Question: USCIS approves a work permit for the employee in accordance with the Department of Labor's certification. If employers must file a separate ETA 750 for each STATE where the H-2B worker is working, is the employee required to carry multiple work permits with him for the State that he is working in at that time?

Answer: This question should be addressed to USCIS. The Department of Labor does not issue the work permits of H-2B workers.

Question: How should an employer advertise if the area of intended employment does not have a newspaper that runs 7 days a week?

Answer: Department of Labor guidance states that an employer must advertise the job opportunity in a newspaper of general circulation or in a readily available professional, trade or ethnic publication, whichever the State Workforce Agency (SWA) determines is the most appropriate for the occupation and most likely to bring responses from U.S. workers. If the job opportunity is located in a rural area that does not have a newspaper with a daily edition that runs 7 days a week, the employer will be instructed to use a daily edition with the widest circulation in the nearest urban area or such other publication, as the SWA may direct. (Training and Employment Guidance Letter (TEGL) No. 21-06, Change 1, Section IV.D.)

Question: Can the DOL develop a process to accelerate the labor certification process for occupations where there is currently a labor shortage?

Answer: In essence, there is a labor shortage for every position included on a labor certification application. To ensure fairness to each employer that applies for temporary labor certification under the H-2B program, all applications are processed on a first in, first out basis, with no exceptions. Employers are encouraged to ensure that they have submitted a complete application to the SWAs and all the necessary supporting documentation to avoid any unnecessary delay.

Question: Once the visa cap for the first half of a fiscal year has been reached, assuming the visas continue to be granted on this basis, can the DOL amend previously certified labor applications so that the date of need can start in the second half of the fiscal year?

Answer: No. A temporary labor certification is valid only for the number of foreign workers, the area of intended employment, the specific occupation and duties, the period of time, and the employer specified in the Application for Alien Employment Certification, ETA Form 750. Employers must file a new application with a valid test of the labor market and include all supporting documentation to support a new date of need.

Question: What are the typical forms of supporting documentation to justify a temporary need for horse groomers?

Answer: To substantiate their temporary need, horse show employers generally provide a copy of their show schedule(s), if applicable, and a summarized monthly payroll report for a minimum of one previous calendar year showing the permanent and temporary groom-related positions. Department of Labor regulations require that a payroll report identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earning received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system. Employers should also be prepared to provide the documents utilized to generate the summarized monthly payroll reports if requested by the NPC Certifying Officer. (Training and Employment Guidance Letter (TEGL) 21-06 Change 1, Section III.D.4.c.)

Question: Is a seasonal or peakload need established if the employer's customers, because of budget constraints or a holiday season, do not request the labor/services during one certain period of the year?

Answer: In order to establish a seasonal need, the employer must establish that its services or labor is traditionally tied to a season of the year by an event or pattern, and is of a recurring nature. The employer can establish a seasonal need for temporary foreign workers if it can establish a clear pattern of when temporary foreign workers are needed regardless of the reasoning behind the need. The employer must specify the period(s) of time during each year in which it does not need the services or labor. An employer providing services whose clients no longer require those services because of a predictable cyclical budget constraint or a holiday season, and can demonstrate that its own need for workers during those weeks or months is then eliminated, demonstrates a temporary need. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section II.D.2.)

Question: What is the process if an employer needs to extend its period of need for H-2B workers?

Answer: If there are unforeseen circumstances where the employer's need exceeds one year, a new application for temporary labor certification is required for each period beyond one year. However, an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted. Training and Employment Guidance Letter (TEGL) No. 21-06, Change 1; DHS regulations at 8 CFR 214.2(h)(6)(ii),)

Question: How should an employer request a copy of its final determination letter indicating that its application has been denied?

Answer: An employer whose application has been denied will receive a final determination letter by mail. The employer may request a duplicate of the denial letter by fax, email or mail from the appropriate National Processing Center that processed the application. The contact information for the National Processing Centers is as follows:

Atlanta NPC:
U.S. Department of Labor
Employment and Training Administration
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, GA 30303
Fax: (404) 893-4643
Email: TLC.Atlanta@dol.gov

Chicago NPC:
U.S. Department of Labor
Employment and Training Administration
844 N. Rush Street
12th Floor
Chicago, IL 60611
Fax: (312) 353-3352
Email: TLC.Chicago@dol.gov

The DOL will send a copy of the final determination letter to the employer with a stamp indicating that the denial letter is a copy.

Question: If a foreign worker would like to work for a new employer (in a different state, but similar position), must the new employer file a new ETA Form 750 and begin the H-2B process as though it were for a new employee?

Answer: Yes. All employers must have a valid labor certification to support any H-2B worker.

Question: What type of supporting documentation should be submitted by an employer seeking temporary labor certification based on a one-time need?

Answer: An employer seeking to justify a one-time need must establish that (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) it has an employment situation that is otherwise permanent, but a temporary event of

short duration has created the need for a temporary worker. Evidence that has been used in cases of one-time need includes contracts showing the need for the one-time services, letters of intent from clients, news reports, event announcements, and similar documentation. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section II.D.1)

Question: Is it permissible for a recruiting agency to pass the employer's legal and administrative costs of applying for H-2B visa certification onto the H-2B workers?

