Wage and Hour Division (WHD)

WHD H-2B Side-by-Side Comparison of the 2009 and 2012 Rules

February, 2012

This Guidance does not supersede the INA or H-2B Regulations

Issue/Provision	2009 Regulations	2012 Regulations
	I. General Information	
Effective Dates	For Applications for Temporary Employment Certification (the "Application"), ETA Form 9142, filed on or after January 18, 2009 until April 23, 2012.	For Applications for Temporary Employment Certification (the "Application"), ETA Form 9142, filed on or after April 23, 2012. Registration will be implemented at a later date to be announced in the Federal Register.
Regulation location, Part and subpart	Employment and Training Administration (ETA) and Wage and Hour Division (WHD) provisions covered under 20 CFR Part 655, subpart A.	Employment and Training Administration (ETA) provisions continue to be covered under (revised) 20 CFR Part 655, subpart A. New regulations for Wage and Hour Division (WHD) introduced at 29 CFR Part 503.
Forms required to obtain certification from ETA	Employer submits and receives a prevailing wage determination and then submits an Application, ETA Form 9142, from which ETA determines temporary need and assesses the employer's test of the labor market.	Employer submits and receives a prevailing wage determination and then submits an H-2B Registration (after the transition period), from which ETA certifies temporary need for up to three years. Each season, employer submits an Application, ETA Form 9142, a copy of the job order, and additional documentation from which ETA assesses the employer's job opportunity and then orders recruitment to ensure a thorough test of the labor market. The Application, ETA Form 9142, and required documents must be submitted 75 - 90 calendar days before the employer's date of need.
Emergency Situations	No provision	The CO may waive the normal filing timeframe (i.e., 75 – 90 calendar days before the employer's date of need).So long as there is enough time to test the labor market and provided that the employer can demonstrate a good and substantial cause, the employer may simultaneously file the H-2B Registration (if necessary), application, and job order less than 75 calendar days before its start date of need.
Temporary Need	Except for one-time need, temporary need (i.e., seasonal, peakload and intermittent need) is limited to 10 months or less.	Except for one-time need, temporary need (i.e., seasonal, peakload and intermittent need) is limited to 9 months or less.
	20 CFR 655.6	20 CFR 655.6
Job Contractors	Full participation of job contractors permitted.	Participation of job contractors is limited to those with their own genuine temporary need for workers on a temporary seasonal or one-time occurrence basis.The job contractor and its clients, the end-employers, must continue to declare joint employment, and both must continue to sign Appendix B agreeing to comply with the H-2B terms and conditions.
	Beginning April 2011, job contractors and their clients, the end-employers, must declare joint employment on the Application, and both must indicate their agreement to comply with the H-2B terms and conditions by signing Appendix B to the Application.	
Corresponding employment	No language explicitly defining corresponding workers, although U.S. workers who are hired in response to required H-2B recruitment are granted the same terms and conditions of employment as H-2B workers.	Corresponding workers are generally defined as non-H-2B workers who perform either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, with exclusions for certain long-term incumbent workers and workers with a Collective Bargaining Agreement or individual employment contract.
		Corresponding workers are entitled to the same rights and benefits as H-2B workers.
		Defined at 29 CFR 503.4; enforcement identified at 29 CFR 503.15.
Timing of recruitment in relation to Application	Employer attests that it has completed all required recruiting before submitting the Application; also attests it was unable to locate sufficient number of qualified U.S. workers.Employer must submit a recruitment report with the Application at time of filing.	Employer completes required recruitment after filing the Application, and must demonstrate – not merely attest – that it was unable to locate sufficient number of U.S. workers.Employer must submit recruitment report to ETA after filing, according to instructions from the Certifying Officer.
	State Workforce Agency (SWA) job posting is active for 10 days, before filing the Application with ETA.	State Workforce Agency (SWA) job posting and Department's electronic job registry job posting stay active and employers must continue to accept U.S. applicants until 21 days before the date of need.
Definition of full-time	30 hours or more per week	35 hours or more per week
	20 CFR 655.4	20 CFR 655.5, 29 CFR 503.4
Disclosure of foreign recruitment	No requirement, although employer must contractually prohibit recruiters from seeking or receiving fees from prospective workers.	New: When filing an Application, employer and its agents and attorneys must provide copies of any agreements with recruiters engaged in international recruiting.In addition, employer and its agent and attorney must provide the names and locations of sub-contractors hired by the recruiter who will recruit H-2B workers.
Termination of job order		New: In the event of an unforeseeable, catastrophic man-made event or Act of God, the employer may petition ETA for early termination of job order. (Employer may not act until Certifying Officer has actually approved the termination of the job order.)
		20 CFR 655.20(g), 29 CFR 503.16(g)
Re-certification		New: In the event that a U.S. worker does not report for employment or abandons the job before the end of the job order, the employer can request from ETA an expedited re-certification in order to gain approval to hire H-2B workers.The Certifying Officer must first determine that no replacement U.S. workers are available.Additional recruitment of U.S. workers is not required.

