection activities under the reimbursable grant; The Immigration and Nationality Act requires employers to furnish housing meeting applicable standards before certification can be issued (INA sec. 218(c)(4)); Housing inspections may be conducted under certain conditions in accordance with OSHA standards at 29 CFR 1910.142, Temporary Labor Camps; Training and Employment Guidance Letter's 16-06, 15-06, 12-04, 23-01, 31-01, 21-01; and the Kansas Department of Commerce Foreign Labor Certification Home Page.

Background: Effective December 18, 2008, employers were required to file original copies of their applications with the ETA National Processing Centers (NPCs) under the H-2A program. The Foreign Labor Certification program ensures the admission of foreign workers into the United States on a permanent or temporary basis will not adversely affect the job opportunities, wages, and working conditions of similarly employed U.S. workers. The U.S. Department of Labor (USDOL) and the State Workforce Agency (SWA) jointly administer the foreign labor certification program. In Kansas, the Department of Commerce is designated as the SWA. The Department of Commerce, State FLC Unit, will coordinate all activities regarding the processing of applications with the NPC.

Attachment A – H2A Flow Chart
Attachment B – Employment Eligibility Verification Certificate

Foreign Labor Certification H-2 B Non-Immigrant Program

References: Training and Employment Guidance Letter 21-06; Section 214(c)(1) of the Immigration and Nationality Act; United States Citizenship and Immigration Service, 8 CFR Part 214.2(h)(6); CFR 20 Part 655 Subpart A; and Kansas Department of Commerce Foreign Labor Certification Home Page.

Background: On January 18, 2009, the Department of Labor issued H-2B Final Regulations, which updated procedures for State Workforce Agencies (SWAs) and ETA National Processing Centers (NPCs) to use in the processing of temporary labor certification applications under the H-2B program. The Foreign Labor Certification program ensures the admission of foreign workers into the United States on a permanent or temporary basis will not adversely affect the job opportunities, wages, and working conditions of similarly employed U.S. workers. The U.S. Department of Labor (USDOL) and State Workforce Agency (SWA) administer the foreign labor certification program. In Kansas, the Department of Commerce is designated as the SWA.

Attachment C – Demonstrating Temporary Need

Foreign Labor Certification Program Prevailing Wage Determinations

References: CFR 20 Part 656; Wage Determination Online Program and Kansas Department of Commerce Foreign Labor Certification Home Page.

Background: The Immigration and Nationality Act (INA) requires wages paid to nonimmigrant's be at least the higher of the actual wage rate paid to all other workers with similar experiences and qualifications for the specific employment in question or the prevailing wage rate for the occupational classification in the area of employment. This does not preclude the employer from paying nonimmigrant's more than the higher of the actual wage or the prevailing wage.

Attachment D – Worksheet for Determining OES Level

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FOREIGN LABOR CERTIFICATION

Foreign Labor Certification H-2A Non-Immigrant Program

PROGRAM OVERVIEW

The H-2A non-immigrant program is funded through Wagner-Peyser to provide certifications to ensure that the admission of foreign temporary agricultural workers into the United States does not adversely affect the job opportunities, wages, and working conditions of similarly employed U.S. workers. The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring non-immigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. "Temporary or seasonal nature" means employment performed at certain seasons of the year, usually in relation to the production and/or harvesting of a crop, or for a limited time period of less than one year when an employer can show that the need for the foreign workers(s) is truly temporary.

RELATIONSHIP OF USDOL AND COMMERCE

The Regional Administrator National Processing Center (NPC) Certifying Officer of the Employment and Training Administration (ETA) issues temporary labor certifications on behalf of the U.S. Secretary of Labor. The NPC Certifying Officer grants or denies a temporary labor certification or issues a notice indicating such certification cannot be made. The U.S. Department of Labor (USDOL) is advisory to the U.S. Citizenship and Immigrant Services (USCIS). The USDOL and the State Workforce Agency (SWA) administer the foreign labor certification program. In Kansas, the Department of Commerce is designated as the SWA. Administrative and appropriate workforce center staff carries out certain H-2A responsibilities.

EMPLOYER'S FILING REQUIREMENTS-NPC

For H-2A certification requests, employers file original copies of their applications with the NPC. The NPC will transmit a copy of the ETA 790 Form to the SWA, the Kansas Department of Commerce Foreign Labor Certification (FLC) Unit. To allow time for processing delays and correcting application errors, the employer should file for H-2A certification at least 45 days (but not more than 60 days) before the worker is needed. This is necessary since the availability of temporary U.S. workers changes over short periods and an adequate test of the labor market cannot be made during a longer period. The employer's request is made using Form ETA-9142, *Application for Temporary Employment Certification*, and Form ETA 790 and all attachments.

