U.S. DEPARTMENT OF LABOR
Employment & Training Administration

H-2B Temporary Labor Certification Process

Stakeholder Briefing Sessions

Washington, DC

2012 Final Rule

Office of Foreign Labor Certification
Employment and Training Administration
United States Department of Labor

1

H-2B Final Rule Briefing Outline

Section I **H-2B Temporary Labor Certification Process**

- 2012 Final Rule Implementation Period
- Step 1: Submit Request for H-2B Registration
- Step 2: Obtain Offered Wage Rate
- Step 3: File H-2B Application and Job Order
- Step 4: Conduct Recruitment of U.S. workers
- Step 5: Completing the Labor Certification Process

Section II **Regulatory Overview, Administrative and Integrity Provisions**

- Purpose and Authority
- Key Terms and Definitions

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Final Rule Briefing Outline

Section II **Regulatory Overview, Administrative and Integrity Provisions** *(continued)*

- Administrative Review
- Audit Examinations
- Assisted Recruitment
- Revocation
- Debarment

Section III **Wage and Hour Enforcement**

- Enforcement Responsibilities
- Program Obligations and Assurances

H-2B Final Rule Briefing

Briefing Section I

H-2B Temporary Labor Certification Process

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

2012 Final Rule Implementation Period

The Final Rule becomes effective on April 23, 2012

- The following implementation rules will generally apply:
  - *Employers whose applications are postmarked before April 23, 2012 (i.e., until midnight on April 22, 2012), will be processed in accordance with the 2008 Final Rule*
  - *Employers whose applications are postmarked on or after April 23, 2012 (i.e., 12:01am on April 23, 2012), will be processed in accordance with the 2012 Final Rule*

2012 Final Rule Implementation Period

H-2B Registration Transition Period

- The following implementation rules will generally apply:
  - *Employers with a start date of need before October 1, 2013, are not required to obtain an approved H-2B Registration. Employers will submit a statement of temporary need (Section B, ETA Form 9142) and all supporting documentation at the time of filing the H-2B application*
  - *Employers with a start date of need on or after October 1, 2013, must comply with all the requirements in the 2012 Final Rule and obtain an approved H-2B Registration before filing an H-2B application*

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Pay Attention to Important "Icons"

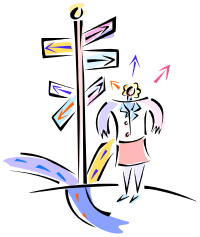
Emphasizes important documentation requirements needed to support H-2B application

Indicates USDOL regulatory requirement contains a definite timeframe for response

Means employer signature is required

"Post-it" notes highlight important reminders for employers

Navigating the H-2B Visa Program



Step 1
Submit Request for H-2B Registration

Remember! *All employers with a start date of need before October 1, 2013, will continue to submit documentation demonstrating temporary need at the time the H-2B application is submitted to the OFLC Chicago NPC for processing*

1 2 3 4 5

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Registration Requirements

20 CFR 655.11

General Provisions (start date of need on or after October 1, 2013)

- Filed by an employer by U.S. Mail or private mail courier to the following location:

  U.S. Department of Labor
  Employment and Training Administration
  Chicago National Processing Center
  536 South Clark Street, 9th Floor
  Chicago, IL 60605 -1509
  Attention: H-2B Registration Unit

- Any future address changes will be published in the *Federal Register* as well as the USDOL Internet Web site at http://www.foreignlaborcert.doleta.gov/
- The Department may also require H-2B Registrations to be filed electronically in addition to or instead of by mail

H-2B Registration Requirements

20 CFR 655.11

General Provisions

- Employer will submit the following documents to the Chicago NPC
  - ✓ ETA Form 9155 – Application for H-2B Registration
  - ✓ Statement of temporary need and supporting documentation

A completed ETA Form 9155 must be filed no more than 150 days and no less than 120 days before the first date the employer requires the services of the H-2B workers *(except emergencies)*

The ETA Form 9155 must bear the original signature of the employer and, if applicable, that of the employer's authorized attorney or agent

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Registration Requirements

20 CFR 655.11

Establishing Temporary Need

- A job opportunity is temporary if the nature of the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary
- Part-time employment does not qualify for H-2B certification; only full-time employment will be certified
- A labor shortage, however severe, does not establish a temporary need under the H-2B classification
- For job contractors, the Department will examine the nature of the job contractor's own need based on only a seasonal or one-time occurrence standard

H-2B Registration Requirements

20 CFR 655.11

Establishing Temporary Need

- Employer must establish that its need for nonagricultural services or labor is temporary
- Burden of proof is on the employer
- As defined by the Department of Homeland Security, employer's need is considered temporary if justified as either a:
  1. One-time occurrence;
  2. Seasonal need;
  3. Peakload need; or
  4. Intermittent need

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Registration Requirements

20 CFR 655.6

Establishing Temporary Need – One-Time Occurrence

- Employer must establish the following:
  - It has not employed workers to perform the services or labor in the past and it will not need the workers to perform the services or labor in the future

    or
  - It has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers

Important Note: *An employer's need is limited to 9 months, but in the case of a one-time occurrence could last up to 3 years. H-2B Registrations based on a one-time occurrence will be adjudicated by the National CO in Washington, DC*

H-B Registration Requirements

20 CFR 655.6

Establishing Temporary Need – Seasonal

- Employer must establish the following:
  - The services or labor to be performed is traditionally tied to a season of the year by an event or pattern and is of a recurring nature

    and
  - The period(s) of time during each year in which the employer does not need the services or labor

Employment is not seasonal if the period of need is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Registration Requirements

