***Employment and Training Administration***
**Office of Foreign Labor Certification**
**Frequently Asked Questions**
**H-2A Temporary Agricultural Foreign Labor Certification Program**
**2010 Final Rule, Round 8**
**February 2013**

## Special Procedures

**Question: Are employers engaged in itinerant custom combine activities exempt from any of the additional documentation requirements for H-2A Labor Contractors (H-2ALCs) beyond Migrant and Seasonal Agricultural Worker Protection Act (MSPA) registration?**

The Training and Employment Guidance Letter (TEGL) No. 16-06, Change 1, establishes special procedures applicable to itinerant custom combine employers seeking H-2A certifications. The TEGL permits them to file one *Application for Temporary Employment Certification* covering one or more areas of intended employment based on a planned itinerary. As the TEGL notes, custom combine activities are exempt from MSPA registration and therefore are not required to provide a MSPA Farm Labor Contractor (FLC) Certificate of Registration. An itinerant custom combine employer, however, meets the definition of an "H-2A Labor Contractor" (H-2ALC) and must submit all of the other documentation required of H-2ALCs by regulation.

**Question: How can an itinerant custom combine employer comply with the requirement that it submit fully executed work contracts with its *Application for Temporary Employment Certification*?**

We recognize that, due to the unique nature of custom combine activities, a custom combine employer operating on a planned itinerary may not have fully executed work contracts for all worksites before filing an *Application for Temporary Employment Certification.* Custom combine employers typically travel across vast distances bringing heavy machinery not available locally to meet the needs of fixed-sited agricultural business owners. Weather, crop growth, and other factors that cannot be anticipated on such long itineraries (e.g., across multiple states) may cause an employer's anticipated work to change during the course of the season. Moreover, when the unique custom combine machinery arrives in a local area, additional local fixed-site agricultural business owners may seek the employer's custom combine services. Nevertheless, the employer must have sufficient evidence of the work it expects to perform across the itinerary at the time it submits its application in support of its request for temporary workers.

Given the unique characteristics of custom combine activities, the Department will consider an employer to have effectively satisfied the intent of the H-2A Labor

Contractor (H-2ALC) work contract documentation requirement if it provides alternative evidence of agreements to perform custom combine work for fixed-site agricultural business owners, such as letters of intent. Therefore, at the time of filing its *Application for Temporary Employment Certification*, the employer must provide copies of work contracts or similar agreements (e.g., letters of intent) with the agricultural business owners listed on the itinerary submitted with the application for which the custom combine employer intends to perform work. If an employer meets all other certification requirements, but is unable to substantiate the period of need requested or itinerary provided, the certification will be limited to the portion of the itinerary substantiated through work contracts or similar agreements.

Under certain circumstances, such as when weather conditions prevent completing the custom combine activities approved on the itinerary during the period of need certified, an employer may request a short or long-term extension. The post-certification extension regulatory provision and request process is discussed in more detail in a separate Frequently Asked Question.

**Important Note:** An employer augmenting its scheduled work within the approved areas of intended employment after certification should maintain an updated itinerary and retain copies of work contracts or similar agreements to ensure that accurate documentation is available in the event of a post-certification audit or upon request by authorized representatives of the Department.

## Pre-Filing

### *Housing*

**Question: When should I contact the State Workforce Agency (SWA) to inspect the housing I plan to provide to my workers?**

An employer may request a pre-occupancy housing inspection well in advance of its date of need. Early contact with the SWA will provide the employer with time to resolve potential housing compliance issues without impacting the issuance of the temporary labor certification. The statute provides that an employer is not required to submit proof that its housing complies with applicable program requirements at the time of filing its *Application for Temporary Employment Certification* (ETA Form 9142). However, the Department cannot grant a temporary labor certification without proof, which is typically provided in the form of a confirmation from the SWA that the employer-provided housing has sufficient capacity and is in compliance with applicable requirements.

We encourage an employer who has not already obtained the SWA's approval of its housing to contact the SWA to schedule the required pre-occupancy housing inspection as part of its initial preparations to submit an *Application for Temporary Employment Certification*. At the latest, the employer must request the housing inspection when submitting its job order (ETA Form 790) to the SWA.

Note that where special procedures permit an employer to use mobile housing on a multi-State itinerary, the employer may contact the SWA with jurisdiction over the initial pre-occupancy location of the mobile housing to conduct the inspection. That SWA's inspection and approval serves to certify the mobile housing for the entire itinerary.

## Filing

**Question: How can I ensure that my application is processed as quickly as possible?**

An employer can minimize processing time by ensuring that its job order and *Application for Temporary Employment Certification* are complete and accurate, and by responding promptly to any request(s) from the State Workforce Agency (SWA) or Chicago NPC during job order and application processing.

