

News Release

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US Labor Department issues proposed rulemaking revising H-2B program

Proposed rule seeks to enhance access to jobs, benefits and protections for US workers

WASHINGTON — The U.S. Department of Labor's Employment and Training Administration and its Wage and Hour Division today announced the publication of a proposed rule that seeks to improve the H-2B temporary nonagricultural worker program. The proposed rule, to be published in the March 18 edition of the *Federal Register*, includes changes to several aspects of the program to ensure that U.S. workers receive the same level of protections and benefits as temporary foreign workers recruited under the H-2B program, and to provide better access for employers with legitimate labor needs.

The H-2B program allows the entry of foreign workers into the United States on a temporary basis when qualified U.S. workers are not available and when the employment of those foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The H-2B program is limited by law to a program cap of 66,000 visas per year.

"As our economy continues to recover, it is important for U.S. workers to receive access to all jobs, and that the H-2B program is used as it was intended," said Secretary of Labor Hilda L. Solis. "At the same time, workers employed through the H-2B program must be treated fairly."

In order to streamline and improve the program for employers, the proposed rule would create an H-2B registration process that would allow employers to conduct labor market tests closer to their date of need before applying for a certification. It also would eliminate job contractors as users of the program.

The department further proposes to improve U.S. workers' access to jobs and increase worker protections by creating a national job registry for all H-2B job postings; requiring employers to provide documentation that they have taken appropriate steps to recruit U.S. workers, rather than permitting employers to attest to such compliance; enhancing transparency by requiring employers to submit agency agreements and through the use of foreign recruiters; reinstating the role of state workforce agencies in providing expertise on local labor market conditions and recruitment patterns; and increasing the amount of time during which U.S. workers must be recruited.

Additionally, the department proposes to extend H-2B program benefits to workers employed alongside those recruited under the H-2B program; require employers to pay transportation costs and other fees; and enhance enforcement by giving the department's Wage and Hour Division independent debarment authority.

To view a copy of the forthcoming *Federal Register* notice, visit <http://s.dol.gov/DK>. Members of the public are invited to submit comments on this proposed rule via the federal e-rulemaking portal at <http://www.regulations.gov>. The deadline for comments is May 17, 2011.

- Read this news release [en Español](#).

H-2B Notice of Proposed Rulemaking
Labor Certification Process and Enforcement for Temporary Employment in Occupations
Other Than Agriculture or Registered Nursing in the United States

The Immigration and Nationality Act provides that the Secretary of the Department of Homeland Security (DHS) must consult with “appropriate agencies of the Government” before granting any H-2B visa petitions. Through regulation, DHS delegated to DOL labor certification and enforcement authority for the H-2B program. As part of its labor certification responsibilities, DOL’s Employment and Training Administration (ETA) certifies whether U.S. workers capable of performing the jobs for which employers are seeking foreign workers are available, and whether the employment of the foreign workers will adversely affect the wages and working conditions of U.S. workers similarly employed. As part of its enforcement responsibilities, DOL’s Wage and Hour Division (WHD) enforces compliance with the conditions of an H-2B petition and DOL-approved temporary labor certification.

The proposed rule will:

- Address the critical issue of U.S. worker access to the jobs for which employers seek H-2B workers through a re-engineered program design which focuses on enhanced U.S. worker recruitment and strengthened worker protections.
- Through more robust domestic recruitment, assist employers to find domestic labor for those positions the employers would otherwise seek to fill with temporary H-2B workers.
- Strengthen existing worker protections, establish new protections, and enhance program integrity measures and enforcement to ensure adequate protections for both U.S. and H-2B workers.
- Ensure that only those employers who demonstrate a legitimate temporary need for temporary foreign workers have access to the H-2B program.

Major features of the NPRM include:

- Creating a national electronic job registry for all H-2B job orders (an expansion of the H-2A job registry) to improve U.S. worker access to nonagricultural jobs and help employers find workers from across the U.S.
- Enhancing the recruitment of U.S. workers, increasing the amount of time for which U.S. workers must be recruited, and requiring the hiring back of former employees when available.
- Requiring employers to engage in post-filing recruitment of U.S. workers, thereby demonstrating compliance with the prerequisites for bringing H-2B workers into the country.
- Creating an H-2B Registration process in which employers must demonstrate temporary need before applying for a labor certification. Temporary need (other than for a one-time occurrence) can be no more than 9 months. This would result in a more streamlined

process that would allow employers to conduct the labor market test closer to the date of need without the simultaneous adjudication of temporary need.

- Reinstating the critical role of the State Workforce Agencies (SWA) in assisting employers by using their expertise on local labor market conditions and recruitment patterns, thereby expanding job opportunities for U.S. workers.
- Maximizing the use of the program by employers with legitimate temporary need through the elimination of job contractors from the program, on the basis that they have a permanent need for workers.
- Providing greater transparency by requiring employer disclosure of agency agreements and use of foreign recruiters in the solicitation of H-2B workers.
- Extending H-2B program benefits, such as wages and transportation, to similarly employed U.S. workers to ensure these workers are not receiving lower wages or fewer benefits than the foreign workers.
- Strengthening worker protections through inclusion of the following provisions:
 - ✓ Payment or reimbursement of transportation and subsistence for workers to/from the place from which the worker has come to work for the employer;
 - ✓ Payment or reimbursement of visa, border crossing and related government-mandated fees;
 - ✓ Provision of all tools, supplies and equipment;
 - ✓ Offering each worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period and requiring full-time work of at least 35 hours per week;
 - ✓ Provision of accurate earnings statements with clear and lawful deductions; and
 - ✓ Requirement that employers provide workers with copies of the job orders no later than the time at which the worker applies for the visa, if the worker is departing directly from his or her home country, and display a poster describing employee rights and protections in English and another language common to the workers at the work site.
- Strengthening debarment authorities by providing WHD with independent debarment authority in addition to ETA, and providing revocation authority to ETA.