20 CFR 655.6

Establishing Temporary Need – Peakload

- Employer must establish the following:
  - It regularly employs permanent workers to perform the services or labor at the place of employment

    and
  - It needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand

    and
  - The temporary additions to staff will not become a part of the employer's regular operation (i.e., permanent staff)

***Important Note*:** *Job contractors will not be eligible for H-2B registration under this standard of temporary need*

H-2B Registration Requirements

20 CFR 655.6

Key Distinctions Between Seasonal vs. Peakload

Seasonal

- Employer's need is clearly tied to a season and has a predictable pattern each year
- Quite often business operations "shut down" or do not employ workers at all in that occupation for part of the year
- It is possible for the business to operate year round, but the need for workers in the occupation is seasonal
- Lasts 9 months or less

Peakload

- Need for workers can be tied to one or more seasons or other short-term demand
- Business operations are year-round and employ workers in that occupation on a permanent basis
- Employer's need is "above and beyond" the existing workers employed in that occupation
- Lasts 9 months or less

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Registration Requirements

20 CFR 655.6

Establishing Temporary Need – Intermittent

- Employer must establish the following:
  - It has not employed permanent or full-time workers to perform the services or labor

    but
  - Occasionally or intermittently needs temporary workers to perform the services or labor for short periods

Important Note: *Job contractors will not be eligible for H-2B registration under this standard of temporary need*

H-2B Registration Requirements

20 CFR 655.11

Establishing Temporary Need

- Examples of documents that can assist an employer in justifying temporary need (not an exhaustive list)
  - Monthly invoices from previous calendar years showing work will be performed for each month during the requested period of employment;
  - Annualized and/or multi-year work contracts or work agreements showing the dates when work will commence and end <u>and</u> work will be performed for each month during the requested period of employment; or
  - Summarized monthly payroll reports in the occupation from previous calendar years showing total workers employed, total hours worked, and total earnings received
    (separately for full-time permanent and temporary employment)

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

NPC Registration Processing
General Provisions

20 CFR 655.11

- Upon receipt of the H-2B registration, the CO performs a review for obvious inaccuracies or omissions and makes a determination based on whether . . .
  - The job classification and duties qualify as non-agricultural;
  - Employer's need is temporary in nature;
  - Number of worker positions and period of need are justified; and
  - Request represents a bona fide job opportunity

Chicago NPC will issue a Request for Information (RFI) within 7 business days if the registration cannot be approved

> ***Important Note:*** *Any notice or request sent by the CO to an employer requiring a response shall be sent using methods to assure next-day delivery, including email. Employer's response must be sent back to the CO using similar methods to assure next-day delivery, including by email*

NPC Registration Processing
RFI Content

20 CFR 655.11

- State the reason(s) why the H-2B registration cannot be approved, citing the relevant regulatory standard(s)

Specify what supplemental information or documentation is needed to correct the deficiencies and a date, no later than 7 business days, by which such information or documentation must be sent to the CO

- Upon receipt of a response, the CO will review the registration and all documentation and either (a) issue a Notice of Decision or (b) issue an additional RFI
- State that failure to comply with the RFI will result in a denial decision on the employer's request for H-2B registration

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

NPC Registration Processing
Notice of Decision

20 CFR 655.11

Approved Registrations

- CO will issue a Notice of Decision and send the employer a copy of the approved ETA Form 9155
- The Notice of Decision will state that the employer is eligible to seek H-2B workers in the job classification for the anticipated number of positions and period of employment
- Approval may be granted for a period of up to 3 consecutive years

Denied Registrations

- CO will issue a Notice of Decision and state the reason(s) why registration is denied
- Except for one-time occurrence, an employer's need lasting longer than 9 months will be denied
- Employer may request administrative review (i.e., appeal) within 10 business days from the decision date

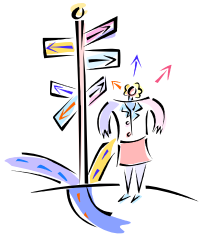
NPC Registration Processing
Conditions for Submitting New Requests

20 CFR 655.12

- Employer must file a new H-2B registration in accordance with the requirements of 655.11 whenever the . . .
  1. Number of workers to be employed has increased by more than 20% (or 50% for employers requesting fewer than 10 workers) from the initial year;
  2. Dates of need for the job opportunity have changed by more than a total of 30 calendar days from the initial year for the entire period of need;
  3. Nature of the job classification and/or duties has materially changed; and/or
  4. Temporary nature of the employer's need for the services or labor has materially changed

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Navigating the Visa Program



Step 2
Obtain an Offered Wage Rate

1 2 3 4 5

Obtaining an Offered Wage Rate

20 CFR 655.10

General Provisions

- An employer must advertise in its recruitment a wage rate that is at least equal to the highest of the following:
  - Prevailing wage;
  - Federal minimum wage;
  - State minimum wage; or
  - Local minimum wage
- Employer must offer and pay this wage (or higher) to both its H-2B workers and workers in corresponding employment
- No wage determination permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local wage law

1 2 3 4 5

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Obtaining an Offered Wage Rate

20 CFR 655.10

General Provisions

- Employer must request and obtain a prevailing wage determination (PWD) before filing a job order with the State Workforce Agency (SWA) serving the area of intended employment
- If there are multiple worksites within an area of intended employment, the prevailing wage will be the highest applicable wage among all the worksites
- PWD must be valid on the date the job order is posted
  (i.e., date Chicago NPC received the H-2B application and job order)

Obtaining an Offered Wage Rate

20 CFR 655.10

Submission of ETA Form 9141

- Electronic submissions of the ETA Form 9141 – *Application for Prevailing Wage Determination* using the OFLC iCERT System is preferred at http://icert.doleta.gov

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Obtaining an Offered Wage Rate

