

H-2B Notice of Proposed Rulemaking
Labor Certification Process and Enforcement for Temporary Employment in Occupations
Other Than Agriculture or Registered Nursing in the United States

The Immigration and Nationality Act provides that the Secretary of the Department of Homeland Security (DHS) must consult with “appropriate agencies of the Government” before granting any H-2B visa petitions. Through regulation, DHS delegated to DOL labor certification and enforcement authority for the H-2B program. As part of its labor certification responsibilities, DOL’s Employment and Training Administration (ETA) certifies whether U.S. workers capable of performing the jobs for which employers are seeking foreign workers are available, and whether the employment of the foreign workers will adversely affect the wages and working conditions of U.S. workers similarly employed. As part of its enforcement responsibilities, DOL’s Wage and Hour Division (WHD) enforces compliance with the conditions of an H-2B petition and DOL-approved temporary labor certification.

The proposed rule will:

- Address 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.
- Through more robust domestic recruitment, assist employers to find domestic labor for those positions the employers would otherwise seek to fill with temporary H-2B workers.
- Strengthen existing worker protections, establish new protections, and enhance program integrity measures and enforcement to ensure adequate protections for both U.S. and H-2B workers.
- Ensure that only those employers who demonstrate a legitimate temporary need for temporary foreign workers have access to the H-2B program.

Major features of the NPRM include:

- Creating a national electronic job registry for all H-2B job orders (an expansion of the H-2A job registry) to improve U.S. worker access to nonagricultural jobs and help employers find workers from across the U.S.
- Enhancing the recruitment of U.S. workers, increasing the amount of time for which U.S. workers must be recruited, and requiring the hiring back of former employees when available.
- Requiring employers to engage in post-filing recruitment of U.S. workers, thereby demonstrating compliance with the prerequisites for bringing H-2B workers into the country.
- Creating an H-2B Registration process in which employers must demonstrate temporary need before applying for a labor certification. Temporary need (other than for a one-time occurrence) can be no more than 9 months. This would result in a more streamlined

process that would allow employers to conduct the labor market test closer to the date of need without the simultaneous adjudication of temporary need.

- Reinstating the critical role of the State Workforce Agencies (SWA) in assisting employers by using their expertise on local labor market conditions and recruitment patterns, thereby expanding job opportunities for U.S. workers.
- Maximizing the use of the program by employers with legitimate temporary need through the elimination of job contractors from the program, on the basis that they have a permanent need for workers.
- Providing greater transparency by requiring employer disclosure of agency agreements and use of foreign recruiters in the solicitation of H-2B workers.
- Extending H-2B program benefits, such as wages and transportation, to similarly employed U.S. workers to ensure these workers are not receiving lower wages or fewer benefits than the foreign workers.
- Strengthening worker protections through inclusion of the following provisions:
 - ✓ Payment or reimbursement of transportation and subsistence for workers to/from the place from which the worker has come to work for the employer;
 - ✓ Payment or reimbursement of visa, border crossing and related government-mandated fees;
 - ✓ Provision of all tools, supplies and equipment;
 - ✓ Offering each worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period and requiring full-time work of at least 35 hours per week;
 - ✓ Provision of accurate earnings statements with clear and lawful deductions; and
 - ✓ Requirement that employers provide workers with copies of the job orders no later than the time at which the worker applies for the visa, if the worker is departing directly from his or her home country, and display a poster describing employee rights and protections in English and another language common to the workers at the work site.
- Strengthening debarment authorities by providing WHD with independent debarment authority in addition to ETA, and providing revocation authority to ETA.