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		20 CFR 655.57
Withdrawal	No provision	An employer may withdraw its application at any time after acceptance but before adjudication.
		20 CFR 655.62
	II. Violations	
Misrepresentation of a material fact	Includes misrepresentations made on the Application and to the State Department during the visa application process.	Includes misrepresentations made:
		-- on the H-2B Registration with ETA
		-- on the Application
		-- on the DHS Petition (form I-129)
	20 CFR 655.60 and .65	-- to the State Department during visa process
		29 CFR 503.19 and .20
Substantial failure of a condition of employment	Includes substantial failures of conditions of the Application and DHS Petition.	Includes substantial failures of conditions of the Application and DHS Petition, and also includes the H-2B Registration.
		20 CFR 655.72 and.73 (revocation/debarment based on substantial failure), 29 CFR 503.19 and .20
	20 CFR 655.60 and .65	
	III. Conditions of Employment	
Disclosure		New: Employers must disclose the job order to all H-2B and corresponding workers; must be in a language understood by the workers, as necessary or reasonable.
		20 CFR 655.20(l), 29 CFR 503.16(l)
Offered wage	Offered wage equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage, and must be paid for the entire employment period certified in the Application.	Offered wage equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage, and must be paid for the entire employment period certified in the Application.
		New: Employer must pay at least the offered wage free-and-clear, either in cash or in a negotiable instrument payable at par.
		20 CFR 655.20(a) & (b), 29 CFR 503.16(a) & (b)
	20 CFR 655.22(e)	
Incentive-based wages	If earnings are based on commissions, bonuses or other incentives, employer must guarantee to pay at least the offered wage on a weekly, biweekly, or monthly basis.	If earnings are based on commissions, bonuses, or other incentives, employer must guarantee to pay at least the offered wage every workweek.
		The 2012 regulations also address piece rates.An employer paying a piece rate wage must guarantee to supplement that wage if, at the end of every workweek, the piece rate does not at least equal what the worker would have earned under the hourly offered wage.
		20 CFR 655.20 (a), 29 CFR 503.16(a)
	20 CFR 655.22(g)(1)	
Frequency of pay		New: Employer must pay the more frequent of: every two weeks or according to prevailing practice in the area of intended employment.
		20 CFR 655.20(h), 29 CFR 503.16(h)
Deductions	Employer must make all deductions required by law. Other deductions must be disclosed, reasonable, and consistent with the Fair Labor Standards Act (FLSA) for employers subject to the FLSA.	Employer must make all deductions required by law. Other deductions must be disclosed and reasonable according to the Fair Labor Standards Act (FLSA) principles at 29 CFR Part 531.
		Also explicitly allows worker-authorized voluntary deductions to third parties for the benefit of the worker.
		Deductions not required by law that are not disclosed in the job order are prohibited.
		20 CFR 655.20(c), 29 CFR 503.16(c)
	20 CFR 655.22(g)(1)	
Employer provided items		New: Employer must provide, without charge or deposit, all tools, supplies, and equipment needed to perform the job.
		20 CFR 655.20(k), 29 CFR 503.16(k)
Three-fourths guarantee		New: Employer must guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays in every 12-week period (or, for job orders less than 120 days, every 6-week period).
		20 CFR 655.20(f), 29 CFR 503.16(f)
Earnings statements		New: Employer must keep accurate pay and hours records and supply workers with earnings statement on or before each payday.
		20 CFR 655.20(i), 29 CFR 503.16(i)
Job opportunity and full-time threshold	Job opportunity is a bona fide, full-time temporary position. Full time defined as 30 or more hours per week.	Job opportunity is a bona fide, full-time temporary position.Full time defined as 35 or more hours per week.