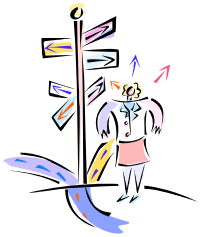
20 CFR 655.10

Receiving a PWD and Validity Period

- OFLC National Prevailing Wage Center (NPWC) will process the employer's request, issue a PWD, indicate the wage source, and return the ETA Form 9141 electronically to the employer with its endorsement

- H-2B PWD requests are generally processed by the NPWC within 30 calendar days of receipt
- NPWC will specify the validity period of the PWD, which must be no more than 365 days and no less than 90 days from the determination date

Navigating the H-2B Visa Program



Step 3

File H-2B Application and Job Order

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Application Filing Requirements

20 CFR 655.15

General Provisions

- Filed by an employer with an approved H-2B registration by U.S. Mail or private mail courier to the following location:

  U.S. Department of Labor
  Employment and Training Administration
  Chicago National Processing Center
  536 South Clark Street, 9th Floor
  Chicago, IL 60605 -1509
  Attention: H-2B Program Unit

- Any future address changes will be published in the *Federal Register* as well as the USDOL Internet Web site at http://www.foreignlaborcert.doleta.gov/
- The Department may also require applications to be filed electronically in addition to or instead of by mail

H-2B Application Filing Requirements

20 CFR 655.15

General Provisions

Employer will submit the following documents:

- ✓ ETA Form 9142 and Appendix B.1
- ✓ A copy of the job order concurrently submitted to the State Workforce Agency serving the area of intended employment
- ✓ Attorney G-28 or agent agreement/documentation demonstrating authority to represent the employer *(if applicable)*
- ✓ Copies of all contracts/agreements with any agent and/or recruiter engaged in international recruitment of H-2B workers *(if applicable)*
- ✓ Contact information of all persons and entities hired by or working for the recruiter or agent, including any "sub" agents or employees of such persons and entities *(if applicable)*

To Do:

Employers should provide certified translations of any contracts or agreements which are not in English to assure timely processing

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Application Filing Requirements

20 CFR 655.15

General Provisions

Required documents (continued)

- ✓ Occupations involving special procedures must submit other required documents (e.g., itineraries)
- ✓ Copy of MSPA registration for the employer or agent *(if applicable)*

Employers with a start date of need before October 1, 2013, must submit documentation supporting . . .

- ✓ the time period of need and the number of positions being requested for certification
- ✓ how the nature of the employer's need for the services or labor is nonagricultural, and is justified as temporary under one of the four regulatory standards
- ✓ For job contractors, only seasonal or one-time occurrence needs will be approved and additional documentation for its joint employer-client must be submitted

H-2B Application Filing Requirements

20 CFR 655.15

General Provisions

- Employer does not need to submit the ETA Forms 9155 or 9141 as long as the approved H-2B registration number and prevailing wage determination case number are disclosed on the ETA Form 9142
- A completed ETA Form 9142 must be filed no more than 90 days and no less than 75 calendar days before the first date the employer requires the services of the H-2B workers
- ETA Form 9142 must bear the original signature of the employer and, if applicable, that of the employer's authorized attorney or agent

Important Note: *Please remember to provide an e-mail address on the ETA Form 9142 for the employer contact and, if applicable, the authorized attorney or agent for more expedited service*

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Application Filing Requirements

20 CFR 655.15

General Provisions

- An association or other organization of employers cannot file master applications on behalf of its employer-members under the H-2B program
- Only one ETA Form 9142 may be filed for worksite(s) within one area of intended employment with an employer for each period of employment
- Certification for multiple positions may be requested as long as all H-2B workers are performing the same services . . .
  - Under the same terms and conditions;
  - In the same occupation and area of intended employment; and
  - During the same period of employment

H-2B Application Filing Requirements

20 CFR 655.19

General Provisions – Job Contractors

- Only one ETA Form 9141 is required covering the job opportunity and the location(s) of employment
- Job contractor may submit an H-2B application on behalf of itself and one employer-client for one job opportunity in one area of intended employment
- ETA Form 9142 must clearly identify the joint employer relationship and provide a signed and dated Appendix B.1 for itself and a separate one for its employer-client
- Each employer assumes full responsibility for the accuracy of representations made and for all assurances and obligations under the H-2B program

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Application Filing Requirements

20 CFR 655.16

Job Order Filing and Content

- A completed job order must be submitted to the SWA at the same time the employer submits the H-2B application to the Chicago NPC
- Employer must inform the SWA that the job order is being placed in connection with a future application for H-2B workers
- If the anticipated worksites are located in more than one State within the area of intended employment, the employer may submit the job order to any one of the SWAs having jurisdiction over the those worksites

- SWA must review the job order for compliance with the criteria at 655.18 as well as any state-specific requirements and notify the CO of any deficiencies within 6 business days of receipt

H-2B Application Filing Requirements

20 CFR 655.18

Job Order Filing and Content

- Employer's job opportunity must . . .
  - Offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers
  - Not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2B workers
  - Offer job qualifications and requirements that are bona fide and consistent with the normal and accepted qualifications and requirements imposed by employers that do not use H-2B workers in the same occupations and area of employment
  - CO may require employers to submit documentation substantiating the appropriateness of any job qualification and/or requirement

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

H-2B Application Filing Requirements

20 CFR 655.18

Job Order Filing and Content

Job Order Content Requirements	Regulatory Citation
State the employer's name and contact information	**655.18 (b)(1)**
Indicate job is temporary, full-time, and number of openings	**655.18 (b)(2)**
Description of job duties, requirements, and qualifications	**655.18 (b)(3)**
Geographic area of employment	**655.18 (b)(4)**
Wage offer or range of applicable wage offers	**655.18 (b)(5)**
Availability of overtime and wage offer *(if applicable)*	**655.18 (b)(6)**
Provision of on-the-job training *(if applicable)*	**655.18 (b)(7)**
State a single workweek will be used in computing wage due	**655.18 (b)(8)**
Specify the frequency of pay	**655.18 (b)(9)**
Provision of board, lodging, or other facilities *(if applicable)*	**655.18 (b)(10)**
State all deductions from the worker's paycheck	**655.18 (b)(11)**

