

**Employment and Training Administration**  
**Office of Foreign Labor Certification**  
**Frequently Asked Questions**  
**H-2A Temporary Agricultural Foreign Labor Certification Program**  
**2010 Final Rule, Round 7**  
**January 2013**

**Pre-filing**

**1. May an agent or attorney sign the ETA 790 on the employer's behalf?**

No. Departmental regulations, prohibit the State Workforce Agency (SWA) from placing a job order seeking workers to perform agricultural or food processing work unless the employer has signed the job order (i.e., the *Agricultural and Food Processing Clearance Order* (ETA Form 790)). 20 CFR 653.50(d)(2). The plain language of the regulation requires the employer's own signature on the ETA Form 790. An employer may not delegate its responsibility to sign the ETA Form 790 to a representative acting on its behalf (e.g., an agent who has obtained a specific power of attorney from the employer).

**Important Note:** An association submitting an *Agricultural and Food Processing Clearance Order* (ETA Form 790) as a joint employer with its employer-members may sign the ETA Form 790, as the association is an employer on the application. An association acting as an agent of the employer-members, however, may not sign the ETA Form 790, as the association is not an employer on the application. An association of employers shall be considered an employer only if the association has an employer relationship with respect to hiring, paying, firing, supervising, or otherwise controlling the work of the workers sought through the ETA Form 790. Such an association, however, shall be considered a joint employer with the employer member(s) when it shares in exercising one or more of the definitional indicia.

**Filing**

***ETA Form 9142***

**2. May an agent or attorney sign the *Application for Temporary Employment Certification* (ETA Form 9142) or recruitment report on the employer's behalf?**

No. The H-2A regulation requires the employer itself to sign the *Application for Temporary Employment Certification* (ETA Form 9142) as well as the recruitment report. The plain language of the regulation requires the employer's original signature on the ETA Form 9142 in addition to, and separately from, the original signature of the employer's attorney or agent, if the employer is represented by an attorney or agent. The plain language of the recruitment report provision conveys the importance of the employer's direct involvement in the recruitment process and validation of the recruitment results reflected in the recruitment report. An employer may not delegate its

responsibility to sign the ETA Form 9142 or recruitment report to a representative acting on its behalf (e.g., an agent who has obtained a specific power of attorney from the employer).

**Important Note:** An association filing an *Application for Temporary Employment Certification* as a joint employer with its employer-members may sign the ETA Form 9142 and recruitment report, as the association is an employer on the application. An association acting as an agent of the employer-members, however, may not sign the ETA Form 9142 or recruitment report, as the association is not an employer on the application.

## **Job Offers, Assurances, and Obligations**

### ***Job Qualifications and Requirements***

#### **3. Why does the Department view my job qualification preferences as requirements?**

It has long been the Department's position that an employer's job qualification preferences, in effect, serve as requirements. The Department's program experience, supported by a number of decisions issued by the Board of Alien Labor Certification Appeals involving job qualification preferences and requirements is that prospective applicants perceive employer job qualification preferences as the employer's hiring criteria, resulting in qualified applicants being less likely to apply. The Department, therefore, treats an employer's listed job qualification preferences as the employer's job qualification requirements, which must meet the regulatory requirement that each job qualification and requirement listed on the employer's *Application for Temporary Employment Certification* (ETA Form 9142) and in its recruitment must be bona fide and consistent with normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.

#### **4. May I include my job qualification preferences in my job order and newspaper advertisements?**

An employer may only include in its recruitment (e.g., job order and newspaper advertisements) those minimum job qualifications and requirements necessary to perform the services or labor, so that the job opportunity is clearly open to any qualified U.S. worker. In order to comply with the statute, 8 U.S.C. 1188(a), (c)(3)(A), and H-2A program regulations, 20 CFR 655.103(a), 655.122(b), and consistent with its other visa programs involving a test of the U.S. labor market, a job opportunity that is clearly open to U.S. workers is one in which the recruitment lists only the minimum job qualification requirements against which prospective applicants will be screened. Where an employer believes its job qualification is necessary to perform the job, the preference is, in fact, a requirement and must be disclosed in the job order and newspaper advertisements.

