Employment and Training Administration
Office of Foreign Labor Certification
H-2A Notice of Final Suspension Frequently Asked Questions

Question: What has the Department published with respect to the H-2A regulations? What does it mean?

Answer: On May 29, 2009, the Department published in the Federal Register a final rule suspending ("Suspension") the H-2A final rule published on December 18, 2008 and in effect as of January 17, 2009 (the "December 2008 Rule"). The final rule reinstated the regulations in effect on January 16, 2009 (the "reinstated regulations"). The Suspension will be effective 30 days after its publication, on June 29, 2009.

Employers should be aware that all applications filed prior to June 29, 2009 will be subject to and adjudicated under the December 2008 Rule. Applications filed on or after June 29, 2009 will be subject to and adjudicated under the reinstated regulations. The reinstated regulations will be in place for a period of no more than 9 months while the December 2008 Rule is under review by the Department.

Question: Which rule applies to what applications?

Answer: If an employer files an application for a labor certification for H-2A workers before June 29, 2009 then the employer's application must comply with, and will be adjudicated under the December 2008 Rule transition procedures contained in 20 CFR 655.100(b), and extended by the Department in an Interim Final Rule on April 16, 2009 (74 FR 17597). If the employer files the application on or after June 29, 2009, then its application must comply with and will be adjudicated under the reinstated regulations. The last day that the Department will receive for processing an H-2A application on ETA Form 9142 is on June 28, 2009, the last day the December 2008 Rule is in effect. Forms ETA 9142 <u>received</u> after June 28, 2009 will be returned and the employer will be instructed to re-file its application using the correct form – ETA Form 750.

Question: I need my workers to begin working on July 15, 2009. What procedures should I follow to get an H-2A temporary labor certification?

Answer: Under both sets of regulations employers must file their applications for a labor certification at least 45 days before their date of need. Therefore, this particular employer must file its application no later than June 1, 2009. On June 1, 2009 the December 2008 Rule will still be in effect and will apply to this employer's application.

Question: I need to file before the effective date of the Suspension. What procedure should I follow - the December 2008 Rule or the reinstated regulations?

Answer: If an application is filed before the effective date of the Suspension, i.e. before June 29, 2009, it must be filed in accordance with the December 2008 Rule. On April 16, 2009, the Department published in the Federal Register (74 FR 17597) an Interim Final Rule extending the December 2008 Rule transition period procedures (20 CFR 655.100(b) of the December 2008 Rule) for all applications with a date of need before January 1, 2010. Employers who are filing or intend to file their applications before the effective date of the Suspension must follow the transition procedures and not the full implementation procedures of the December 2008 Rule.

Question: I am planning to file an application for a temporary labor certification under the H-2A program. What form should I use?

Answer: The form that an employer uses, and the procedures that it follows, depend upon when the employer files. For applications that will be received by CNPC before June 29, 2009, employers will continue to use the *Application for Temporary Employment Certification* - ETA Form 9142. For applications that will be received by the CNPC on or after June 29, 2009 (the effective date of the Suspension), employers will use the *Application for Alien Employment Certification* - ETA Form 750. In addition, all employers regardless of their filing date will need to include the *Agricultural and Food Processing Clearance Order* - ETA Form 790 and all attachments with their applications.

Question: Where should I send my application?

Answer: Employers filing their applications prior to June 29, 2009 (the effective date of the Suspension) should send their applications to the:

Chicago National Processing Center
DOL/ETA/OFLC
844 N Rush Street
12th Floor
Chicago, IL 60611

Employers whose applications are filed on or after June 29, 2009 will submit one originally signed application and accompanying documents to the Chicago National Processing Center at the address provided above and one copy of the application and accompanying documents to the SWA serving the area of intended employment. Please visit http://www.foreignlaborcert.doleta.gov/contacts.cfm for a list of SWAs.

Question: I have already filed an application on ETA Form 9142, but it has not yet been accepted. Do I have to re-file on ETA Form 750?