H-2B Application Filing Requirements

20 CFR 655.18

Job Order Filing and Content

Job Order Content Requirements	Regulatory Citation
Inbound transportation/daily subsistence *(if applicable, lodging)*	**655.18 (b)(12)**
Outbound transportation/daily subsistence *(if applicable, lodging)*	**655.18 (b)(13)**
Provision of daily transportation *(if applicable)*	**655.18 (b)(14)**
State reimbursement of visa, border, and related fees	**655.18 (b)(15)**
Provision of any tools, supplies, and equipment at no cost	**655.18 (b)(16)**
Three-fourths guarantee	**655.18 (b)(17)**
Instruct applicants to contact nearest office of the SWA	**655.18 (b)(18)**

Important Note: *The amount of daily subsistence must be at least the amount permitted under 20 CFR 655.173 (H-2A regulations). Employers may obtain the current minimum and maximum subsistence charges at: http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm*

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

NPC Application Processing
Notice of Deficiency

20 CFR 655.31

- Upon receipt of the H-2B application and job order, the CO will . . .
  - Review for obvious inaccuracies or omissions
  - Review for compliance with criteria for certification
- The CO will issue a Notice of Deficiency (NOD) to the employer within 7 business days where the H-2B application and/or job order does not meet regulatory requirements
- The CO has the authority to issue more than one NOD during processing

Important Note: *The CO will generally issue correspondence on any minor deficiencies as well as the NOD via e-mail to the employer contact and copy the attorney/agent. Employers will be able to submit their responses back to the CO via e-mail to TLC.Chicago@dol.gov to minimize any processing delays*

NPC Application Processing
Notice of Deficiency - Content

20 CFR 655.31

- State the reason(s) why the application or job order fails to meet the criteria for acceptance, citing the relevant regulatory standard(s)
- Offer the employer an opportunity to submit a modified application or job order within 10 business days from the date of receipt, stating the modification is necessary for the CO to issue a Notice of Acceptance
- Offer the employer an opportunity to request administrative review (i.e., appeal) within 10 business days from the date of issuance
- State the employer's application will be denied if the employer fails to either (1) submit a modified application correcting the deficiencies or (2) make a timely request for appeal

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

NPC Application Processing
Submission of Modified Applications

20 CFR 655.32

- CO will review the employer's response, including any modification to the application and/or job order
- If accepted, CO will issue a Notice of Acceptance *(via e-mail to the SWA, employer and attorney/agent)*
- If not accepted, CO may either issue a 2nd NOD or a Notice of Decision to deny temporary labor certification
- Employer has a right to request administrative review of the CO's decision

Important Note: *Even if the modifications are accepted, the CO may request additional modifications at any time before a final determination is issued where the job order does not contain all of the minimum benefits, wages and working conditions required by the regulations*

NPC Application Processing
Notice of Acceptance - Content

20 CFR 655.33

- CO will issue a Notice of Acceptance (NOA) to the employer within 7 business days where the H-2B application and/or job order meets regulatory requirements
- The NOA will . . .
  - Direct the employer to engage in positive recruitment of U.S. workers (e.g., local newspaper ads, contact former U.S. employees, etc.), including any additional recruitment ordered by the CO
  - State that such positive recruitment must be conducted by the employer within 14 calendar days from the date the NOA is issued
  - Direct the SWA to place the job order into intra- and interstate clearance (all states designated by the CO)

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

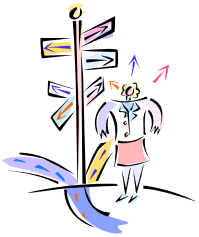
NPC Application Processing
Notice of Acceptance - Content

20 CFR 655.33

- The NOA will . . .
  - Instruct the SWA to keep the approved job order on its active file until 21 calendar days before the start date of need and transmit a similar instruction to other designated SWAs
  - Where the occupation or industry is traditionally or customarily unionized, direct the SWA to circulate the job order to . . .
    - the central office of the State Federation of Labor; and
    - the local union office(s) representing employees in the same or substantially equivalent job classification in the area(s) of employment
  - Instruct the employer to contact appropriate community-based organizations, as appropriate
  - Specify the date on which the employer must submit an initial report of its recruitment efforts

1 2 3 4 5

Navigating the H-2B Visa Program



Step 4

Conduct Recruitment of U.S. Workers

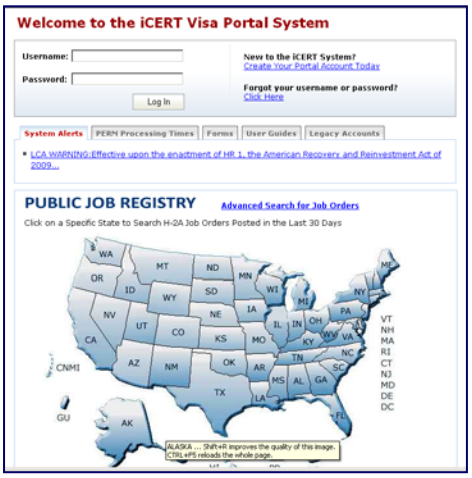
1 2 3 4 5

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Recruitment of U.S. Workers
Electronic Job Registry

