Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2A Temporary Agricultural Foreign Labor Certification Program
2010 Final Rule, Round 6
February 2012

H-2A Labor Contractors

Surety Bonds

Question: May an H-2A Labor Contractor use the same surety bond to support *Applications for Temporary Employment Certification* in different years?

No. A new, separate bond is required for each *Application for Temporary Employment Certification.*

The regulations governing the H-2A program require an H-2A Labor Contractor (H-2ALC) to submit an original surety bond, i.e. one with a raised seal or other indicator evidencing it is an original, for *each Application for Temporary Employment Certification* filed with the Department.

Submitting a copy of a surety bond or a surety bond without an original indicator is not sufficient to satisfy the regulations. Also, submitting a rider or evidence of a "continuous" bond, even if an original document, is not sufficient to satisfy the regulations. Such documents provide evidence of an existing bond rather than a new bond specific to the application. The requirement of a new original surety bond to support each *Application for Temporary Labor Certification* allows the Chicago National Processing Center (NPC) to ensure that the amount of the bond coverage appropriately corresponds to the number of workers requested on the employer's ETA Form 9142. Additionally, in the event of a violation, a separate bond for each application is critical to the effective enforcement of the H-2ALC's wage obligations against the surety that agreed to be legally responsible.

Each surety bond must comply with all requirements outlined in the regulations. These requirements include the bond: (1) identifying the issuer, the name, address, phone number, and contact person for the surety; (2) specifying the amount of the bond, the date of issuance and expiration and any identifying designation used by the surety for the bond; (3) being payable to the Administrator, Wage and Hour Division, United States Department of Labor; and (4) remaining in force for a period of no less than 2 years from the date on which the labor certification expires. Additional information about surety bonds may be found in other Frequently Asked Questions (FAQs) posted here.

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Important Reminder: The employer must submit the original surety bond to the Chicago NPC at the time of filing its *Application for Temporary Employment Certification.*

Question: Can I ask the Chicago National Processing Center (NPC) to return my original surety bond after my *Application for Temporary Labor Certification* is denied or withdrawn?

Yes. If an *Application for Temporary Labor Certification* is denied or withdrawn and the Chicago NPC receives a written request from the employer or the employer's authorized agent for the original surety bond that was submitted with the application, the Chicago NPC will return the original surety bond using regular mail.

Positive Recruitment and Hiring of U.S. Workers

Recruitment/Recruitment Report:

Question: I do not have enough time to complete all of the required advertising listed in the Notice of Acceptance before the recruitment report due date. Do I submit the recruitment report before completing all of the required advertising, or do I wait to submit the recruitment report until all recruitment is complete?

The Notice of Acceptance contains the recruitment instructions and the due date for the first recruitment report. The employer should begin recruitment when it receives the Notice of Acceptance and then submit the first recruitment report by the due date provided. We understand that an employer may not have time to complete the required recruitment before submitting its first recruitment report. The regulation provides for the employer to continue recruiting after submitting the first recruitment report. Specifically, an employer must continue to maintain and update its recruitment report during the first 50 percent of the contract period and be prepared to submit the updated recruitment report, if requested.

Question: I am located in a rural area that does not have a newspaper with a Sunday edition. What are my advertising requirements?

The Certifying Officer (CO) will outline the employer's recruitment requirements in the Notice of Acceptance. When a job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

Post-Certification

Amendments and Extensions

Question: After certification, can I amend my temporary labor certification to increase the number of H-2A workers requested?

No. At any time before certification, an employer may submit a request to increase the number of H-2A workers stated on the *Application for Temporary Employment Certification* to the Certifying Officer (CO) following the instructions in a separate Frequently Asked Question (FAQ) available in the "Post-Filing" FAQ section. After certification, however, the regulations do not allow the employer to request more H-2A workers than it stated on the *Application for Temporary Employment Certification* at the time of certification. An employer that needs additional workers after receiving a certification would need to conduct another test of the labor market by placing a new job order with the State Workforce Agency (SWA) serving the area of intended employment and filing a new *Application for Temporary Employment Certification* with the Chicago National Processing Center (NPC).

When the employer needs the additional workers to begin work in less than 45 calendar days, the employer may seek a waiver of the regulatory filing time period requirement through the emergency filing procedures. An employer requesting this waiver must concurrently submit to the Chicago NPC and the SWA: the *Application for Temporary Employment Certification*; a completed job order on ETA Form 790; and a statement justifying the request for the waiver. The statement must include detailed information describing the good and substantial cause which necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions. The CO can only grant the request if the request is justified and there is sufficient time to test the local area for the availability of U.S. workers.

Abandonment/Termination

Question: When is a worker considered to have abandoned the job?

A worker who fails to report for work at the regularly scheduled time for five consecutive working days, without the employer's prior consent, is considered to have abandoned the job. This includes a worker who fails to report for employment for the first five consecutive working days of the contract period. When a worker does not appear on the first day of the contract period, we suggest that the employer contact the worker and, in the case of a U.S. worker, the State Workforce Agency (SWA) to resolve any confusion about the start date and confirm whether the worker will report to work or is no longer available for the job opportunity.

Instructions for submitting the written notification of abandonment for those workers who fail to report to work, as scheduled, for five consecutive working days, are available in a separate H-2A Frequently Asked Question (FAQ).

Question: Can I replace workers who abandon the job with more H-2A workers?