In addition, an employer should begin the temporary labor certification application process as early as the regulations permit. Absent an emergency situation, an employer may begin the process by submitting a job order to the SWA serving the area of intended employment **as early as 75 calendar days before the date of need** (**but must submit its job order no fewer than 60 days before the date of need**). As soon as the SWA approves the employer's job order, the employer may submit its completed *Application for Temporary Employment Certification* and a copy of the SWA-approved job order to the Chicago NPC. This non-emergency submission must occur no less than 45 days before the employer's date of need. Note that under certain circumstances (i.e., the SWA does not provide notice of acceptance or deficiencies within 7 calendar days after job order submission or the SWA and employer try but are unable to resolve a dispute about regulatory compliance of job order content), an employer may submit a copy of an unapproved job order to the Chicago NPC with its *Application for Temporary Employment Certification*.

After reviewing the *Application for Temporary Employment Certification* and job order, the Chicago NPC will issue either a Notice of Acceptance or a Notice of Deficiency. An employer receiving a Notice of Acceptance should follow the recruitment instructions provided by the Certifying Officer (CO) and may submit the recruitment report and any other required documentation identified in the Notice of Acceptance to the Chicago NPC as soon as the employer has that documentation but must submit this documentation no later than the date specified by the CO. An employer receiving a Notice of Deficiency minimizes delay when it responds to the Notice of Deficiency quickly and completely. As soon as all certification requirements are met, the Chicago NPC can issue a certification.

**Important Note:** We encourage employers to register for our e-mail notification program by contacting TLC.Chicago@dol.gov. Participation in our e-mail notification program is an effective way for employers or, if applicable, their authorized attorney or

agent to receive information about deficiencies more quickly, enabling them to more quickly respond.

***ETA Form 9142***

**Question: May I use correction tape or fluid ("white-out") to fix typographical errors on the ETA Form 9142?**

An employer may use correction tape or fluid to fix typographical errors on the *Application for Temporary Employment Certification* (ETA Form 9142), provided that its use of correction tape or fluid does not render the text illegible or ambiguous.

In all fields of the *Application for Temporary Employment Certification*, employers may make any necessary corrections using a pen and striking a line through unwanted text directly on the ETA Form 9142. Pen-and-ink corrections that are initialed and dated by the employer are acceptable.

**Important Note:** We encourage employers to use the fillable ETA Form 9142 and Appendix A.2 available on our Web site. Completing the form electronically enables the preparer to resolve typographical errors before printing the final document.

**Question: Can a farm that has operations in two States with the same crop and period of need submit one *Application for Temporary Employment Certification* including both worksite locations?**

An *Application for Temporary Employment Certification* is limited to a single area of intended employment, unless the job opportunity is covered by an approved special procedure that permits work in multiple areas of intended employment. The H-2A regulation defines an area of intended employment as the geographic area within normal commuting distance of where the job opportunity is located. An employer may include multiple worksite locations, including worksites on different sides of State lines, on a single *Application for Temporary Employment Certification* as long as each worksite is within a single area of intended employment (i.e., within normal commuting distance). If the worksites are beyond a reasonable commuting distance, then a separate application must be filed for those worksites.

There is no specific distance that constitutes a maximum normal commuting distance because various factors specific to the worksite area determine what length of commute is normal. For example, the quality of the public transportation network impacts the length of commute considered normal. To provide an employer with some measure of normal commuting distance, the Department has determined that any place within a Metropolitan Statistical Area (MSA) (including a multistate MSA) is within normal commuting distance. The borders of an MSA are not controlling, however, for identifying normal commuting distance; a location outside of an MSA may be within normal commuting distance of a location inside the MSA (e.g., close to the border of the MSA).

The Chicago National Processing Center (NPC) will consult with the applicable State Workforce Agency in determining what constitutes the maximum normal commuting distance for a given geographic area.

**Question: Can an association that has members in two States with the same crop and period of need submit one *Application for Temporary Employment Certification* including all members?**

In most cases, an *Application for Temporary Employment Certification* is limited to a single area of intended employment. However, provided that certain conditions are met, an association may file a Master Application on behalf of its employer-members in multiple areas of intended employment:

- The association must file as a joint employer with its employer-members;
- All employer-members must be located in no more than two contiguous States;
- The application covers the same occupation or comparable work with employer-members; and
- A single date of need is provided for all workers requested in the application.