20 CFR 655.34

- CO will place a copy of the SWA job order on the iCERT Public Job Registry, including any approved modifications
- Job order will be available in "active" status until 21 days before the start date of need
- H-2B job orders will be posted once appropriate modifications to the iCERT System are implemented *(scheduled for July 2012)*



Recruitment of U.S. Workers
Employer-Conducted Recruitment

20 CFR 655.40

- Employer is obligated to conduct positive recruitment for qualified U.S. workers who will be available for the positions listed in the ETA Form 9142
- Recruitment must be conducted within 14 calendar days from the date the Notice of Acceptance is issued
- All U.S. applicants must be considered for the job opportunity
- Employer must accept and hire any applicants who are qualified and who will be available
- All employer-conducted recruitment must be completed before a recruitment report can be submitted to the CO for review

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Recruitment of U.S. Workers
Employer-Conducted Recruitment

20 CFR 655.19

Requirements for Job Contractors

- Either the job contractor or employer-client may place the job order, conduct recruitment for U.S. workers, and interview applicants
- The job order and advertisements must disclose the names of both of the joint employers and the location(s) of work
- Both of the joint employers must sign and date the recruitment report required by the CO
- Where job opportunities are identical, a job contractor may combine more than one of its joint employer-client's job opportunities into a single advertisement

Recruitment of U.S. Workers
Advertising Requirements

20 CFR 655.41

Advertising Requirements

- ✓ Employer's name and contact information
- ✓ Geographic area(s) of employment with specificity to apprise US workers of any travel requirements
- ✓ Description of job duties and requirements
- ✓ Work hours and days
- ✓ Start and end dates of work
- ✓ State the job is "temporary, full-time"
- ✓ Total number of job openings
- ✓ State overtime is available and the wage offer(s) *(if applicable)*
- ✓ State on-the-job training will be provided to the worker *(if applicable)*
- ✓ Wage offer or range of wage offers

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Recruitment of U.S. Workers
Advertising Requirements

20 CFR 655.41

Advertising Requirements (continued)

- ✓ State any board, lodging, or other facilities *(if applicable)*
- ✓ All deductions not required by law
- ✓ State transportation and subsistence expenses to the worksite will be provided in accordance with 655.20(j)(1)
- ✓ State work tools, supplies, and equipment will be provided at no cost to the worker *(if applicable)*
- ✓ State daily transportation to and from the worksite will be provided *(if applicable)*
- ✓ State the three-fourths guarantee specified in 655.20(f)
- ✓ SWA contact information and job order number, if available
- ✓ Statement directing applicants to apply at the nearest local office of the SWA in the State in which the advertisement appeared

Recruitment of U.S. Workers
Newspaper Advertisements

20 CFR 655.42

- Employer must place an advertisement on 2 separate days, which may be consecutive, and one of which must be a Sunday
- Ads must be placed in a newspaper of general circulation in the area of intended employment and appropriate to the occupation
- Advertisements must satisfy the requirements of 20 CFR 655.41

Important Note: *If the 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*

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Recruitment of U.S. Workers
Contact with Former U.S. Employees

20 CFR 655.43

- Employer must contact former U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job
- Employer must contact by mail or other effective means
- Employer is not required to contact employees who were either
  - Dismissed for cause; or
  - Abandoned the worksite
- Documentation sufficient to prove contact must be maintained in the event of an audit examination

Recruitment of U.S. Workers
Bargaining Contact/Notice of Posting

20 CFR 655.45

Bargaining Representative Exists

- Employer provides a copy of the ETA Form 9142 and job order to the bargaining representative of employees in the occupation and area of employment
- Employer must document notice of contact and disposition of any referrals in the recruitment report

Notice of Posting (No Bargaining Representative)

- Post job opportunity in at least 2 conspicuous locations at the place(s) of employment or another manner providing reasonable notification to all employees
- Electronic posting prominently displaying the job and customarily used for posting notices to employees is acceptable

Must be posted for at least 15 consecutive business days

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Recruitment of U.S. Workers
Additional Positive Recruitment

20 CFR 655.46

- CO may instruct the employer to conduct additional recruitment for qualified and available U.S. workers, particularly in Areas of Substantial Unemployment (ASU)
- ASU is defined as an area with a population of at least 10,000 with an average unemployment rate equal or exceeding 6.5% for the prior 12 months
- CO will describe the precise number and nature of the additional recruitment efforts, such as employer's website, professional or trade publication, other public or private recruitment/employment-based organizations
- Documentation sufficient to prove additional recruitment efforts will be specified by the CO

Recruitment of U.S. Workers
Submission of Initial Recruitment Report

20 CFR 655.48

Employer must prepare, sign, and date a written recruitment report

- Recruitment report must be submitted by the date specified in the Notice of Acceptance

Recruitment report contents include . . .

- ✓ Identification of each recruitment activity or source by name
- ✓ Name/contact information of each U.S. worker who applied for the job and the disposition of each worker
- ✓ Clearly indicate, for each worker, whether the job was offered and whether the worker accepted or declined

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Recruitment of U.S. Workers

20 CFR 655.48

Submission of Initial Recruitment Report

Recruitment report contents (continued)

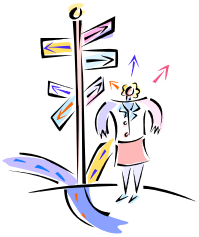
- ✓ Confirm that former US employees were contacted and by what means *(if applicable)*
- ✓ Confirm the bargaining unit was contacted, by what means, and what response was received *(if applicable)* or that a notice of the job opportunity was posted
- ✓ A statement confirming that each additional recruitment activity ordered by the CO was completed, listing each activity
- ✓ Explanation of the lawful job-related reason(s) for not hiring each U.S. worker *(if applicable)*

Don't Forget!