- Employer will submit the following documents no less than 45 days prior to its date of need to the Chicago NPC
  - ✓ A completed ETA Form 9142
  - ✓ A completed ETA Form 790 and all attachments
- Employer will not be required to . . .
  - ✓ Obtain an offered wage rate through the Chicago NPC prior to filing an H-2A application
  - ✓ Submit the ETA Form 9142 & 790 simultaneously to the SWA

- ETA Form 750, Part A, is discontinued with implementation of the H-2A Final Rule December, 2008
- Employer will be required to make all the attestations applicable to its future activities on the ETA Form 9142

To view NPC's review process, double-click on the below PDF.

H2A_FedReg.pdf

QUALIFYING CRITERIA

Who May Apply

The following general categories of individuals or organizations may file an application:

- An agricultural employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may file an application requesting temporary foreign agricultural labor certification. "Temporary or seasonal nature" means employment performed at certain seasons of the year, usually in relation to the production and/or harvesting of a crop, or for a limited time period of less than one year when an employer can show the need for the foreign worker(s) is truly temporary.

- The employer may be an individual proprietorship, a partnership or a corporation. An association of agricultural producers may file as a sole employer, a joint employer with its members, or as an agent of its members.
- An authorized agent, whether an individual (e.g., and attorney) or an entity (e.g., an association), may file an application on behalf of an employer.

The employer is fully responsible for the accuracy of all representations made by the agent on the employer's behalf. An association or other organization of employers is not permitted to file master applications on behalf of its membership under the H-2A program.

How to Apply

Applications may be filed using any of the methods below:

- Filed with the appropriate NPC and the State FLC Unit;
- Mailed to Chicago NPC by certified mail, return receipt requested;
- Delivered by guaranteed commercial delivery to Chicago NPC;

Conditions to be Satisfied

Many of the benefits that must be included in a job offer and other conditions that must be satisfied will be dependent upon what prevailing practices exist in the same occupation, crop and area. Employers are advised it is desirable to make an independent determination of factors such as prevailing wages and employer practices before filing an application.

An employer who files an application for temporary foreign labor certification pursuant to H-2A regulations must meet the following specific conditions:

Recruitment

The employer must agree to engage in independent positive recruitment of U.S. workers. This means an active effort, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to recruitment conducted by non-H-2A agricultural employers in the same or similar crops and areas to secure U.S. workers. This must be an effort independent of and in addition to the efforts of the SWA. In establishing worker qualifications and/or job specifications, the employer must designate only those qualifications and specifications essential to carrying out the job and normally required by other employers who do not hire foreign workers.

- Employer is required to engage in positive recruitment of U.S. workers 30 days past the employer's start date
- Chicago NPC may also require employers to positively recruit in other states of "traditional or expected labor supply" 20 CFR 655.105(a)
- SWAs are encouraged to provide the NPC Certifying Officer with current information on expected sources of labor supply for the job opportunity
- Such information will be considered by the NPC Certifying Officer and, where appropriate, incorporated into employer acceptance letters
- Each newspaper advertisement as well as all intra/interstate job orders must direct interested applicants to apply or send resumes to the nearest office of the SWA
- For interstate clearance, SWAs must circulate job orders accepted for processing with . . .
    - No fewer than 3 proximate states
    - At least 1 traditional labor supply state (TX, CA, FL, PR)
    - Any other states where a significant number workers would be available
- Employer must consider for employment individuals who appear at the place of work or otherwise contact the employer directly (i.e., "gate hires")

Referral of U.S. Workers

- Workers may be referred to employers only where the SWA determines the worker is
  - Able;
  - Willing; and
  - Eligible to take the job
- Eligibility is defined by the INA to mean "an individual who is not an unauthorized alien . . . with respect to that employment." INA Section 218(i)(1). The INA requires that employers execute a Form I-9 for all new employees
- Agricultural workers referred by the SWA must be legally authorized to work in the U.S. 20 CFR 651.10.

Wages

The wage or rate of pay must be the same for U.S. workers and H-2A workers. The hourly rate must also be at least as high as the applicable federal or state minimum wage, or the applicable prevailing hourly wage rate, whichever is higher.

If a worker will be paid on a piece rate basis, the worker must be paid the prevailing piece as determined by the State FLC Unit. If the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the hourly rate, then the worker's pay must be supplemented to the equivalent hourly level. The piece rate offered must be no less than what is prevailing in the area for the same crop and/or activity.

Housing

The employer must provide free housing to all workers who are not reasonably able to return to their residences the same day. Such housing must be inspected and approved according to appropriate standards. Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142 or the full set of standards at 654.404-645.417. Rental housing meeting local or state health and safety standards also may be provided.

Meals

The employer must either provide three meals a day to each worker or furnish free and convenient cooking and kitchen facilities for workers to prepare their own meals. If meals are provided, then the employer may charge each worker a certain amount per day for the three meals.

Transportation

The amount of transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. The employer is responsible for the following different types of transportation of workers:

- After a worker has completed fifty percent of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work if such costs were borne by the worker.
- The employer must provide free transportation between the employer's housing and the worksite for any worker who is provided housing.
- Upon completion of the work contract, the employer must pay economic costs of a worker's subsistence and return transportation to the place of recruitment. Special conditions apply when the worker will not be returning to the place of recruitment because of another job. If the employer must advance transportation costs to foreign workers or provide transportation, the employer must advance such costs or provide transportation to U.S. workers as well. In addition, if it is prevailing practice in the occupation to provide transportation, the employer must provide transportation to U.S. workers, as well.