## Job Offers, Assurances and Obligations

### *Rates of Pay*

**Question: What is the required wage for H-2A sheepherders? Can they be paid more than the prevailing wage rate?**

The Agricultural Online Wage Library, available at http://www.foreignlaborcert.doleta.gov/aowl.cfm, reflects the current prevailing wage rate for agricultural occupations, including sheepherders. A sheepherding employer is required to pay at least the prevailing wage rate which for occupations that are characterized by other than a reasonably regular workday, such as sheepherding, is deemed to be the Adverse Effect Wage Rate. The employer must also comply with any mandatory state monthly minimum wage rates for the occupation. The employer may but is not required to pay the workers more than the required wage rate.

### *Reimbursements*

**Question: When is an employer that has not advanced transportation and subsistence costs to a worker required to reimburse the worker for those costs?**

Under section 655.122(h)(1) and (p) of the H-2A regulations, consistent with the Fair Labor Standards Act (FLSA), a covered employer must reimburse a worker for inbound transportation costs by the first payday to the extent that those costs effectively bring a

worker's wages below the FLSA minimum wage during the first workweek of employment.

After that, when the worker completes 50 percent of the work contract period, an employer is obligated to fully reimburse the worker for the reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker came to work for the employer. Some employers may choose to fully reimburse workers before they have a regulatory obligation to do so, i.e., upon the worker's arrival. Those employers may, through reasonable deductions that do not bring the worker's wages below the FLSA minimum wage, recoup the cost until obligated, by regulation, to fully reimburse the workers when 50 percent of the contract period has elapsed. As with all deductions not required by law, this must be disclosed in the job offer.

**Question: What pre-employment costs are required to be reimbursed by the Fair Labor Standards Act (FLSA), other than inbound transportation?**

Under the FLSA, covered employers may not require workers to pay for expenses that are for the primary benefit of the employer, through deductions or otherwise, when doing so would effectively bring a worker's wages below the FLSA minimum wage during the first workweek of employment. Therefore, any pre-employment costs found to be primarily for the benefit of the employer must be reimbursed to the extent that they bring a worker's wages below the FLSA minimum wage.

The Department's view on costs that are primarily for the benefit of the employer in the context of the H-2B non-agricultural program is discussed in detail in the Wage and Hour Division's Field Assistance Bulletin No. 2009-2, which is available at http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.htm. The Department will view costs the same way in the H-2A program.

**Question: Is the employer required to reimburse the worker for the worker's passport?**

No. The employer is not required to reimburse workers for fees associated with obtaining or maintaining a worker's passport. Employers are not responsible for costs that are for the primary benefit of the worker. Government-required passport fees are considered costs primarily for the benefit of the worker as the worker may use the passport for purposes other than employment.

## H-2A Labor Contractors

### *Surety Bonds*

**Question: Why are separate surety bonds required for H-2A Labor Contractors (H-2ALCs) to support each *Application for Temporary Employment Certification*?**

The requirement of a new original surety bond to support each *Application for Temporary Employment 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, as outlined in 29 CFR 501.9. Additionally, in the event there is a finding of a violation, the requirement that a separate bond meet the face value parameters specified in 29 CFR 501.9 for each application is critical to the effective enforcement of an H-2ALC's wage obligations against the surety that agreed to be legally responsible with regard to the wages owed to the workers under that particular application.

## Positive Recruitment and Hiring of U.S. Workers

### *Interviews*

**Question: Some U.S. workers tell me during the pre start-date interview that they cannot commit to beginning work on the application's start date or may not be able to work for the entire period of need. Are these workers considered "willing and available"?**

No. A willing and available worker anticipates being available on the start date and throughout the period of need.

### *Recruitment/Recruitment Report:*

**Question: How does an employer determine whether a specific newspaper is appropriate for the two local newspaper advertisements required?**

When choosing where to place the two required newspaper advertisements in the area of intended employment, an employer must ensure that the publication it selects meets the following regulatory criteria:

- It is a newspaper;
  Note: A newspaper contains news articles, editorials, feature articles and some advertising. A publication primarily consisting of advertising is not a newspaper.

- It maintains general circulation;
  Note: A newspaper maintains general circulation when it is sold to the public in general.

- It serves the area of intended employment; and

- It is appropriate to the occupation and the workers likely to apply for the job opportunity.

A newspaper that is circulated on a weekly basis, or less frequently than weekly (e.g., monthly), is not acceptable. Factors such as the cost of an advertisement or advertisement presentation format, however, do not necessarily indicate that a newspaper is more or less appropriate for the labor market test. The employer should be prepared, if asked, to explain how the publication it selected meets the regulatory criteria.

In some cases the SWA may, but is not required by regulation to, include the name of appropriate newspaper(s) in its letter to the employer accepting the job order.

**Important Note**: If an employer needs assistance identifying a newspaper of general circulation in the area of intended employment, the employer may direct an inquiry to the Chicago National Processing Center Help Desk: TLC.Chicago@dol.gov.