The initial recruitment report must be received by the CO before a final determination is issued on the ETA Form 9142

1 2 3 4 5

Navigating the H-2B Visa Program



Step 5
Completing the Labor Certification Process

1 2 3 4 5

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

NPC Application Processing
Issuance of Determinations

20 CFR 655.50

- Except where directed by the OFLC Administrator, the CO will make a determination either to certify or deny the ETA Form 9142
- Employer must meet all the regulatory requirements, including the criteria for certification at 20 CFR 655.51
- Where certification is granted, the CO has determined that . . .
  1. There is an insufficient number of qualified U.S. workers available for the certified job opportunity; and
  2. The employment of H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed US workers

Important Note: *Where the application meets the criteria for certification, the CO may issue a final determination 30 days before the start date of need. An application that is modified under 20 CFR 655.31 or otherwise does not meet the requirements for certification* ***is not subject to this determination timeframe***

Issuance of Determinations
Approved Certification

20 CFR 655.52

- Employer will receive the following documents by means normally assuring next day delivery:
  - ✓ Final Determination letter
  - ✓ ETA Form 9142
- If applicable, a copy will be sent to the employer's attorney or agent
- Employer must submit the certified ETA Form 9142 and appropriate documentation to the USCIS Service Center

Important DATE!

Employer must continue to cooperate with the SWA in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies until 21 days before the start date of need

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Issuance of Determinations
Approved Certification - Partial

20 CFR 655.54

- CO may reduce either the period of need and/or the number of H-2B workers being requested for certification
- Number of workers certified will be reduced by one for each qualified and available U.S. worker not rejected for lawful job-related reasons
- Employer will receive an amended ETA Form 9142 and a Final Determination letter that includes . . .
  - the reason(s) partial certification is being granted
  - address the availability of US workers (if applicable), and
  - provide notice of the employer's right to request administrative review (i.e., appeal) in writing within 10 business days from the date of determination

Issuance of Determinations
Validity and Scope of Labor Certification

20 CFR 655.55

- A temporary labor certification (certified ETA Form 9142) is valid only for . . .
  - ✓ the period of employment;
  - ✓ number of H-2B workers;
  - ✓ area of intended employment;
  - ✓ job classification and specific services or labor to be performed; and
  - ✓ the named employer(s)
- Certification cannot be transferred to another employer, except where the other employer is a successor in interest
- Certification expires on the last day of authorized employment, or any approved extension

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Issuance of Determinations
Denials

20 CFR 655.53

- Employer will receive the following by means assuring next day delivery:
  - ✓ Final Determination letter
- Final Determination letter will include . . .
  - the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures
  - provide notice of the employer's right to request administrative review (i.e., appeal) in writing within 10 business days from the date of determination
  - Provide notice that the denial determination is the final decision of the Secretary if the employer does not request administrative review

Redetermination Requests
U.S. Worker Availability

20 CFR 655.57

- Employer may request a redetermination based on non-availability of U.S. workers where the CO issued a denial or a partial certification
- Requests can be made via email, fax, or U.S. mail and include
  - a signed written statement confirming no U.S. workers are available
  - a listing of the names and contact information of each U.S. worker and reason(s) for unavailability
- CO will consult with the SWA or other sources as to whether replacement U.S. workers are qualified and available
- CO will issue a determination within 72 hours after the time a complete request is received
- Employer may appeal a denial of a redetermination request

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Post-Determination Actions
Updates to Recruitment Report

20 CFR 655.48(b)

Employers must continue to cooperate with the SWA in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies until 21 days before the start date of need

- Employer must continue to update the initial recruitment report submitted to the CO for certification throughout the entire recruitment period

Employer must sign and date the final written recruitment report and be prepared to submit it when requested by the CO in the event of an audit examination or other request from the Department

Post-Determination Actions
Request to Extend Period of Employment

20 CFR 655.60

- Employer may request an extension related to weather conditions or other factors beyond the employer's control that could not have been foreseen
- CO will accept written notification and supporting documentation via email at H2B.Amend&Extend.chicago@dol.gov or fax at 312-353-8830
- CO will notify the employer of the decision in writing
- Extensions will not be approved where the total period of employment would be more than 3 years for one-time occurrence or 9 months for all other needs
- Employer may appeal a denial of an extension request

Employer must immediately provide to its workers a copy of any approved extension

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Navigating the H-2B Visa Program

Briefing Section II

Regulatory Overview, Administrative and Program Integrity Provisions

Purpose and Scope of Final Rule

20 CFR 655.1

- 20 CFR 655, Subpart A, sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations that . . .
  1. There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers; and
  2. That the employment of H-2B workers will not adversely affect the wages and working conditions of workers in the U.S. similarly employed

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Authority

20 CFR 655.2

Authority of ETA-OFLC

- Labor certification determinations are made by the OFLC Administrator within USDOL-ETA who, in turn, may delegate this responsibility to a designated staff member (e.g., NPC Certifying Officer - CO)
- Certain types of applications may be designated for adjudication in the National Office

Authority of WHD

- Investigations and enforcement of terms and conditions of employment in the H-2B program, including those included in the H-2B temporary labor certifications, are conducted by the Wage and Hour Division

Special Procedures

20 CFR 655.4

Establishment of Special Procedures

- Provides a limited degree of flexibility in processing certain H-2B applications while not deviating from statutory requirements (e.g., reforestation/tree planters, professional athletes, emergency boilermakers, and entertainers)
- OFLC Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures (established special procedures in effect as of April 23, 2012 will remain in force until modified or withdrawn by the OFLC Administrator, except to the extent they conflict with these regulations)
- Requests must be made in writing to the OFLC Administrator and demonstrate that special procedures are necessary
- Consultation with employer and worker representatives may be solicited before establishing special procedures

