

Fact Sheet #69: Requirements to Participate in the H-2B Program

The H-2B provisions of the Immigration and Nationality Act (INA) provide for the admission of nonimmigrants to the U.S. to perform temporary non-agricultural labor or services. [8 U.S.C. 1101(a)(15)(H)(ii)(b)]

The Wage and Hour Division (WHD) of the U.S. Department of Labor (Department) has been delegated enforcement responsibility to ensure H-2B workers are employed in compliance with H-2B labor certification requirements. This enforcement authority has been delegated by the Department of Homeland Security (DHS) pursuant to 8 U.S.C. 1184(c)(14)(B) and 8 U.S.C. 1103(a)(6). The Department's regulations implementing this authority became effective on January 18, 2009, and are applicable to applications for certifications filed on or after that date pursuant to 20 C.F.R. Part 655.

As part of the application process an employer seeking authorization to employ H-2B workers must attest that it:

Job Opportunity

1. Will offer terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, which are no less favorable than those offered to H-2B workers. [20 C.F.R. § 655.22(a)]
2. Will offer a job opportunity to H-2B workers that is a bona fide, full-time temporary position with qualifications that are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. [20 C.F.R. § 655.22(h)]
3. Will truly and accurately state the dates of temporary need, reason for temporary need, and number _____ of positions being requested for labor certification. [20 C.F.R. § 655.22(n)]

Strike/Lockout

Must not seek H-2B certification for a specific job opportunity that is vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage. _____ [20 C.F.R. § 655.22(b)]

Recruiting

Has met recruiting requirements found in 20 C.F.R. § 655.15(d), which require the employer to:

- A. Obtain a prevailing wage determination from the National Processing Center;
- B. Submit a job order to the State Workforce Agency (SWA) serving the area of intended employment;
- C. Publish advertisements in compliance with 20 C.F.R. § 655.15(f);
- D. Contact the local union as a recruitment source if the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application.

U.S. Applicants

1. Will not reject U.S. applicants for the job opportunity for which the labor certification is sought for reasons other than lawful, job-related reasons. [20 C.F.R. § 655.22(c)]
2. Will retain records of all rejections of U.S. worker applicants for the job opportunity for which labor certification is sought. [20 C.F.R. § 655.22(c)]
3. Has not been successful in locating sufficient numbers of qualified U.S. applicants for the open job opportunity. [20 C.F.R. § 655.22(c)]

Other Laws

Will comply with applicable Federal, State, and local employment-related laws, including health and safety laws. [20 C.F.R. § 655.22(d)]

Wage Payments

1. Will offer and pay the H-2B worker no less than the highest of the prevailing wage, applicable Federal minimum wage, State minimum wage, or local minimum wage during the entire period of the approved H-2B labor certification [20 C.F.R. § 655.22(e)] which:
 - A. Is not based on commissions, bonuses or other incentives unless guaranteed and paid by the employer on a weekly, bi-weekly, or monthly basis; and
 - B. Does not include any deductions that would violate the Fair Labor Standards Act (FLSA) for an employer covered by the FLSA. [20 C.F.R. § 655.22(g)(1)]
2. Will make all deductions from the workers' paychecks that are required by law. [20 C.F.R. § 655.22(g)(1)]
3. Has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees except as provided at 8 C.F.R. § 214.2(h)(5)(xi)(A) or as reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees. [20 C.F.R. § 655.22(g)(2)]
4. Has not, whether directly or through its attorney or agent, sought or received payment of any kind for an activity related to obtaining the labor certification, including payment of the employer's attorney's or agent's fees, H-2B application, or recruitment costs. [20 C.F.R. § 655.22(j)]

Layoffs

1. Has not laid off and will not lay off any similarly employed U.S. worker in the occupation for which the labor certification is sought:
 - A. In the area of intended employment within the period from 120 calendar days before the date of need through 120 calendar days after the date of need;
 - B. Except where the employer has offered the job opportunity for which the labor certification is sought to laid-off U.S. workers and such workers either refused the job opportunity or were rejected only for lawful, job-related reasons. [20 C.F.R. § 655.22(i)]

2. Will not place, if a job contractor, any H-2B worker with any other employer or at another employer's worksite unless:
 - A. The employer first makes a bona fide written inquiry as to whether the other employer has displaced or intends to displace any similarly employed U.S. workers within the area of intended employment within the period beginning 120 calendar days before through 120 calendar days after the date of need; and
 - B. The other employer provides written confirmation that it has not so displaced and does not intend to displace U.S. workers; and
 - C. All worksites are listed on the H-2B certification, including amendments or modifications. [20 C.F.R. § 655.22(k)]

Relocating

Will not place any H-2B worker outside the area of intended employment listed on the H-2B certification unless the employer has obtained a new temporary labor certification from the Department. [20 C.F.R. § 655.22(l)]

Notice

1. Will notify the Department and DHS in writing of the separation from employment of an H-2B worker, not later than two work days after such separation is discovered by the employer, if such separation occurs prior to the end date of the employment specified in the H-2B application. [20 C.F.R. § 655.22(f)]
2. Will notify the H-2B workers:
 - A. Of the requirement that they leave the U.S. at the end of the authorized period of stay provided by DHS or separation from the employer, whichever is earlier, absent any extension or change of such workers' status or grace period pursuant to DHS regulations; and
 - B. That the employer is liable for return transportation of the workers if the workers are dismissed before the end of the authorized period of stay. [20 C.F.R. § 655.22(m)]

Failure to meet any of these obligations may result in the assessment of civil money penalties, a recommendation that the employer be disqualified from approval from future petitions (debarment), reinstatement of displaced U.S. workers, payment of back wages owed to H-2B workers, and other legal or equitable remedies as the Administrator of the WHD determines to be appropriate.

The requirement listed above can be found in the Immigration and Nationality Act § 241, 8 U.S.C. § 1184, and 20 C.F.R. Part 655 Subpart A.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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