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		NEW: Workweek is defined as a regularly recurring period of 168 hours (seven consecutive 24-hour days).
		20 CFR 655.5 (full-time definition) & .20(d) (condition)
		29 CFR 503.4 (full-time definition) & .16(d) (condition)
	20 CFR 655.4 (full-time definition) and .22(h) (condition)	
No strike or lockout	H-2B job may not be vacant because former occupants are on strike or locked out.	There may not be any strike or lockout in any of the employer's worksites within the area of intended employment.
		20 CFR 655.20(u), 29 CFR 503.16(u)
	20 CFR 655.22(b).	
Required recruiting	Employers must conduct required recruiting.	Employers must conduct required recruiting.
	No discrimination in hiring; rejections are only for lawful, job-related reasons; employer must maintain and submit a recruitment report, indicating the source, name, and disposition of each worker, along with the lawful reasons for any rejections.	No discrimination in hiring; rejections are only for lawful, job-related reasons; employer must maintain and submit a recruitment report, indicating the source, name, and disposition of each worker, along with the lawful reasons for any rejections.
	20 CFR 655.22(c)	20 CFR 655.20(r) & (s), 29 CFR 503.16(r) & (s).
Required recruiting activities	Required recruiting includes:	Required recruiting includes:
	-- SWA job posting for a 10-day period before the employer files the Application	-- SWA job posting until 21 days before the date of need
	-- newspaper ad on 2 days during the 10-day SWA posting	-- newspaper ad on 2 days (one a Sunday)
	-- the call-back of, and offer of re-employment to, U.S. workers laid off within 120 before date of need	-- the call-back of, and offer of re-employment to, former U.S. workers (including workers who were laid off) from the previous year
	-- union referrals where the employer is party to a CBA covering the occupation.	-- contacting the bargaining representative OR (if there is no bargaining representative) posting the job for 15 business days at 2 conspicuous locations at every place of employment
		-- other recruiting activities directed by Certifying Officer.
		The SWA performs two additional activities:
		-- contacts the union, where the occupation or industry is customarily unionized
		-- sends the job order to DOL for posting on the national job registry.
		20 CFR 655.20-.48 and 29 CFR 503.16(t)
	20 CFR 655.15	
No layoffs	Employer has not and will not layoff any U.S. worker in the occupation and the area of intended employment during the period 120 days before and after the first date of need.	Employer has not and will not lay off any U.S. worker in the occupation and the area of intended employment during the period from 120 days before the first date of need through the end of the period of employment .
		Layoffs for lawful, job-related reasons (such as lack of work or the end of a season) are not disqualifying if all H-2Bs are laid off before corresponding U.S. workers.
		20 CFR 655.20(v), 29 CFR 503.16(v)
	20 CFR 655.22(i)	
No preferential treatment of H-2B workers	The offered terms and conditions are not less favorable than those offered to H-2B workers.	The offered terms and conditions are not less favorable than those offered to H-2B workers.
		NEW: Employers may not impose on U.S. workers restrictions or obligations not imposed on H-2Bs.
		20 CFR 655.20(q), 29 CFR 503.16(q)
	20 CFR 655.22(a)	
Prohibited fees	Employer and its agent and attorney may not seek or receive payment for any costs associated with the certification, including attorney/agent fees, Application costs, recruitment fees.	Employer and its agent, attorney, and employees may not seek or receive payment (including, but not limited to, monetary payments, wage concessions, kickbacks, bribes, etc.) for any costs associated with the certification, including attorney/agent fees, Application costs, DHS Petition fees, recruitment fees.
		20 CFR 655.20(o), 29 CFR 503.16(o)
	20 CFR 655.22(j)	
Contracts with recruiters	Employer must contractually prohibit recruiters whom the employer engages in international recruitment of H-2B workers from seeking or receiving fees from prospective workers.	Employer must contractually prohibit agents and recruiters (and any employee of those agents and recruiters) whom the employer engages directly or indirectly in international recruitment of H-2B workers from seeking or receiving fees from prospective workers.
		20 CFR 655.20(p), 29 CFR 503.16(p)
	20 CFR 655.22(g)(2)	
Transportation and Subsistence Expenses	Employer is liable under H-2B regulations only for outbound travel and only when the worker is dismissed prior to the end of the certified period of employment.	Employer is liable under H-2B for reasonable cost of 1) inbound travel, including daily subsistence expenses, for workers who complete 50% of the job order, and 2) outbound travel, including daily subsistence expenses, for workers who work until the end of the job order or are dismissed early.