Workers' Compensation Insurance

The employer must provide workers' compensation insurance where it is required by state law. Where state law does not require it, the employer must provide equivalent insurance for all workers. Proof of insurance coverage must be provided to the NPC before certification is granted.

Tools and Supplies

The employer must furnish at no cost to the worker all tools and supplies necessary to carry out the work, unless it is common practice in the area and occupation for the worker to provide certain items.

Three-Fourths Guarantee

The employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract period and any extensions. If the employer affords less employment, then the employer must pay the amount which the worker would have earned had the worker been employed the guaranteed number of days.

Thirty Day Rule

The employer must hire any qualified and eligible U.S. worker who applies for a job until for a period of 30 days after the employer’s date of need.

Labor Dispute

The employer must assure the job opportunity for which the H-2A certification is being requested is not vacant because the former occupant is on strike or is being locked out in the course of a labor dispute.

Certification Fee

Each employer of H-2A workers will pay the appropriate fees to DOL for each temporary agricultural labor certification received.

Other Conditions

The employer must keep accurate records with respect to a worker's earnings. The worker must be provided with a complete statement of hours worked and related earnings on each payday. The employer must pay the worker at least twice monthly or more frequently if it is customary practice to do so. The employer must provide a copy of a work contract or the job order to each worker.

SWA ROLES & RESPONSIBILITIES

Phase I: General Responsibilities

Outreach to Employers

- General notification regarding effective date of new H-2A Rule and transition filing procedures
- Refer questions to USDOL at H-2A.Regulation@dol.gov
- Provide a copy of ETA Form 9142 and offer assistance in preparing ETA Form 790 for submission to Chicago NPC
- Encourage early filing based on expected date of need

Conduct Prevailing Wage Surveys

- Survey agricultural and logging activities in accordance with ETA Handbook 385
- Complete all surveys and submit signed ETA 232 to the National Office of Foreign Labor Certification for review and final certification
- National interest surveys (e.g., custom combine, sheepherding) will continue to be conducted by the SWA's

Schedule and Inspect Housing

- Plan to schedule housing inspections prior to filing for employers who regularly use the H-2A program
- Encourage employers to have housing ready for inspection at time of filing or earlier
- If not previously done, schedule and conduct pre-occupancy housing inspections upon request from Chicago NPC
- Provide notification to the employer of any deficiencies, request correction in 5 calendar days, and re-inspect
- Complete all scheduled housing inspections and submit reports to the Chicago NPC
- If housing not approved, cancel job order and notify any referred U.S. workers
- Provide notification to the Chicago NPC of any changes in housing and the results of any inspections conducted on substitute housing

Housing Inspections/Standards

- Housing must be provided at no cost to any worker not able to return to his/her residence in the same day
- TEGL reminds SWAs of the applicable standards for employer-provided housing as well as rental, public accommodation, or other similar habitation
- SWAs should perform timely housing inspections to minimize any delays in H-2A processing

- Substitute housing is permitted where . . .
  - Original certified housing becomes unavailable for reasons beyond the employer's control
  - Employer notifies the SWA in writing
  - Notification states the reason(s) for the change in accommodations
  - Rental or public accommodation housing possesses a valid certificate of occupancy
- USDOL strongly recommends the SWA schedule and inspect such accommodations prior to or during occupation

Phase II: Initial Processing (at 45 Days)

- Receive a copy of the job offer (ETA 790) from the Chicago NPC; not directly from employer
- Review contents of job offer for compliance with 20 CFR 653 Subpart F
  - Advise Chicago NPC of any deficiencies such that the 7 day acceptance timeframe can be met
- Respond to Chicago NPC requests for assistance or information about the employer's job offer
- Prepare local job order based on content of job offer and, if appropriate, place on active file and begin recruitment
  - If available, advise Chicago NPC of local job order number for inclusion on acceptance letter
- Begin preparation of interstate clearance order based on employer's job offer
- If application is not accepted, receive a copy of the Chicago NPC modification letter containing . . .
  - The reason(s) why the application fails to meet the criteria for certification
  - An opportunity to submit a modified application within 5 business days
  - An opportunity to request administrative review within 5 business days
- Where appropriate, consult with employer to determine if requested modifications will be accepted
- Revise local job order and clearance order to incorporate modifications requested by Chicago NPC and agreed to by the employer
- If employer appeals, place job orders in abeyance until resolution is reached