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Key Terms and Definitions
Area of Intended Employment

20 CFR 655.5

- Area within normal commuting distance of the worksite of the job opportunity
- No rigid measure of distance due to a variety of conditions (e.g., terrain, obstacles to reaching worksite, quality of transportation network)
- If within an Metropolitan Statistical Area (MSA) – any location in the MSA is deemed to be within normal commuting distance of the place of intended employment (including multi-state MSAs)
- MSAs are not controlling – a location outside an MSA may be within normal commuting distance of a location that is inside the MSA

Key Terms and Definitions
Employer

20 CFR 655.5

- Person (individual, firm, association or other organization) that:
  - Has a place of business (physical location) in the US and means by which it may be contacted for employment
  - Employer relationship (hire, pay, fire, supervise/control the work) with H-2B employees or workers in corresponding employment
  - For purposes of filing, possesses a valid Federal Employer Identification Number (FEIN)

Where two or more employers each have sufficient definitional indicia of employment with an employee, those employers will be considered to jointly employ that employee

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Key Terms and Definitions
Employer-client

20 CFR 655.5

- An employer that has entered into an agreement with a job contractor for specific services or labor and
  - The employer is not an affiliate, branch or subsidiary of the job contractor
  - The employer, not the job contractor, will exercise substantial, day-to-day, supervision and control over the labor or services being performed
  - The job contractor's employer relationship to the workers will be limited to hiring, paying and firing the workers

Key Terms and Definitions
Job Contractor

20 CFR 655.5

- Must meet the definition of an employer and
  - Contracts services or labor on a temporary basis to other employers
  - Its employer-clients are not affiliates, branches, or subsidiaries of the job contractor
  - Does not exercise substantial, direct day-to-day supervision and control in the performance of the services
  - Deals with hiring, paying, and firing of workers

Important Note: *An employer who contracts services or labor to another employer and does exercise substantial day-to-day supervision and control over the work, such as through an on-site supervisor, is not a job contractor within the meaning of this definition*

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Key Terms and Definitions
Job Opportunity

20 CFR 655.5

One or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Important Note: *Each job opportunity must be bona fide*

Key Terms and Definitions
Employee

20 CFR 655.5

- General common law meaning of someone engaged to perform work for an employer
- Determination of employee status includes:
  - Hiring party's right to control the manner and means by which work is accomplished
  - The skill required to perform the work
  - Source of instrumentalities and the tools accomplishing the work
  - Location of the work
  - Hiring party's discretion over time and length of work
  - Whether the work is part of the hiring party's regular business
- Terms "employee" and "worker" have the same meaning

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Key Terms and Definitions
Job Offer vs. Job Order

20 CFR 655.5

Job Offer

- The offer made by an employer or potential employer of H-2B workers to both U.S. and H-2B workers that includes all the material terms and conditions of employment, including information about wages, working conditions and other benefits

Job Order

- The document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits including the obligations and assurances under 20 CFR part 655, subpart A and 29 CFR part 503

Key Terms and Definitions
Job Qualification vs. Job Requirement

20 CFR 655.20(e)

Job Qualification

- A characteristic that is necessary to the individual's ability to perform the job in question

Job Requirement

- A term or condition of employment which a worker is required to accept in order to obtain the job opportunity

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Key Terms and Definitions
Non-agricultural labor and services

20 CFR 655.5

- Any labor or services not considered to be agricultural labor or services as defined in 20 CFR part 655, subpart B
- By statute, does not include the provision of services as members of the medical profession by graduates or medical schools.

***Important Note*:** *Unlike logging, which was included in the definition of agricultural labor and services in 2010, reforestation and pine straw activities continue to be included in the definition of non-agricultural labor and services*

Key Terms and Definitions
Offered Wage & Full-Time

20 CFR 655.5

Offered Wage

- Wage offered by the employer in the H-2B job order
- Equals or exceeds the highest of the prevailing wage, or the Federal minimum wage, the State minimum wage, or the local minimum wage

Full-Time

- 35 or more hours per week

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

20 CFR 655.61

Administrative Review

- Employer has a right to request administrative review under the following circumstances:
  - Notices of deficiency, partial certifications/denial of labor certification, denials of redetermination requests, denials of modified application or job order, denial of extension request
- Request for administrative review must be sent simultaneously to BALCA and the CO within 10 business days from the date of the action.
- Request may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued.

20 CFR 655.61

Administrative Review

- BALCA will notify employer of the decision within 7 business days of the submission of the CO's brief or 10 businesses days after it received the Appeal file, whichever is later
- Decision will:
  - Affirm CO decision
  - Reverse or Modify
  - Remand for further action

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

20 CFR 655.70

Integrity Provisions - Audits

- CO may conduct audits of both certified and denied applications and has sole discretion to choose the applications selected for audit
- CO will issue a Notice of Audit Examination Letter specifying the following:
  - Documentation to be submitted by the employer
  - A date no more than 30 days from issuance in which the CO must receive the documentation
  - Notice that failure to comply with the audit process may result in assisted recruitment, revocation of the certified application or program debarment from future filings

20 CFR 655.70

Audits

- Supplemental Information and/or documentation may be requested from the employer to complete the audit - ETA will coordinate efforts with WHD when initiating audits
  - CO may issue one or more requests
- Potential results from the audit findings include:
  - Affirm Compliance
  - Revocation of certified application
  - Debarment proceedings
  - Referral to DHS, WHD or other appropriate enforcement agency
  - Referral to DOJ (finding employer failed to hire, discouraged or discriminated against U.S. workers)