Answer: There are currently no ETA regulations that expressly prohibit passing the legal and administrative costs of applying for H-2B visa certification onto the H-2B workers.

Question: According to TEGL 21-06, Change 1, Section IV.F, an employer shall document that union and other recruitment sources appropriate for the occupation and customary in the industry, were contacted and either were unable to refer qualified U.S. workers or were non-responsive to the employer's request. When an employer is instructed by the SWA to contact a union, who determines what is appropriate for the occupation and customary in the industry?

Answer: Item 19 of the ETA Form 750, Part A require the employer to indicate whether the temporary position is unionized. The State Workforce Agency serving the area of intended employment may also determine whether unions that are appropriate for the occupation and customary in the industry exist and may, instruct the employer to contact a specific union to determine if qualified U.S. workers are available for the position. Once the application is forwarded from the SWA to the NPC, the NPC Certifying Officer may determine whether there are other appropriate sources of workers from which the employer should have recruited in order to obtain qualified U.S. workers. If the NPC Certifying Officer determines that an appropriate union was not contacted, the NPC Certifying Officer may remand the case to the SWA with specific instructions on contacting the union.

Question: Is it permissible for the State Workforce Agency to refer U.S. candidates who applied for the position after the conclusion of the 10-day job order? And should SWAs be required to issue an end of recruitment report?

Answer: ETA has encouraged SWA staff to provide employers with a definitive "cut-off" time for the recruitment period to ensure timely processing and ample time for applicants to respond to the contact. The SWA should notify the employer no later than 10 days after the end of the recruitment period, as to each applicant referred (i.e., names and contact information) or the SWA must issue a

statement indicating that no applicants were referred for hiring consideration. (Training and Employment Guidance Letter 21-06, Change 1)

Question: When a SWA is referring a candidate to the employer, what can be done to establish consistency for the SWA's method of communicating to employers? If employers include prepaid FedEx envelopes for SWAs to forward the case to USDOL, will SWAs be required to use the prepaid FedEx?

Answer: The communication methodology utilized by SWAs remains a state decision.

Question: Is there a required time period in which DOL must process cases?

Answer: The INA and regulations do not set time limits for DOL's processing of H-2B applications. However, it is DOL's practice, consistent with available program resources, to process cases within 60 days.

Question: What are the remedies available to an employer if the SWA did not forward an employer's necessary supporting documentation to the National Processing Center?

Answer: In such an instance, the employer should contact the appropriate ETA National Processing Center for assistance using the e-mail box noted earlier.

Question: How can an employer obtain a duplicate certified ETA Form 750?

Answer: Only the U.S. Citizenship and Immigration Services (USCIS) may request a duplicate certified ETA Form 750. USCIS may do so through a written request to DOL in connection with a petition to employ the H-2B worker(s).

Employers requesting USCIS to obtain a duplicate certified ETA Form 750, should include on the top of the I-129, Petition for Nonimmigrant Worker -- a cover sheet (preferably highlighted with colored paper) stating the following:

LOST OR MISPLACED LABOR CERTIFICATION, REQUEST FOR DUPLICATE, DO NOT REJECT

On the same sheet, the following information should also be included:

1. Attorney or agent name, if applicable;
2. Employer's name;
3. ETA case number;

4. Specify that you want USCIS to initiate the request for a duplicate certified ETA Form 750;
5. Proper fee, signature and all required supporting documents;
6. Provide the reason(s) for requesting that the Service Center secure a duplicate, approved labor certification from DOL, e.g., "Case was certified, original approved labor certification was never received in the mail."

Once the USCIS receives the duplicate certified ETA Form 750, the USCIS will contact the employer and/or his representative via a Request for Evidence (RFE) in order to secure the employer's signature on the duplicate certification.

REMEMBER THAT DOL WILL NOT SEND THE DUPLICATE CERTIFICATION TO THE EMPLOYER. DOL WILL SEND IT ONLY TO USCIS.

Question: Will an employer's case be delayed if the employer requests assistance from a Member of Congress? During an inquiry from the employer's Member of Congress, will the DOL continue to communicate with the employer's agent/attorney?

Answer: An employer's case will not be delayed if the employer requests assistance from a Member of Congress. To ensure fairness to all H-2B applicants, the DOL will continue to process all applications on a first in, first out basis, regardless of whether the employer has requested assistance from a Member of Congress. Therefore, the employer's application will neither be delayed nor expedited due to a Congressional inquiry.

Question: If the employer clearly identifies and describes a temporary need in its needs statement, is it necessary to specify whether that temporary need is peakload or seasonal?

Answer: Yes. Every H-2B application must include a detailed statement explaining (a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer's request for the services or labor meets one of the standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. This statement of temporary need must be submitted separately on the employer's letterhead and with the employer's signature. An employer should specify how it meets one of the standards, and identify which standard. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section III.D.3)

Question: If a criminal background check is required for domestic workers and is company policy, can this be listed as a requirement on the ETA Form?

Answer: Yes. As with all such requirements, if a background check is warranted for the job opportunity and required for U.S. workers in such job opportunities, it must also be required for foreign workers.