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	Travel expenses paid by the worker may also be covered under FLSA in the first and last workweeks of employment.See WHD Field Assistance Bulletin 2009-02:http://www.dol.gov/whd/FieldBulletins/	In addition, if worker is entitled to Federal minimum wage, then the FLSA requires reimbursement of inbound costs in the first workweek.
	FieldAssistanceBulletin2009_2.pdf.	
		All transportation provided by the employer must comply with applicable Federal, State, and local laws and regulations.
		20 CFR 655.20(j), 29 CFR 503.16(j)
	20 CFR 655.22(m)	
Visa and visa-related expenses	Not an employer obligation under H-2B. May be covered under FLSA in first workweek. See WHD Field Assistance Bulletin 2009-02:http://www.dol.gov/whd/FieldBulletins/	New: Employer is required to pay or reimburse in the first workweek the full cost of visa and visa-related expenses.
	FieldAssistanceBulletin2009_2.pdf.	
		20 CFR 655.20(j), 29 CFR 503.16(j)
Place of employment	Employer may not place H-2B workers outside the area(s) of intended employment certified on the Application.	Employer may not place H-2B workers outside the area(s) of intended employment certified on the Application.
	20 CFR 655.22(l)	20 CFR 655.20(x), 29 CFR 503.16(x)
Certified occupation	Inaccurate statements on the Application regarding the occupation and job duties may be pursued as willful misrepresentations of the Application (20 CFR 655.60(a))	New: Employers may not place H-2B workers in a job opportunity not certified on the Application.
		20 CFR 655.20(x), 29 CFR 503.16(x)
Accuracy of statements	The dates of and reasons for temporary need and the number of positions must be accurately stated on the 9142.	No similar provision.Inaccurate statements may be pursued as willful misrepresentations of the Application (20 CFR 655.60(a)).
	20 CFR 655.22(n)	
Workers rights poster		New: Employer must post a workers' rights poster in English, provided by WHD, and in other languages as needed and provided by WHD.
		20 CFR 655.20(m), 29 CFR 503.16(m)
No unfair treatment		New: The employer has not and will not (and has not and will not cause another person to) intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any person who, with respect to 8 U.S.C. 1184(c), 20 CFR Part 655, Subpart A, 29 CFR Part 503, or any other Department regulation promulgated thereunder: has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with a workers' center, community organization, labor union, legal assistance program or attorney; or exercised or asserted on behalf of himself/herself any right or protection.
		20 CFR 655.20(n), 29 CFR 503.16(n)
DHS/ETA notification of early separation	Employers must notify USCIS and ETA within two workdays of any H-2B worker who separates before the end of the certified period of employment.	Employers must notify USCIS and ETA within two workdays of an H-2B worker who separates before the end of the certified period of employment.
		New: Employers must notify ETA within two workdays of any corresponding worker who separates before the end of the period of employment.
		New:
		--if separation is due to voluntary abandonment by the worker and proper notification is made, the employer will not be responsible for return transportation and the worker will not be entitled to the three-fourths guarantee beyond the last, full 12- or 6-week period before abandonment;
		--if separation is due to dismissal for cause and proper notification is made, the employer will not be liable for the three-fourths guarantee beyond the last, full 12- or 6-week period before termination.
		20 CFR 655.20(y), 29 CFR 503.16(y)
	20 CFR 655.22(f)	
Compliance with other employment-related laws	During the period of employment, employers must comply with all other employment-related laws, including employment-related health and safety laws.	During the period of employment, employers must comply with all other employment-related laws, including employment-related health and safety laws.
		2012 also adds a prohibition against the employer and its agents confiscating or holding immigration documents.
		20 CFR 655.20(z), 29 CFR 503.16(z)
	20 CFR 655.22(d)	
Cooperation with investigators	Employers must at all times cooperate in administrative and enforcement proceedings.An employer being investigated must make available to WHD the records, information, person, and places that WHD deems appropriate.Records must be made available within 72 hours following notice from WHD.No employer or representative or agent of the employer may interfere with any Department official performing an investigation, inspection, or law enforcement function pursuant to the H-2B program.	The employer will cooperate with any agent of the Secretary of Labor who is exercising or attempting to exercise the Department's authority pursuant to the H-2B program.The employer will retain all documents pertaining to the Application and Registration, the recruitment-related documents, the payroll records, and related documents for 3 years, and make them available to WHD within 72 hours after a request from WHD.
	20 CFR 655.50(c)	