Phase III: Post-Acceptance Processing

- Receive a copy of the Chicago NPC acceptance letter containing…
  - Instructions to the employer for recruiting U.S. workers consistent with 20 CFR 655.102(d)(2)-(4)
  - Instructions to the SWA for clearing local job order to other states and requesting an inspection of the housing
  - Offered wage rate
  - Date for employer to submit initial recruitment report
- Finalize clearance order and transmit (e.g., scan/email, fax, mail) promptly to all states designated by the Chicago NPC and begin recruitment of eligible U.S. workers
- Unless otherwise directed by the NPC, the SWA must keep the job order open until the end of the recruitment period (i.e., 30 days after the start date of need)
- Interstate Recruitment
  - SWA will promptly transmit, on behalf of the employer, a copy of its active ETA 790 to all states listed in the job order as anticipated worksites
  - SWA has the flexibility to transmit a copy of all active job orders to additional states (beyond those designated by the Chicago NPC) of traditional or expected labor supply for the area(s) of intended employment
  - Each of the SWAs to which the ETA Form 790 was referred must keep its own job order open until the end of the recruitment period and refer each eligible U.S. worker who applies for the job opportunity
- Maintain Records of Referrals
  - Maintain record of referrals of U.S. workers and any actions subsequently taken (e.g., hired, not hired)
  - Provide notification to the Chicago NPC of any "questionable" refusals to hire
  - SWAs may only refer for employment individuals whom they have verified identity and employment eligibility through the process for employment verification of all workers that is established by INA § 274A(b)
  - SWAs must provide documentation to the employer certifying the employment verification that satisfies the standards of INA § 274A(a)(5) and its implementing regulations at 8 CFR 274a.6
- Processing Amendments
  - Upon receipt of notice from the Chicago NPC, assist the employer in processing amendments to the job order
    - Number of workers requested
    - Period of intended employment
    - Other minor amendments approved by the Chicago NPC
  - Ensure all approved amendments are incorporated into the job order package
  - If employer appeals a rejection of the requested amendment(s), maintain existing or job order currently on active file until resolution is reached
  - Upon receipt of the employer's initial recruitment report and any other documentation from the SWA, the NPC will issue a determination to certify or deny the H-2A application consistent with 20 CFR 655.109
  - A determination will be issued no later than 30 days before date of need, except for modified applications or those otherwise not meeting the criteria for certification by that date

Phase IV: Post-Determination Actions

- Receive a copy of final determination letter (either electronically or by mail) of the labor certification determination
- Respond to requests for assistance from Chicago NPC on . . .
  - Appeals of denial determinations
  - Requests for re-determinations based on worker availability
- If certified, continue to cooperate with the employer by referring eligible workers until the recruitment period has ended (i.e., 30 days after the date of need)
- Continue to provide notification to the Chicago NPC of any "questionable" refusals to hire
- Refer complaints involving the work contract to the ESA Wage and Hour Division for appropriate handling and resolution
- Refer and receive complaints from/to the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), Department of Justice, involving allegations of an employer discouraging workers from applying, failure to hire, discharging, or otherwise discriminating against eligible U.S. workers
- Provide notification to the Chicago NPC if worker terminations, abandonments, or abscond come to its attention
- Cancel local job order and interstate clearance order(s) when 30 days of the work contract has elapsed
- Cooperate with the Chicago NPC by submitting documentation or information to support audit examinations

RESPONSIBILITY OF THE STATE FOREIGN LABOR CERTIFICATION (FLC) UNIT

Recruitment of U.S. Workers

After an application is accepted for consideration, the NPC sends the ETA 790 to Commerce FLC Unit. The State FLC Unit prepares a job order and notifies the appropriate workforce center(s) to initiate the recruitment of U.S. workers. The form ETA 790 and attachments will be completed by the employer when filing a Temporary Seasonal Agricultural Alien Labor Certification and submitted with the ETA 9142.

The State FLC Unit is responsible for the following:

- Opening a Job Order in **KANSAS**WORKS.com;
- Send copy of ETA 790 and attachments to the workforce center;
- Acts as liaison between USDOL and the workforce centers to process H-2A applications;
- Trains appropriate workforce center staff on H-2A housing inspections Coordinates and assists enforcement agencies in resolution of any worker complaints;
- Provides technical assistance and information, materials, and forms to the workforce centers so they may fulfill all responsibilities associated with the H-2A application process, including housing inspections.
- Provides technical assistance, forms, and information to employers inquiring about the H-2A application process.

- Advises the NPC if the employer refuses referred workers;
- Submits recruitment report to the NPC; and
- Advises the NPC if worker terminations come to their attention.

Housing Inspections

The State FLC Unit will coordinate all scheduled housing inspections to ensure these are completed by the workforce center. If deficiencies are found, the employer is allowed five calendar days to make the necessary corrections. If the housing is not approved after the re-inspection, the job order must be canceled and referred workers should be notified. The Immigration and Nationality Act requires employers to furnish housing meeting applicable standards before certification can be issued (INA sec. 218(c) (4)). Documentation to verify the employer provided housing meets applicable standards must be received by the NPC prior to certification being granted. The State FLC Unit encourages employers who expect to obtain their certification 30 days before the date of need to have housing ready for inspection at the time of filing their application or earlier.