Question: When the application clearly establishes representation by an agent or an attorney, is it appropriate for the SWAs to discourage an employer from utilizing their services?

Answer: Neither DOL nor the SWAs advise employers on the best procedures for submitting an H-2B labor certification application.

Question: Does the DOL recognize any distinctions between job and labor contractors?

Answer: No. The Department considers labor contractors to be the same as job contractors; job and labor contractors undertake the same activities with respect to their employment of workers for hire by other entities and are, therefore, under the same policies and procedures. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section III.C.)

Question: What steps should a farm labor contractor applying for temporary workers in tree planting and related reforestation occupations take if its Certificate of Registration will expire before its listed period of need in its ETA Form 750, but has not expired when it submitted the application to the DOL?

Answer: The Farm Labor Contractor should submit a copy of its existing Certificate of Registration with the application for alien labor certification, as well as a signed, written assurance that all registrations will be valid during the entire period of use.

Question: I have a need for a worker to perform similar combined duties. May I advertise and seek to employ an H-2B worker to perform a combination of duties?

Answer: Yes. An employer may require that an H-2B worker perform a combination of duties as long as the employer can prove that: (1) the employer has normally employed workers with these combination of duties in the occupation; (2) workers customarily perform these combination of duties in the area of intended employment; or (3) requiring the combination of duties is a business necessity. In any event, the employer will be required to pay the salary that is the higher of the salaries of the two positions that are combined, based on the combination of the skill sets, regardless of the amount of time the worker will spend performing each respective duty.

Question: Are landscape workers permitted to perform activities that involve construction of pathways and patios?

Answer: The current Occupational Information Network (O*NET) description states that landscape workers may perform installation of mortar-less segmental concrete masonry wall units. Therefore, landscape laborers may construct pathways and patios that do not involve the laying of the masonry with mortar. If the employer wishes to employ landscape workers to construct pathways and patios involving mortar, the employer is essentially searching for an H-2B worker to perform a combination of duties. In this instance, the employer may employ an H-2B worker to perform a combination of job duties as long as the employer can prove that: (1) the employer has normally employed workers with these combination of duties in the occupation; (2) workers customarily perform these combination of duties in the area of intended employment; or (3) requiring the combination of duties is a business necessity. Additionally, the employer will be required to pay the salary that is the higher of the salaries of the two positions that are combined (e.g., landscape worker and mason or bricklayer), based on the combination of the skill sets, regardless of the amount of time spent performing each respective duty.

Question: In circumstances where the employer is requesting certification for a job opportunity (e.g., landscaping, construction) containing multiple worksite locations within the area of intended employment, how should the employer complete the ETA Form 750, Part A, specifically item #7, and conduct the required advertisement to recruit U.S. workers?

Answer: To be consistent with the guidance provided in TEGL 21-06, Change 1, the employer should do the following:

ETA Form 750, Part A

Under Item #7, the employer should complete the application as follows:
(1). Write the phrase “Multiple worksites within MSA” or “Multiple Worksites within area of intended employment”;

(2). Providing as much geographic detail as possible, write the work site address where the employment is expected to begin in Item #7, since this should correspond to the SWA where the application was initially filed; and

(3). Submit an addendum to the ETA Form 750, Part A, which includes a listing of all the worksite locations where the work will be performed during the period of employment indicated on the form. Employers are not required to provide a comprehensive listing of all worksites at the street address level, but must provide enough geographic detail (e.g., county/state, township/state, or city/state)

to cover all of the worksite locations so that the SWA staff understands where the work will be performed within the area of intended employment.

Content for Newspaper Advertisements

TEGL 21-06, Change 1, Section IV.E, specifies the employer's advertisement must "identify the employer's name, location(s) of work, and direct applicants to report or send resumes to the SWA for referral to the employer by disclosing the SWA contact information and job order number." In order to meet the content requirements for newspaper advertisements and apprise US workers of where work will be performed, employers must provide enough geographic detail (e.g., county/state, township/state, or city/state) to cover all of the worksite locations where the work will be performed in the area of intended employment. For instance, the employer can disclose a listing of all the counties where work will be performed within the area of intended employment in order to meet the advertising requirements and apprise U.S. workers of the potential travel requirements for the job opportunity. This level of geographic detail is typically provided in advertisements for job opportunities under the H-2B program where the work will be performed in multiple worksite locations (i.e., covering multiple counties) within the area of intended employment. Employers are not required to disclose a listing of all worksite locations at the street address level in the newspaper advertisements.

Important Note: A common practice of landscaping and construction companies is to provide transportation to the worksite by picking up workers at a centralized location. Only listing the geographic location of the centralized "pick up" location in the advertisement is not appropriate and does not apprise US workers of where the actual work will be performed. The advertisement must identify the geographic location of the worksite, as well as the geographic location of the pick-up site, and disclose that the employer will provide transportation to the worksites through that centralized pick up location. Applications and/or newspaper advertisements where the employer discloses or otherwise apprises U.S. workers to provide their own transportation to the worksites will be considered by the NPC Certifying Officer to be an unduly restrictive job requirement that is not normal to the occupation.