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

20 CFR 655.71

Assisted Recruitment

- If CO determines that a violation occurred that is not severe enough for debarment, CO may order assisted recruitment for up to 2 years from date of notice for future filed applications
- Takes place in addition to recruitment required under the recruitment provisions
- Material failure to comply will lead to denial and potential debarment

20 CFR 655.71

Assisted Recruitment

- Can include:
  - Submission of a draft ad for review
  - Designation of sources of U.S. workers
  - Proof of publication of ads, SWA referrals, contact with referrals and former U.S. workers
  - Additional recruitment/longer placement of ad/job order

Important Note: *Notwithstanding regulatory changes, Assisted Recruitment is the 2012 Final Rule successor to an existing regulatory process - Supervised Recruitment – see, 655.30 (Dec. 19, 2008)*

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

20 CFR 655.72

Revocation

- OFLC Administrator may revoke certified applications
- Bases for revocation include:
  - Certification was not justified due to fraud or willful misrepresentation of a material fact in the application process
  - Substantial failure to meet any of the terms/conditions of the registration, the certified application, or the petition
    - Substantial failure is a willful failure to comply that constitutes a significant deviation from the terms/conditions of the documents
  - Failure to cooperate with a DOL investigation, inspection, audit, or law enforcement function
  - Failure to comply with one or more sanctions or remedies imposed by WHD, DOL or a court of law

20 CFR 655.72

Revocation Procedures

- Employer or representative will receive a Notice of Revocation
- Notice will provide an opportunity for the employer to submit evidence to rebut the charge(s) or appeal
- CO must receive a response within 10 business days
  - If no evidence is submitted, the revocation is the Secretary's final decision and takes effect immediately
  - If evidence is submitted timely, OFLC Administrator will provide a Final Notice within 10 business days
- Final Notice will provide an opportunity for appeal to ALJ
- A timely submission of evidence or appeal stays the revocation

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

20 CFR 655.72

Revocation -- Employer Obligations

- OFLC Administrator will send a copy of the final revocation to DHS and DOS
- Where revoked, the employer is responsible for the following:
  - Reimbursement of actual inbound transportation and subsistence expenses
  - Worker's outbound transportation expenses
  - Payment to the worker of the amount due under the three-fourths guarantee
  - Any other wages, benefits, and working conditions due or owing to the worker

20 CFR 655.73

Debarment

- Jurisdiction to debar concurrent with WHD; WHD and OFLC will coordinate their activities, single debarment proceeding
- Can be imposed for no less than 1 year and up to 5 years
- Debarment across programs – the debarred party will be disqualified from filing any labor certification applications or LCAs
- Violations must be willful and significant
  - Willful misrepresentation of a material fact in the H-2B Registration, H-2B application, or H-2B petition, or visa process
  - Substantial failure to meet any of the terms and conditions of H-2B Registration, Application, or H-2B petition

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

20 CFR 655.73

Debarment

- Acts of commission or omission which involve:
  - Failure to pay/provide required wages, benefits or working conditions to workers, recruit or offer employment to US workers
  - Employing an H-2B worker outside the terms of the job order
  - Improper layoff or displacement of US workers or workers in corresponding employment
  - Violating certain requirements (prohibition on fees)
  - Failure to comply with certain processes (NODs, assisted recruitment) or remedies imposed by WHD, DOL or a court of law
  - Fraud involving the H-2B Registration, Application or Petition
  - Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot be expected

20 CFR 655.73

Debarment Procedures

- Notice of Debarment provides an opportunity for the employer to submit evidence to rebut or request a hearing
- CO must receive a response within 30 calendar days
  - If no evidence is submitted, the revocation is the Secretary's final decision and takes effect immediately
  - If evidence is submitted timely, OFLC Administrator will provide a Final Notice within 30 calendar days
- Final Notice will provide an opportunity for appeal to ALJ
- A timely submission of evidence or appeal stays the debarment

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

20 CFR 655.73

Debarment Procedures

- Hearing:
  - Must request ALJ hearing within 30 days
  - Administrator must send the case to Chief ALJ within 10 business days of request
  - ALJ must affirm, reverse, or modify the determination within 60 days after record closes
- ARB Review of Decision:
  - Must petition for ARB review within 30 days
  - ARB has 30 days to determine whether to accept
  - If petition for review accepted, ALJ's decision stayed
  - ALJ must affirm, reverse, or modify the determination within 90 days

Intermission

Please wait a few moments while our colleagues from the Wage and Hour Division initiate their portion of today's presentation

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Additional H-2B Program Information

- In the weeks and months to come, we will make available to the public this power point presentation, as well as additional outreach materials, including filing tips, Frequently Asked Questions (FAQs) and additional program updates on the OFLC website http://www.foreignlaborcert.doleta.gov/
- Please continue to send your questions regarding the new regulation to H-2B.Regulation@dol.gov. Your questions will be answered in the form of FAQs
- Case and program-specific inquiries should be directed to the Chicago National Processing Center through TLC.Chicago@dol.gov

Feedback

We would appreciate any comments you may have regarding the H-2B 2012 Final Rule outreach so that we may continue to improve your customer service experience. Please send your comments to:

H-2B2012.Feedback@dol.gov

THANK YOU

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)

Disclaimer

This presentation is intended for training use only and does not carry the force of legal opinion.

The Department of Labor is providing this information as a public service. This information and any related materials are presented to give the public access to information on the Department of Labor programs. You should be aware that, while we try to keep the information timely and accurate, there will often be a delay between official publications of the materials and the modification of these pages. Therefore, we make no express or implied guarantees. The *Federal* Register and the *Code of Federal Regulations* remain the official source for regulatory information published by the Department of Labor. We will make every effort to keep this information current and to correct errors brought to our attention.

AILA InfoNet Doc. No. 12032066. (Posted 03/20/12)