

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
H-2B Program Frequently Asked Questions

March 9, 2020

The U.S. Department of Homeland Security (DHS) recently announced¹ that it intends to make available 35,000 supplemental H-2B temporary non-agricultural worker visas for the second half of fiscal year (FY) 2020, and that of these 35,000 visas, 20,000 would be made available for employment start dates beginning April 1, 2020, and 15,000 would be made available for employment start dates beginning May 15, 2020. Additionally, DHS indicated it intends for these visas to be available to returning workers from one of the three previous fiscal years, with the exception of 10,000 visas, which would be available for nationals of Guatemala, Honduras, and El Salvador. The following general information concerning the U.S. Department of Labor's (Department) procedures is provided with that announcement in mind.

- 1. I am an employer who would like to file a petition under this supplemental allocation, but I have not previously submitted an H-2B application. Based on the Department's regulatory timeframes, I cannot obtain a valid prevailing wage determination (PWD) and H-2B certification in a timely manner in order to file a petition under this supplemental allocation. Can I file an emergency H-2B application with DOL?**

Yes. In the event DHS publishes a Temporary Final Rule to accept more petitions for employment start dates during the second half of FY 2020, as outlined in their announcement from March 5, 2020,² OFLC recognizes that some employers *who have not previously requested a temporary labor certification* and seek to hire H-2B workers to begin employment from May 15, 2020, through June 30, 2020, may have insufficient time to obtain valid PWDs and prepare all required documentation in order to file completed *Applications for Temporary Employment Certification* within the regulatory filing timeframe under 20 CFR 655.15.

As such, these employers may also be unlikely to have sufficient time to obtain valid temporary labor certifications in order to file petitions with DHS and receive timely approval to hire H-2B workers to begin work during this timeframe. Therefore, OFLC would consider this specific situation to qualify as good and substantial cause under 20 CFR 655.17. If these employers are unable to meet the regulatory filing timeframe under 20 CFR 655.15, they should request a waiver of the regulatory filing timeframe as provided below.

An employer who chooses to request a waiver of the regulatory filing timeframe must submit a statement describing the good and substantial cause necessitating the waiver request, a completed *Application for Temporary Employment Certification*, a proposed job order identifying the State Workforce Agency serving the area of intended employment, and all applicable documentation meeting the requirements of 20 CFR 655.15. See 20 CFR

¹ See <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>

² See <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>

655.17(b). An employer should state that they have a temporary need for H-2B workers, identify the anticipated start date of employment, provide a statement that they have not already filed an *Application for Temporary Employment Certification* on or after January 2, 2020, and are thereby seeking to utilize the emergency filing procedures. If the employer did not previously apply for a PWD, the employer should concurrently submit a completed *Application for a Prevailing Wage Determination* (Form ETA-9141) requesting a PWD for the job opportunity. *See* 20 CFR 655.17(b).

2. Would the Department's Office of Foreign Labor Certification (OFLC) need to open a new three-day filing window for employers to obtain an H-2B certification so they may file a petition under this supplemental allocation?

No. On January 6, 2020, and in accordance with the procedures published in the Federal Register on March 4, 2019, OFLC completed the [randomization process](#) to randomly assign to analysts for processing all H-2B applications submitted during the three-day filing window, January 2-4, 2020, requesting an April 1, 2020 start date of work, *i.e.*, the earliest start date of work permitted under the semi-annual visa allotment for the second half of FY 2020.

OFLC processes applications for temporary labor certification regardless of the availability of visas under the semi-annual and supplemental visa allotments. Regardless of DHS's announcement that it intends to accept more petitions for employment start dates during the second half of FY 2020, OFLC will continue to process applications for temporary labor certification in accordance with the procedures published in the Federal Register on March 4, 2019. Accordingly, for all employers seeking to obtain temporary labor certifications to employ H-2B workers for employment start dates on or after April 1, 2020, including under a supplemental visa allotment, OFLC will randomly assign to analysts for processing all completed H-2B applications filed on *each calendar day*, irrespective of the specific start date of work requested.

3. I am an employer who already received a temporary labor certification from OFLC containing an April 1, 2020, start date of employment, but DHS rejected my petition due to the second-half statutory cap of 33,000 visas being reached. If DHS again rejects my petition due to this supplemental cap of 20,000 being reached, may I return my temporary labor certification and file a new application for the same job opportunity with OFLC requesting an employment start date on or after May 15, 2020, to have an opportunity to file a petition under a second supplemental cap of 15,000?

Please note you must follow all regulatory requirements under 20 CFR part 655, subpart A, including 20 CFR 655.15(b) regarding timeliness of filing an *Application for Temporary Employment Certification*. Except in limited situations, *see* 20 CFR 655.17, employers may not file less than 75 calendar days before their date of need. Further, with limited exceptions, under [20 CFR 655.15\(f\)](#), only one *Application for Temporary Employment Certification* (Form ETA-9142B and appendices) may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.

When an employer files a new H-2B application and has not returned the first certification covering the same job opportunity, OFLC will issue a Notice of Deficiency (NOD) before the Certifying Officer reviews the application. This NOD will require the employer to justify the bona fides of the new H-2B application. OFLC may not accept for processing a new or subsequent H-2B application covering the same employer and job opportunity unless the first labor certification is returned.

Employers may return a temporary labor certification that is no longer needed, at any time, using the following procedure:

- Email the Chicago National Processing Center at TLC.Chicago@dol.gov;
- Include the phrase “*H-2B Cert Return Notification*” followed by the full case number in the email subject line; and
- Include the full case number and employer name in the body of the email and a brief explanation as to the certification return.

Example: Acme Company will not use the certification for H-400-1234-56789 due to the H-2B cap being reached.

4. **DHS announced their intent to publish a Temporary Final Rule to accept more petitions from employers requesting an employment start date on or after April 1, 2020, under a supplemental allocation of 35,000 visas, and that they intend to set aside 10,000 of those visas for nationals of Guatemala, El Salvador, and Honduras. I am an employer who would like to file a petition under this supplemental allocation, but I have not previously recruited workers from one of those countries. Can DOL help me identify eligible nationals of Guatemala, El Salvador, and Honduras?**

No. First and foremost, the role of OFLC in the H-2B temporary non-agricultural visa program is to ensure that U.S. workers have access to job opportunities and that wages and working conditions will not be adversely affected by the hiring of foreign labor. If, through this labor market test, there are not sufficient qualified, willing, or able U.S. workers to perform a temporary or seasonal job for which a U.S. employer needs workers, OFLC may then certify to DHS the need of the U.S. employer. DOL has, however, coordinated with other offices within the U.S. Government, to include the below Embassy contacts, and the governments of Guatemala, El Salvador, and Honduras to improve the integrity of the H-2B program. Employers desiring to hire workers from Guatemala, El Salvador, and/or Honduras for a job opportunity for which DOL has already issued a temporary labor certification can use the information below to contact the respective Ministries of Labor, who have developed a database of available workers. In addition, employers are encouraged to contact officials from the U.S. Embassy in the respective country about the current recruitment programs and efforts to prevent fraud and abuse of the H-2B program.

Guatemala:

U.S. Embassy – GuatemalaH2@state.gov
Ministry of Labor - MovilidadLaboral@MinTrabajo.gob.gt

Honduras:

U.S. Embassy - tgglegalemploymentusa@state.gov
Ministry of Labor – pttusa@trabajo.gov.hn

El Salvador:

U.S. Embassy – ElSalvadorH2@state.gov
Ministry of Labor - H2visas@mtps.gob.sv