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		29 CFR 503.16(bb) and 503.25.
III. Remedies		
Revocation		New: ETA may revoke a labor certification for a variety of reasons, including fraud; willful misrepresentation of a material fact; substantial failure of a term or condition of employment; failure to cooperate with DOL or law enforcement; or failure to comply with DOL remedies, sanctions, or decisions.
		20 CFR 655.72
Civil Money Penalties	Up to $10,000 per violation.	Up to $10,000 per violation. New: What constitutes a single violation: "Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the H-2B Registration , Application for Temporary Employment Certification , or H-2B Petition , constitutes a separate violation."
	CMPs are equal to back wages and subject to a $10,000total cap for violations related to H-2B wages (655.22(e)), prohibited fees (655.22(j)), and improper deductions (655.22(g)).	CMPs are equal to back wages subject to the $10,000 cap for violations related to H-2B wages, prohibited fees, and improper deductions.
	Highest penalties are reserved for violations that involve harm to U.S. workers.	CMPs are equal to wage assessments for U.S. workers who were improperly laid off or not hired or rehired.
		Highest penalties are reserved for violations that involve harm to U.S. workers.
		29 CFR 503.23
	20 CFR 655.65	
Debarment	WHD does not have independent debarment authority.WHD may recommend debarment to ETA after a final determination.ETA must debar within 2 years of the occurrence of the violation.ETA debarment authority also extends to agents and attorneys.Debarment period: between 1 and 3 years.	WHD does have independent debarment authority to debar employers, agents, and attorneys.Debarment extends to all other labor certifications (other visa programs) with DOL.
		Offenses which may be cause for debarment are broader than in 2009 regulations.
		Debarment period: between 1 and 5 years.
	20 CFR 655.23	
		29 CFR 503.24
Other remedies	Include back wages, reinstatement of U.S. workers, and any other appropriate legal or equitable remedy (such as make-whole wages for U.S. workers improperly laid off or not hired/rehired).	Include back wages, enforcement of provisions of the job order, make-whole relief for any person discriminated against, make-whole relief, including and instatement/reinstatement of U.S. workers improperly laid off or not hired/rehired, or other actions deemed appropriate.
		29 CFR 503.20
	20 CFR 655.65(i)	

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