Conversely, where an employer does not believe the job qualification is necessary to perform the job (e.g., one month of experience is necessary to perform the job, but the employer prefers to hire workers with more experience, when possible), the job qualification preference for workers with more than the minimum qualifications necessary (e.g., more than one month of experience) must not be disclosed in the job order and newspaper advertisements. Identifying such a job qualification preference in its recruitment efforts implies to prospective applicants that the employer will use the job qualification preference as a screening mechanism, discouraging prospective applicants who meet the actual minimum job requirements, but not the preference, from applying. As such, job qualification preferences that are not, in fact, actual minimum requirements necessary to perform the job, must not be included in the employer's recruitment efforts and may not be used to screen applicants.

***Important Reminder:*** Each job qualification and requirement listed on the employer's *Application for Temporary Employment Certification* (ETA Form 9142) and in its recruitment must be bona fide and consistent with normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.

### ***Rates of Pay***

#### **5. For agricultural occupations other than open range production of livestock, sheepherding and goatherding, and itinerant animal shearing occupations, how are prevailing wage rates determined in a State where there is insufficient wage data?**

Prevailing wage rates are established through surveys conducted by State Workforce Agencies (SWAs) in accordance with the [ET Handbook 385](#) wage finding process. Where the SWA is unable to reach a prevailing wage rate finding (e.g., due to insufficient numbers of domestic workers and/or employers employing domestic workers), the SWA will recommend a No Finding for the occupation or crop activity surveyed to the Office of Foreign Labor Certification (OFLC). The OFLC will post a No Finding to the Agricultural On-Line Wage Library and will require that the employer offer and pay the worker(s) the legal state or Federal minimum wage, the agreed-upon collective bargaining wage, or the Adverse Effect Wage Rate (AEWR) for that State, whichever is highest.

This procedure does not apply to wage findings for open range production of livestock, sheepherding and goatherding, and itinerant animal shearing occupations, which are subject to special procedures. These occupations involve atypical work schedules, for which an hourly wage cannot be used for a default, or piece rate work performed along a planned itinerary. In those cases where a SWA's survey results are insufficient to establish a prevailing wage rate for an occupation, due to inadequate sample size or another valid reason, the wage setting procedures allow the Department to issue a prevailing wage or piece rate for that State based on the wage rate findings submitted

by an adjoining or proximate SWA or using a regional approach (e.g., U.S. Department of Agriculture farm production regions) for the same or similar agricultural activity.

## **Post-certification**

### ***Post-certification changes in required wage rates***

#### **6. How will the Department notify me when the prevailing wage rate changes after I receive a certification?**

When the prevailing wage rate for a specific crop in a specific State changes after a certification has been granted the Office of Foreign Labor Certification posts the new prevailing wage rate, including the effective date, on its Web site in the Agricultural On-Line Wage Library (AOWL), available at <http://www.foreignlaborcert.doleta.gov/aowl.cfm>. Also, the Chicago National Processing Center (NPC) sends a letter to all potentially affected employers notifying them of the change.

***Important Note:*** Because the Office of Foreign Labor Certification receives new wage findings from States for different crops/occupations on a rolling basis, employers are encouraged to periodically check the AOWL to ensure that they are paying the appropriate required wage throughout the certified period of employment. If needed, Employers may direct their questions regarding the applicability of new wage determinations to [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov).

## **Labor Certification Fee**

#### **7. Am I required to pay a fee in connection with filing an H-2A application for temporary labor certification?**

Yes. Where the Department certifies an *H-2A Application for Temporary Employment Certification* in whole or in part, the employer will receive a bill for the required certification fee in the envelope delivering the original certification. The employer must timely pay the certification fee no more than 30 calendar days after the date of the certification.

***Important Note:*** An employer who is issued an H-2A labor certification but who requests post-certification withdrawal of that H-2A labor certification, and/or who decides not to proceed with the filing of a Petition for a Nonimmigrant Worker (Form I-129) with the United States Citizenship and Immigration Services is still required to pay the required labor certification fee in a timely manner. Failure to do so can result in debarment from the H-2A program.