Prevailing Wage and Prevailing Practice Surveys

The State FLC Unit is responsible for conducting prevailing wage surveys and submitting these to the NPC for verification. Prevailing wage surveys are conducted for the following reasons:

- Implement regulations at CFR 653.501(recruitment of farm workers) and CFR 655.102 and .103 (H-2A recruitment procedures);
- Evaluate job orders;
- Facilitate recruitment and placements; and
- Conduct earnings analysis.

RESPONSIBILITIES OF WORKFORCE CENTER STAFF

A number of Wagner-Peyser staff is already trained to carry out the following local responsibilities. If other employees (Wagner-Peyser or WIOA) are assigned any of these responsibilities, the State FLC Unit will provide training and technical assistance as needed.

- Acts as liaison between the employer and applicant throughout the recruitment period;
- Acts as liaison between the employer, the Kansas H-2A Coordinator and USDOL throughout the H-2A program process;
- Conducts housing inspections;
- Coordinates and assists enforcement agencies in resolution of any worker complaints;
- Provides technical assistance, forms, and information to employers inquiring about the H-2A application process;
- Screens applicant resumes received against advertisements to ensure job candidates meet employer requirements, makes referrals of qualified applicants, and enters services provided into **KANSAS**WORKS.com;

VIOLATIONS, PENALTIES AND SANCTIONS

The Wage and Hour Division of the Employment Standards Administration (ESA) of the U.S. Department of Labor has a primary role in investigating and enforcing the terms and conditions of employment. ESA is responsible for enforcing the contractual obligations employers have toward

employees, and may assess civil money penalties and recover unpaid wages. Administrative proceedings and/or injunctive actions through federal courts may be instituted to compel compliance with an employer's contractual obligations to employees.
The Employment and Training Administration (ETA) enforces other aspects of the laws and regulations. ETA is responsible for administering sanctions relating to substantial violations of the regulations (denial of certification for up to three years) and less than substantial violations of the regulations (reductions of one fourth of job opportunities certified).

Validity of Temporary Labor Certifications

The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring non-immigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. "Temporary or seasonal nature" means employment performed at certain seasons of the year, usually in relation to the production and/or harvesting of a crop, or for a limited time period of less than one year when an employer can show the need for the foreign workers(s) is truly temporary.

Process for Appeal

The NPC will inform the employer about the system of appeals provided for in the regulations for Notices of Non-acceptance, Denials of Certifications, and Employer Penalties.

CASE STATUS INQUIRY

Employers may obtain information regarding the status of their H-2A applications by using the new H-2A Online Application Processing System. Additionally, the system provides the capability to track applications as they move through the process.

Foreign Labor Certification H-2 B Non-immigrant Program

PROGRAM OVERVIEW

The H-2B non-immigrant program provides certifications to ensure the admission of foreign workers into the United States to perform temporary nonagricultural work will not adversely affect the job opportunities, wages, and working conditions of similarly employed U.S. workers. There is currently a 66,000 limit on new H-2B visas issued each federal fiscal year (Oct-Sept).

ROLE OF USDOL AND COMMERCE

The Regional Administrator National Processing Center (NPC) Certifying Officer of the Employment and Training Administration (ETA) issues temporary labor certifications on behalf of the U.S. Secretary of Labor.

The NPC Certifying Officer grants or denies a temporary labor certification or issues a notice that such certification cannot be made. The U.S. Department of Labor (USDOL) is advisory to The U.S. Citizenship and Immigrant Services (USCIS). The USDOL and the State Workforce Agency (SWA) administer the foreign labor certification program. In Kansas, the Department of Commerce is designated as the SWA.

EMPLOYER'S FILING REQUIREMENTS-NPC

Application Filing Procedures

- Filed by a U.S. employer by U.S. Mail or private mail courier with the USDOL Chicago National Processing Center (NPC)
- Changes and updates will be published in the *Federal Register* as well as the USDOL Internet Web site at http://www.foreignlaborcert.doleta.gov/
- Employer will submit the following documents to the Chicago NPC
- ETA Form 9142 – Application for Temporary Employment Certification with Appendix B.1
- Initial Recruitment Report
- Application must contain attestations of the employer's compliance or promise to comply with program requirements regarding recruitment of eligible U.S. workers, the payment of an appropriate wage, and terms and conditions of employment
- The ETA Form 9142, Appendix B.1 must bear the original signature of the employer and, if applicable, that of the employer's authorized attorney or agent
- Except where otherwise permitted under 20 CFR 655.3, only ONE Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.
- An association or other organization of employers CANNOT file master applications on behalf of its employer-members under the H-2B program
- Job contractors can file applications under the H-2B program
  - However, the temporary nature of the work or services will be determined by examining:
    1. The job contractor's own need for the labor or services; AND
    2. The needs of each individual employer with whom the job contractor has agreed to provide workers