After submitting the written notification of abandonment, if the workers who abandoned the job were in H-2A visa status, the employer may submit a request to USCIS to replace the workers. For more information please contact USCIS at www.uscis.gov or at its National Customer Service Center at 1-800-375-5283.

If, however, the workers who abandoned the job were U.S. workers and the employer's labor certification had been denied or reduced by the number of U.S. workers hired, the employer may submit a request for a new temporary labor certification determination to the Chicago National Processing Center (NPC). By regulation, the employer may contact the Certifying Officer by telephone (312-886-8000) or e-mail to request a new determination based on U.S. worker unavailability. The employer must also submit a signed written statement confirming its belief that U.S. workers are unavailable. Employers may submit the request and/or written statement by e-mail directly to the Chicago NPC using the address: h2a.amend&extend.chicago@dol.gov, with the words "H-2A Redetermination Request" contained in the subject line of the e-mail. Employers without internet access may fax the request and/or written statement to (312) 886-1688 (ATTN: H-2A Redetermination Request) or by U.S. mail to the following address:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
536 South Clark Street, 9th floor
Chicago, Illinois 60605-1509
ATTN: H-2A Redetermination Request

If the Certifying Officer (CO) does not receive the employer's signed written statement within 72 hours of the employer's initial request, the CO will deny the request.

Upon receipt of the request, the CO will look to applicable sources, which may include the State Workforce Agency, to determine whether specific able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to report for the job within 72 hours of the employer's request. If the CO determines that U.S. workers are unavailable and cannot identify sufficient available replacement U.S. workers, the CO will issue a new determination, which the employer may use to seek additional workers in H-2A visa status with USCIS.

Contract Impossibility

Question: Due to recent violent weather my crop can no longer be cultivated and, therefore, I no longer need my approved H-2A workers. What do I do?

An employer may, upon receiving approval from the Chicago National Processing Center (NPC) Certifying Officer (CO), terminate work to be performed under the job order and/or work contracts with employees before the end date of work due to fire,

weather, or other Act of God beyond its control that makes fulfillment of the contract impossible. An employer seeking the CO's "contract impossibility" determination must submit a written request directly to the Chicago NPC.

The employer may e-mail its request for relief under the "Contract Impossibility" provision directly to the Chicago NPC using the address: h2a.amend&extend.chicago@dol.gov, with the words "H-2A Contract Impossibility Request" contained in the subject line of the e-mail.

Employers without internet access may also fax a request to (312) 886-1688 (ATTN: H-2A Contract Impossibility Request) or by U.S. mail to the following address:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
536 South Clark Street, 9th floor
Chicago, Illinois 60605–1509
ATTN: H-2A Contract Impossibility Request

Important Reminders:

- An employer continues to be responsible for its obligations under the work contract until receiving a favorable "contract impossibility" determination from the CO.
- In the event that the CO makes a finding of contract impossibility, the employer should document its efforts to comply with each aspect of the contract impossibility provision. Specifically, the employer should document that it:

- Fulfilled the three-fourths guarantee for the time that has elapsed from the start date of work specified in the work contract to the date of termination;
- Made efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration laws; and
- In situations where a transfer did not occur:
    - Returned the workers at the employer's expense to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to his/her next certified H-2A employer, whichever the worker prefers. **Note**: This requirement does not apply if the worker has contracted with a subsequent employer who has agreed to provide or pay for the worker's transportation and subsistence expenses from the present employer's worksite to the subsequent employer's worksite;
    - Reimbursed the worker the full amount of any deductions made by the employer from the worker's pay for transportation and subsistence expenses to the place of employment, and

- Paid the worker for any transportation and subsistence expenses, including any lodging expenses incurred on the employer's behalf, incurred by the worker to that employer's place of employment.

Staggered Dates of Need

Question: My workers currently inside the U.S. are able to start work on the start date listed on my certified *Application for Temporary Labor Certification*. Those workers coming to my place of employment from outside the U.S., however, may be delayed due to visa processing and travel time and may each arrive on different days, since they each have different travel schedules. Do I need to amend the start date on my *Application for Temporary Labor Certification* so that all workers start on the same date? Will the Department think I have staggered dates of need?

As discussed further in a separate Frequently Asked Question (FAQ), where an employer requires workers to begin work on different dates, the employer has staggered dates of need and must file a separate *Application for Temporary Employment Certification* for each of the different start dates of need.

An employer that intends for all of its workers to begin work on the same date, but finds that some workers are unable to arrive in time due to minor travel delays, is different from an employer that requires workers to begin work on different dates. We recognize that these employers make every effort to ensure that all workers arrive in time to be ready to work on the start date listed on the *Application for Temporary Employment Certification*. The regulatory provision for requesting a delayed start date applies when the employer wishes to delay the start date of all workers covered by the *Application for Temporary Employment Certification.* It does not cover minor travel delays or slower than expected processing times at USCIS or a U.S. Consulate for workers coming from outside the U.S.; however, these delays should not delay any other worker's start date or the employer's start date of work.

The employer's application also does not need to be amended when minor differences in worker travel schedules, such as those described above, mean workers will arrive within a few days of each other or the start date of need.

Important Reminder: The employer's positive recruitment obligations continue through the date the H-2A workers depart for the employer's place of work. Unless the SWA is informed in writing of a different date, the date that is the third day before the employer's start date will be considered the date the H-2A workers depart for the employer's place of work.

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