

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2015 H-2B Interim Final Rule FAQs

Round 1: Implementation, Major Changes (2008 Final Rule v. IFR)

On April 29, 2015, the Department of Labor (the Department) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule (IFR) promulgating regulations governing the certification of employment of nonimmigrant workers in temporary non-agricultural employment and the enforcement obligations applicable to employers of H-2B workers and U.S. workers similarly employed. These FAQs are provided to assist employers, workers, and other interested parties in understanding the 2015 IFR as it goes into effect.

1. Why did the Department of Labor issue a new H-2B Interim Final Rule?

On March 4, 2015, the U.S. District Court for the Northern District of Florida (District Court) vacated the Department of Labor's (Department) 2008 H-2B regulations on the ground that the Department lacked authority under the Immigration and Nationality Act to unilaterally issue regulations in the H-2B program. *Perez v. Perez*, No. 3:14-cv-682 (N.D. Fla. Mar. 4, 2015). Because this decision vacated the 2008 H-2B Rule and permanently enjoined the Department from implementing or enforcing it, the Department was forced to immediately discontinue the processing of applications for temporary labor certification in the H-2B program. On March 18, 2015, the District Court granted a temporary stay of the vacatur, allowing the Department to resume the processing of H-2B applications and prevailing wage determinations. On April 15th, the Court extended the temporary stay through May 15, 2015.

On April 29, 2015, the Departments of Labor and Homeland Security jointly issued an Interim Final Rule (IFR) to rectify the regulatory gap that the vacatur of the 2008 H-2B regulations caused. The H-2B 2015 IFR addresses the critical issue of U.S. worker access to the jobs for which employers seek H-2B workers through a re-engineered program design which focuses on enhanced U.S. worker recruitment and strengthened worker protections.

As the 2015 IFR is immediately effective, the Department will process H-2B applications received on or after the effective date of the 2015 IFR under this authority.

2. How is the new 2015 H-2B Interim Final Rule different from the 2008 H-2B regulations?

Below is a brief list of some of the major changes incorporated in the 2015 Interim Final Rule (IFR). These updates are covered in greater detail in the particular topic areas below.

Duration of Temporary Need: Seasonal need, peakload need and intermittent need are limited to a validity period of 9 months or less. One-time occurrence remains available for a 3-year timeframe,

Definition of Full-Time Work: Full time work has been expanded from 30 hours per week to 35 hours per week.

H-2B Registration: New pre-filing process allowing the employer to “register” its temporary need for a specific number of job opportunities that will be sought in the first year of registration. DOL may approve an employer’s H-2B Registration for a period up to 3 consecutive years (to be effective at a later date, to be published in the Federal Register).

Post Filing Recruitment Model: Recruitment is conducted after the application is accepted for processing.

Application and Job Order Filing: Simultaneous; must occur no more than 90 and no less than 75 calendar days before the date of need, unless there is an emergency.

Proof of Agency. Where an employer is represented by an agent, any application filed by an agent must be accompanied by an agreement demonstrating the agent’s authority to act on behalf of the employer in the labor certification process.

Prevailing Wage Determinations in Guam: Subject to the transfer of authority from DHS to DOL, employers who will employ H-2B workers in Guam must request a Prevailing Wage Determination from the Department’s National Prevailing Wage Center. The Governor of Guam will retain the authority to issue temporary non-agricultural labor certifications for labor or services to be performed on Guam.

Employer-Conducted Recruitment: Includes additional components, including contact with the bargaining representative if the job is unionized, or posting the job opportunity on the employer’s work premises or electronically, such as displaying a notice prominently on any internal or external Web site. May include contact with community-based organizations and additional recruitment, as ordered by the Certifying Officer (CO). Recruitment requirements under the IFR expand disclosures to prospective applicants. Employer is required to update the recruitment report throughout the referral period.

Extended Referral Period: Employer is required to accept referrals and hire qualified U.S. workers until 21 days before the employer's date of need.

Emergency Filings: Employers that show good and substantial cause may file the H-2B registration, application and job order fewer than 75 days before the date of need, where there is sufficient time to test the labor market and make a final determination.

Determinations Based on the Nonavailability of U.S. Workers: New provision allowing an employer whose application was partially certified or denied to request a new determination from the Department based on the non-availability of U.S. workers.