#### **8. What is the amount of the H-2A labor certification filing fee?**

The basic labor certification fee is \$100.00 per application and \$10.00 for each H-2A worker certified, up to a maximum labor certification fee of \$1000.00 per employer. For example, an employer who received an H-2A labor certification to hire 15 temporary H-2A workers would pay a total fee of \$250.00, which includes \$100.00 for the temporary labor certification plus \$10.00 for each certified worker position (15 x \$10.00 = \$150.00). No additional fee is assessed to an association filing jointly with its employer members.

**9. I am a member of an agricultural association. Am I responsible for paying the H-2A labor certification fee or is the association?**

Each employer member is responsible for paying through its association the required fee related to the H-2A labor certification, where the association filed the *Application for Temporary Employment Certification* jointly with its employer members. At the time of certification, the Chicago National Processing Center (NPC) will issue an invoice directly to the association for the aggregate amount of labor certification fees owed by all employer members covered by the H-2A labor certification. For example, if employer member A is certified for 10 workers, employer member B is certified for 15 workers and employer member C is certified for 20 workers, the H-2A labor certification fee invoice would request the payment of \$750.00 – employer A (\$100.00 + 10 x \$10.00 = \$200.00) plus employer B (\$100.00 + 15 x \$10.00 = \$250.00) plus employer C (\$100 + 20 x \$10.00 = \$300.00). No additional fee would be assessed to an association filing jointly with its employer members. While the aggregate amount of labor certification fees appearing on an association’s invoice may be greater than \$1,000, no employer member will be billed for or assessed a fee of more than \$1,000 (i.e., the maximum labor certification fee per employer).

If, however, the association is representing the employer as an agent in the labor certification process, the Chicago NPC will direct the invoice for the labor certification fee to the individual employer, who will be responsible for paying the required fee directly to the Department. As with other correspondence, the Chicago NPC will send the invoice to the employer through its agent (i.e., the association).

**10. What is the process for paying the H-2A labor certification fee?**

After receiving a bill for the required H-2A labor certification fee, the employer should send a money order payable in U.S. currency or a check from a U.S. bank payable to the “United States Department of Labor” to the Chicago National Processing Center (NPC) at the following address:

U.S. Department of Labor  
Employment and Training Administration  
Office of Foreign Labor Certification  
Chicago National Processing Center  
P.O. Box A3804

Chicago, IL 60690–A3804  
Attention: Director of Administration

Employers should include with the payment the H-2A case number, and the employer's name, address, and phone number. The payment must be received by the Chicago NPC no more than 30 calendar days after the date of certification.

**Associations filing jointly with employer members** should send a **single** money order payable in U.S. currency or a check from a U.S. bank covering the aggregated fees for all employer members covered by the single *Application for Temporary Employment Certification*.

Questions related to the labor certification fee invoice should be directed to the Chicago NPC at [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov) with the e-mail subject line "H-2A Invoice Question".

***Important Note:*** Please note that some commercial express couriers will not deliver to a U.S. P.O. box; therefore, an employer choosing to use a commercial express courier should confirm that provider's services before submitting a payment. Also, all employers should allow for sufficient time to assure timely receipt of payment.

#### **11. Is there a deadline for paying the H-2A labor certification fee, and if so, what will happen if my payment is late?**

The Chicago National Processing Center (NPC) must receive payment of H-2A labor certification fees **no more than** 30 calendar days after the date of certification. Payment that is received more than 30 calendar days after the date of certification will be considered untimely. Non-payment or untimely payment of the H-2A labor certification fees may be considered a substantial violation and subject the employer to debarment from the H-2A program, consistent with 20 CFR 655.182.

Questions related to the labor certification fee invoice should be directed to the Chicago NPC at [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov) with the e-mail subject line "H-2A Invoice Question".

### **Labor Certification Determinations**

#### ***Criteria for Certification***

#### **12. Are dairy farmers who perform milking operations able to qualify for an H-2A labor certification?**

No. To qualify for an H-2A labor certification an employer must establish a need for the agricultural services or labor to be performed on a seasonal basis.

Although the Department considers each employer's specific circumstances on a case-by-case basis, the Department's program experience has consistently shown that the

majority of dairy activities, and milk production in particular, are year-round and therefore cannot be classified as either temporary or seasonal.