Application Filing Requirements - Establishing Temporary Need

- To use the H-2B Program, the employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary
- The employer's need is considered temporary if justified as either a:
  - One-time occurrence;
  - Seasonal need;
  - Peakload need; or
  - Intermittent Need

Offered Wage Rate Determination

- The employer must obtain a prevailing wage determination that is valid either:
  - On the date recruitment begins; OR
  - The date of filing the ETA Form 9142
- The employer must request and obtain a wage rate determination from the NPC before commencing any recruitment under the regulations, except where a specific exemption is granted

Pre-Filing Recruitment Activity - General Provisions

- Employer may not file the ETA Form 9142 until all of the pre-filing recruitment steps have been met, except where a specific exemption applies
- Employer must attest on the ETA Form 9142 that it has complied with all necessary steps of the recruitment process, including:
  - Obtain a prevailing wage determination from the NPC
  - Submit a job order to the SWA serving the area of intended employment
  - Run two print advertisements in area of intended employment, one must be a Sunday
  - If the employer is part of a CBA, contact the union for referrals of able, willing, qualified and available U.S. workers
- All advertising must contain terms/conditions of employment which are no less favorable than those offered to the H-2B workers

Pre-Filing Recruitment Activity - SWA Job Order

- The employer must place an active job order with the SWA no more than 120 calendar days before the date of need for intrastate and interstate clearance
- The SWA must keep the job order open for at least 10 calendar days
- If the job contains multiple worksites in the same area of intended employment covering multiple states, the employer will place the job order with the SWA having jurisdiction where employment will begin
- The SWA will then transmit the job order to all states listed in the application as anticipated worksites

STATE REVIEW PROCESS

The H-2B SWA Job Order request is filed with the Kansas Department of Commerce, Foreign Labor Certification (FLC) Unit. To allow time for processing delays and correcting application errors, the employer should file for H-2B certification at least 60 days (but not more than 120 days) before the worker is needed. Applications filed more than 120 days prior to the date of need will be held until a job order can be opened according to the guidelines. This is necessary since the availability of temporary U.S. workers changes over short periods and an adequate test of the labor market cannot be made during a longer period. The employer's request is made using Form ETA-9142, *Application for Temporary Employment Certification*. More than one worker may be requested if they are to do the same type of work on the same terms and conditions, in the same occupation, in the same area(s) of intended employment during the same period.

H-2B requests for Job Orders filed with the Kansas FLC Unit must include the following:
ETA Form 9142, Instructions for applicants to be referred to the Employer.

STATE (SWA) RESPONSIBILITIES

- Receiving employer job order to be placed in connection with a future application for H-2B workers
- Reviewing employer's job order for obvious errors or omissions and compliance with content requirements at 20 CFR 655.17
- Where necessary, providing written notification to the employer of any deficiencies or corrections
- Placing job order on active file for intrastate clearance
- Providing the employer with proof of publication containing the text of the job order and the start and end dates of posting
- Maintaining active job order for a period of not less than 10 days; although SWAs have authority to require longer recruitment period
- Promptly transmitting, on behalf of the employer, a copy of its active job order to other States contained in the same area of intended employment (if applicable)
- Instructing other SWAs to keep its own job order open until the end of the recruitment period in the original job order and refer each eligible U.S. worker who applies for the job opportunity
- Maintaining record of referrals of U.S. workers and any actions subsequently taken (e.g., hired, not hired)
- Providing notification to the Chicago NPC of any "questionable" refusals to hire
- Referring for employment individuals whom they have verified identity and employment eligibility through the process for employment verification of all workers that is established by INA § 274A(b)
- Providing documentation to the employer certifying the employment verification that satisfies the standards of INA § 274A(a)(5) and its implementing regulations at 8 CFR 274a.6

A job opportunity containing a wage offer below the prevailing wage will not be accepted. The Immigration and Nationality Act (INA) requires wages paid to non-immigrants be at least the higher of the actual wage rate paid to all other workers with similar experiences and qualifications for the specific employment in question or the prevailing wage rate for the occupational classification in the area of employment. This does not preclude the employer from paying non-immigrants more than the higher of the actual wage or the prevailing wage.

If the job offer is less than full-time, offers to pay a wage below the prevailing wage, contains unduly restrictive job requirements or a combination of duties not normal to the occupation, or has terms and conditions of employment which otherwise inhibit the effective recruitment and consideration of U.S. workers for the job, or is otherwise unacceptable, the FLC Unit will advise the employer to correct the deficiencies before commencing the recruitment. All deficiencies must be corrected before commencing recruitment.

When recruitment begins, the FLC Unit prepares a job order using the information on the ETA 9142 form and places it in **KANSAS**WORKS.com for no less than ten calendar days. Qualified applicants are asked to forward a resume to the employer. During this period, the workforce centers refer qualified applicants directly to the employer. Advertisements must be published only after the job order is accepted by the SWA for intrastate/interstate clearance.