Employer Assurances and Obligations

Fees (Visa/Border Crossing): Employer must cover the cost of visa processing, border crossing, and other related fees within the first workweek. Passport or other charges primarily for the benefit of the workers need not be reimbursed.

Transportation to and from the place of employment: Employers must cover the cost of inbound transportation and subsistence for H-2B workers who complete 50 percent of the period of employment covered by the job order, and outbound transportation and subsistence for H-2B workers who work to the end of the job order or are dismissed early.

Three-fourths guarantee: Employers must offer employment for three-fourths of each 12-week period for certifications extending 120 days or more; certifications covering fewer than 120 days will use a 6-week period. Employer must inform the CO if the certified work period will end early in order to modify this guarantee.

Tools and Equipment: Employer must provide all tools and equipment necessary to perform the job to workers free of charge.

Worker Protections: The 2015 Interim Final Rule includes additional worker protections, including protections from retaliation. See 20 CFR 655.20(n) and 20 CFR 503.16(n). Employer obligations and assurances are enforced by the Department's Wage and Hour Division. For compliance guidance, please visit:
<http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm>

Disclosure of Foreign Recruitment: Employer must provide a copy of all agreements with any agent or recruiter who conducts or plans to conduct international recruitment for the employer, and a list of the identities and locations of persons hired by or working for the recruiter.

Revocation: The OFLC Administrator has new authority to revoke approved temporary non-agricultural labor certifications.

3. The regulations permit an employer to seek H-2B workers for temporary non-agricultural employment only. What constitutes a temporary need for workers under the 2015 H-2B Interim Final Rule?

An employer must establish that its need for non-agricultural services or labor is temporary in nature, which means the need is for a limited period of time and, as defined by the Department of Homeland Security (DHS), will “end in the near, definable future.” See 8 CFR 214.2(h)(6)(ii)(B). The DHS categorizes and defines temporary need into the following four standards:

- a. **One-time occurrence**: The employer must establish the following:
- It has not employed workers to perform the services or labor in the past and it will not need 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 a temporary worker.

- b. **Seasonal need**: The employer must establish the following:
- The services or labor 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 it does not need the services or labor.

Important Note: The employment is not seasonal if the period during which the services or labor is not needed is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees.

- c. **Peakload need**: The 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 at the place of employment on a temporary basis due to a seasonal or short-term demand
 - and**
 - The added temporary staff will not become a part of the employer's regular operation.

d. **Intermittent need**: The 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.

Under the 2015 Interim Final Rule, an employer's temporary need justified on either a seasonal, peakload, or intermittent basis will be limited to 9 months or less in duration. An employer's temporary need justified on a one-time occurrence basis can be approved for up to 3 years.

4. My H-2B application was certified under the 2008 Final Rule to hire H-2B workers for a 10-month validity period. When filing new applications under the 2015 Interim Final Rule (IFR), will I be required to reduce my period of need to 9 months?

Yes. Under the 2008 H-2B regulations, an employer may have been approved to hire temporary H-2B workers for a period of need lasting up to 10 months. However, under the 2015 IFR, the maximum duration for which an employer may hire temporary workers in the H-2B visa category is 9 months, unless the temporary need is based on a one-time occurrence. Therefore, the Department will not certify an H-2B application based on a seasonal, peakload or intermittent need which reflects a period of need exceeding 9 months.

5. My H-2B application was certified prior to April 29, 2015 under the 2008 H-2B regulations for 10 months. Will the Department reduce my period of need after the effective date of the 2015 Interim Final Rule?

No. Any H-2B application that was certified under the 2008 Final Rule will continue to be governed by those regulations. Therefore, a certification previously issued for a 10-month validity period continues to be valid through the validity end date identified on the certification.

6. Are staffing companies permitted to participate in the H-2B program?

Any business enterprise that meets the definition of employer, possesses a valid Federal Employer Identification Number (FEIN) and has a temporary need for non-agricultural services or labor can qualify for a temporary non-agricultural labor certification. If a staffing company meets the definition of a "job contractor" under 20 CFR 655.5, the staffing company must comply with

specific filing requirements applicable to job contractors at 20 CFR.655.19, and may only qualify for certification based on its own temporary need, which may be either seasonal or a one-time occurrence. If a staffing company can demonstrate that it will exercise substantial, day-to-day supervision and control over the temporary workers performing the services or labor and, is not a "job contractor" as defined in the regulation, it may seek certification under the seasonal, peakload, intermittent or one-time occurrence temporary need standards.