

**U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION**

2015 H-2B Interim Final Rule FAQs

Round 9: Staggered Crossing of H-2B Nonimmigrants Working in the Seafood Industry

1. What is the “staggered crossing” provision and who does it apply to?

On January 17, 2014, the President signed into law the Consolidated Appropriations Act of 2014 (the “2014 Appropriations Act”), Pub. L. 113-76, which included a provision permitting staggered entry of H-2B workers employed in the seafood industry under certain conditions. This legislation was extended by Section 108 of the Consolidated and Further Continuing Appropriations Act, 2015 (the “2015 Appropriations Act”), Pub. L. 113-235, 128 Stat. 2130, 2464.

All employers submitting an H-2B *Application for Temporary Employment Certification* must accurately describe their temporary need, including the start and end dates of a time period during which they need the services or labor of H-2B nonimmigrant workers. However, this “staggered crossing” provision permits employers in the seafood industry to bring into the United States, in accordance with an approved H-2B petition, nonimmigrant workers at any time during the 120 day period on or after the employer’s certified start date of work provided certain conditions are met.

2. I am an employer in the seafood industry and have been relying on the appropriations “staggered crossing” provision to stagger the entry of my H-2B workers into the United States. I learned that the Department of Labor issued new H-2B regulations on April 29, 2015. Will I be able to continue this practice under the new regulations?

Yes. The Departments of Labor and Homeland Security have determined that the 2015 Omnibus made the “staggered entry” provision permanent and have incorporated its existing requirements into 20 CFR 655.15(f)(1)-(3) of the H-2B 2015 Interim Final Rule.

3. How is “seafood” defined for purposes of the 2015 Interim Final Rule?

Seafood is defined as fresh or saltwater finfish, crustaceans, other forms of aquatic animal life, including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals, and all mollusks.

4. I am an employer in the seafood industry filing in the H-2B program; what new or additional information or documentation should I include with my H-

2B Application for Temporary Employment Certification in order to be able to use the “staggered crossing” provision encompassed by the H-2B 2015 Interim Final Rule?

No additional information or documentation related to this new provision should be submitted with an H-2B application to the Office of Foreign Labor Certification’s Chicago National Processing Center. However, as discussed in the answer to Question 6 below, in order for employers to use this provision, H-2B nonimmigrant workers must show to the Department of State’s Consular Officers and to the Department of Homeland Security’s Customs and Border Protection Officers, as necessary, the employer’s attestation that the conditions contained in the statute and encompassed in H-2B regulations at 20 CFR 655.15(f)(1)-(3) have been met.

5. Does the H-2B staggered crossing provision applicable to seafood industry employers include any additional requirements?

Yes. The “staggered crossing” provision includes two primary conditions that employers must meet in order to benefit from this provision. First, the provision applies only to employers engaged in a business in the seafood industry, as defined in 20 CFR 655.5 and included in the answer to Question 3 above. Second, any seafood industry employer that permits or requires its H-2B nonimmigrant workers to enter the United States between 90 and 120 days after the certified start date of need must complete a new assessment of the local labor market during the period that begins **at least 45 days after the certified start date of need and ends before the 90th day after the certified start date of need**, which must include:

- (A) Listing the job in local newspapers on 2 separate Sundays; and
- (B) Placing new job orders for the job opportunity with the State Workforce Agency serving the area of intended employment and posting the job opportunity at the place of employment for at least 10 days; and
- (C) Offering the job to an equally or better qualified United States worker who applies for the job and who will be available at the time and place of need.

6. I am an employer in the seafood industry and I want to use the “staggered crossing” provision with respect to the H-2B nonimmigrant workers entering the United States to work for my business. What must I do to comply with this provision?

A seafood industry employer must prepare a written, signed attestation indicating its compliance with the statutory conditions outlined above in a response to Question 5. The official attestation is available in PDF-format on the Office of Foreign Labor Certification’s (OFLC’s) website at: <http://www.foreignlaborcert.doleta.gov/form.cfm>. Employers must download the official attestation, review the conditions contained in the attestation, and indicate compliance by signing and dating the attestation. An employer seeking to use this statutory provision must provide each H-2B nonimmigrant worker seeking entry into the United States a copy of the signed and dated attestation, with instructions that the worker must present the documentation

upon request to the Department of State's Consular Officers when they apply for an H-2B visa, and/or the Department of Homeland Security's Customs and Border Protection officers when seeking entry into the United States. Without this attestation, an H-2B nonimmigrant may be denied entry into the United States if seeking to cross the border at any time other than the designated 20-day period (10 days before and after the start date) surrounding the start date stated in the petition. (The attestation is not necessary when filing an amended petition based on a worker that is being substituted under 8 CFR 214.2(h)(6)(viii)). The attestation presented by an H-2B nonimmigrant worker in order to cross the border must be the official attestation downloaded from OFLC's Web site and may not be altered or revised in any manner.

7. I have conducted the additional recruitment necessary to bring my H-2B workers into the United States 90 days after my certified start date of need. Should I send proof of the additional recruitment to the Office of Foreign Labor Certification's Chicago National Processing Center?

No. Seafood industry employers who conducted additional required recruitment should not submit proof of the additional recruitment to the Office of Foreign Labor Certification. However, seafood industry employers must retain the additional recruitment documentation, along with other required H-2B recruitment documentation, for a period of three (3) years from the date of certification, consistent with the document retention requirements under 20 CFR 655.56 of the 2015 Interim Final Rule.