The employer must contact qualified individuals referred and allow ample time for individuals to respond to the contact. After the recruitment period, the FLC Unit will notify the NPC if the recruitment procedures have not been followed as required. Based on the results of the employer's and the FLC Unit's recruitment efforts, the NPC Certifying Officer must determine whether there are other appropriate sources of workers from which the employer should have recruited in order to obtain qualified U.S. workers.

To view NPC's review process, double-click on the below PDF.

H2B_FedReg.pdf

CASE STATUS INQUIRY

Employers may obtain information regarding the status of their H-2B applications by sending an email to TLC.Chicago@dol.gov. Depending on workload volume, the NPC will respond to a case status inquiry within 48 hours. In the subject line, include the program designation (e.g., H-2B) and the words "Case Status Request." In the body, include the following information:

- Name of the state – Kansas
- Occupation title
- Employer name (ETA Form 9142)
- Agent/Attorney Name, if applicable

Foreign Labor Certification Program Prevailing Wage Determinations

PROGRAM OVERVIEW

The Immigration and Nationality Act (INA) requires wages paid to nonimmigrant's be at least the higher of the actual wage rate paid to all other workers with similar experiences and qualifications for the specific employment in question or the prevailing wage rate for the occupational classification in the area of employment. This does not preclude the employer from paying nonimmigrant's more than the higher of the actual wage or the prevailing wage.

When determining prevailing wages 20 CFR, Part 656.40, effective March 28, 2005, must be followed. The prevailing wage determination is an opinion issued by the FLC Unit based on prevailing wage policy guidance. Prevailing wage determinations for foreign labor certification purposes are intended to prevent an employer from paying a foreign worker a wage lower than required under federal, state, or local law.

ROLE OF KANSAS DEPARTMENT OF COMMERCE

The Kansas Department of Commerce is required to provide wage determination information to employers wishing to file or update a labor attestation or labor condition application.

Please Note: The employer must request and obtain a wage rate determination from the NPC before commencing any recruitment under the H-2B regulations.

PREVAILING WAGE DETERMINATIONS

Employers should complete a Prevailing Wage Request Form and submit it by e-mail or FAX to the Foreign Labor Certification (FLC) Unit. The job description included in the request must include sufficient information to determine the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. The state agency may not charge a fee for making or reviewing a prevailing wage determination.

O*NET information is used to identify the tasks, work activities, knowledge, and skills generally required for performance in an occupation. To determine the appropriate wage level, a comparison is made between the employer's job offer and the requirements for similar (O*NET) occupations.

The use of such employer-provided wage data is an employer option. The employer must provide enough information about the survey methodology (e.g., sample size and source, sample selection procedures, survey job descriptions) to allow a determination with regard to the adequacy of the data provided and the validity of the statistical methodology used in conducting the survey. If the employer submits a published survey, that survey must:

- have been published within 24 months of the date of submission of the prevailing wage request;
- be the most current edition of the survey; and
- be based on data collected within 24 months of the date of the publication of the survey.

The U.S. government's Program Electronic Review Management (PERM) regulation published December 27, 2004, with an effective date of March 28, 2005, has modified the prevailing wage determination process in the following significant ways:

- The use of Davis-Bacon or the McNamara-O'Hara Service Contract Act is no longer controlling for prevailing wage determinations although an employer may request that those sources be considered as an employer provided wage source;

- Employers may continue to submit published surveys from public or private sources or employer-conducted surveys as long as the survey complies with acceptable standards. Although the prevailing wage data will be provided for four skill levels, employer-provided surveys are acceptable if they contain only one weighted arithmetic mean level. If an employer-proved survey does not contain an arithmetic mean, and only provides the median, the median wage figure can be used for determining the prevailing wage; and

- Employers who disagree with their prevailing wage determination are afforded one opportunity to provide supplemental information to the state. Additionally, employers may choose to file a new request for a wage determination or request review by the Certifying Officer or the Board of Alien Labor Certification Appeals.

would be indicators that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation (SVP) is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. This training may be acquired in a school, work, military, instructional, or vocational environment. It does not include the orientation time required of fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- Vocational education (high school, commercial or shop training, technical school, art school, and that part of college training which is organized around a specific vocational objective);
- Apprenticeship training (for apprentice able jobs only);
- In- plant training (organized classroom study provided by an employer);
- On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker); or
- Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

APPEAL PROCESS

Employers wishing to challenge prevailing wage determinations must request a review of the determination in writing within 30 days of the date of the determination. The written request must be sent by postal mail to the FLC Unit.

The employer's request for review must contain the following:

- Cover letter identifying the prevailing wage determination for which the review is sought and clearly stating the grounds for the request;
- Revised Prevailing Wage Request form marked as an appeal; and
- Any new material documenting the grounds for the request.

Upon receipt of a request for review, the FLC Unit must accomplish the following:

- Review the employer's request and accompanying documentation;
- Add any material the employer may have omitted; and
- Send copy of the employer's appeal to the national processing center in Chicago.

The director of the national processing center will determine which certifying officer will review the employer's appeal. The certifying officer will review the appeal based on the information upon which the prevailing wage determination was made. The certifying officer may:

- Affirm the state's prevailing wage determination;
- Modify the prevailing wage determination; or
- Remand the matter to the state for further action.

If an employer desires further review after the certifying officer makes a determination, a request for review by the Board of Alien Labor Certification Appeals must be made in writing within 30 days of the date of the certifying officer's determination.

VALIDITY OF PREVAILING WAGE DETERMINATION

The validity period of the prevailing wage determination shall not be less than 90 days or more than one year from the determination date. The validity period of the prevailing wage determination shall be issued on the determination.

Attachments

Flow Chart

If problems develop, the line of contact is:

1. Trained staff in the workforce center
2. Functional Supervisor
3. State FLC Unit

Employer Name: _____

Employer Address: _____

Job Order #: _____

ATTENTION EMPLOYER: This certificate is issued in compliance with the Immigration and Nationality Act, the United States Citizenship and Immigration Services (USCIS) and the U.S. Department of Labor (USDOL). Do not accept certificates that have been altered or machine copied. This certificate is invalid if not complete. You must have the employee sign the attestation on this certification in your presence. You are not required to verify the individual's identity or employment eligibility, but must retain this certificate in lieu of Form I-9. If you have questions or detect errors on this certificate, please contact the Kansas Workforce Center at the telephone shown below.

In response to your request for a _____, we referred the individual listed below, whose eligibility for
(Occupation)
employment in the United States was verified by this office prior to referral.

Name: _____ Birth Date: _____ SSN: _____

Expiration date of employment (if applicable): _____
Restrictions, conditions, limitations (if any): _____

1. **Document Title**: _____
   Issuing Authority: _____
   Document ID Number: _____
   Expiration Date (if any): _____

2. **Document Title**: _____
   Issuing Authority: _____
   Document ID Number: _____
   Expiration Date (if any): _____

Workforce Center Name: _____
Street Address: _____
City, State, Zip: _____
Staff Name: _____
Telephone Number: _____

I certify this document complies with the requirements of the Governing Laws and Regulations concerning verification of the identity and employment eligibility of the individual referred, and I have determined that, to the best of my knowledge, the individual is authorized to work in the United States.

_____ _____
Signature of Workforce Center Staff Date

ATTESTATION: I attest under penalty of perjury that I am the individual named on this certificate and that I am a United States citizen or national or alien authorized for employment in the United States.

_____ _____
Signature of Worker Hired Date

_____
PRINTED Name of Worker Hired

Counterfeiting, falsification, unauthorized issuance, or alteration of this certification constitutes a violation of federal law pursuant to Title 18 U.S.C. Section1546.

Demonstrating Temporary Need

A job opportunity is considered temporary under the H-2B classification if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. It is the nature of the employer's need, not the nature of the duties that is controlling. The period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. If there are unforeseen circumstances where the employer's need exceeds one year, a new application for temporary labor certification is required for each period beyond one year. However, an employer's seasonal or peak load need of longer than 10 months, which is of a recurring nature, will not be accepted.

Job contractors typically supply labor to one or more employers as part of signed work contracts or labor services agreements. The temporary or permanent nature of the work to be performed in such applications will be determined by examining the job contractor's need for such workers, rather than the needs of its employer customers.

Part-time employment does not qualify as employment for temporary labor certification under the H-2B program. Only full-time employment can be certified.

One of the four temporary need standards must be satisfied. The employer's need for temporary non-agricultural services or labor must be justified as a one-time occurrence, seasonal need, peak load need; or intermittent need as follows:

One-Time Occurrence - The petitioner must establish either (1) it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future, or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s);

Seasonal Need - The petitioner must establish the services or labor are traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees;

Peak load Need - The petitioner must establish (1) 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 (2) the temporary additions to staff will not become a part of the petitioner's regular operation; or

Intermittent Need - The petitioner must establish it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. A labor shortage, however severe, does not alone establish a temporary need.

Supporting Evidence and Documentation

Supporting evidence and documentation to justify the chosen standard of temporary need must be submitted. Examples of supportive evidence or documentation for the most common standards of seasonal and peak load need include, but are not limited to, the following:

- Signed work contracts, letters of intent from clients, and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142. This documentation must demonstrate the employer's need for the work to be performed is tied to a season(s) of the year and will recur next year on the same cycle.

- Annualized and/or multi-year work contracts or work agreements supplemented with signed work contracts specifying the actual dates when work will commence and end during each year of service.

- Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. The employer must sign attesting the information being presented was compiled from the employer's actual accounting records or system. Employers should be prepared to provide the documents utilized to generate the summarized monthly payroll reports if requested.

Examples of **insufficient documentation** include, but are not limited to, the following:

- Work contracts with no clear termination date and contracts with temporary workers;
- Applications supported solely by weather charts, event calendars, hotel occupancy rates, or annual/quarterly tax reports (e.g., IRS Form 941); and
- Staffing charts, graphs, or other documentation, which do not correspond with the requested period of need on the ETA Form 9142.