Answer: Employers who filed their applications on ETA Form 9142 under the December 2008 Rule (extended transition procedures) prior to June 29, 2009 have properly filed their applications and should not re-file on ETA Form 750, even if the CNPC subsequently reviews the application and finds deficiencies with it.

Question: How can I obtain the required wage?

Answer: For employers filing prior to June 29, 2009 the employer will send the *Application for Temporary Employment Certification* (ETA Form 9142) and *Agricultural and Food Processing Clearance Order* (ETA Form 790) to the CNPC. The employer has an option of leaving the wage section(s) blank or supplying the highest of the AEWR, the prevailing hourly wage rate, the prevailing piece rate, or the Federal or State minimum wage rate as the offered wage rate; wage rates can be viewed on the Online Agricultural Wage Library available on the OFLC website, but the CNPC determines the highest wage, not the employer. When it accepts the application for processing, the CNPC will either verify the offered wage rate to ensure that the employer's offered wage meets the required minimum on the date of filing or in the case of an employer who has left the wage section(s) blank will provide the employer with the minimum wage rate it must offer its prospective employees.

For employers filing under the reinstated regulations (after the Suspension is in effect on June 29, 2009) the employer will send the signed original Application for Alien Employment Certification (ETA Form 750) and the signed original *Agricultural and Food Processing Clearance Order* (ETA Form 790) to the CNPC and one copy of each form to the SWA serving the area of intended employment. Under the reinstated regulations the employer will fill in the wage section with the highest of the AEWR (which was published by the Department concurrently with the Suspension), the prevailing wage rate, the prevailing piece rate or the Federal or State minimum wage rate. Again, the employer may review wages on the Agricultural Online Wage Library to determine what it believes is the appropriate wage but the CNPC makes the final determination. Upon receipt of the employer's application, the SWA and the CNPC will each verify the wage supplied by the employer and either accept the wage rate or inform the employer that the stated wage is too low. The employer must offer a wage rate that is the highest of the AEWR or the prevailing wage rate, the prevailing piece rate, or the Federal or State minimum wage rate.

Question: Which AEWR is applicable to my application?

Answer: Employers filing under the December 2008 Rule will offer a specific wage rate as directed by the CNPC, which will be based on the AEWR determined under the December 2008 Rule. Employers filing under the reinstated regulations will fill in the wage section of the ETA Form 750 with the AEWR published by the Department concurrently with the Suspension. Both the

CNPC and the SWA will verify the wage to ensure that the prevailing wage rate, the prevailing piece rate or the Federal or State minimum wage is not higher than the AEWR. If any of those are higher than the newly published AEWR, the CNPC will inform the employer that the wage offered is too low through a letter of deficiency and request that the employer modify its application to reflect a higher wage. A copy of the letter of deficiency will be sent to the SWA.

Question: I am concerned about the effect the Suspension will have on my workforce. After the reinstated regulations come into effect I will have workers certified under different regulations working side by side. What should I do?

Answer: The Department acknowledges that employers may have, as a result of the Suspension, groups of workers to whom two different sets of regulations apply. However, employers follow varying requirements for workers in other situations; for example, employers may be required to follow different rules for workers hired under H-2A and non-H-2A pay schemes. The Department expects that employers will need to segregate required paperwork for each type of H-2A employee. Regardless of which regulation an application is certified under, the employer must comply with all required obligations under the respective applicable regulations.

Question: I received a labor certification under the December 2008 Rule. Will I have to change the amount of wages and benefits I pay to my H-2A employees after the December 2008 Rule is suspended and the reinstated regulations are in effect?

Answer: No. Employers who either applied for or received a labor certification under the December 2008 Rule will continue to pay the wages offered in accordance with the wage determination they received from the CNPC.

Question: How do I conduct my positive recruitment?

Answer: Under both regulations the employer will be directed to follow particular positive recruitment procedures as part of the acceptance letter. Under the December 2008 Rule the employer will receive recruitment requirements directly from the CNPC, whereas under the reinstated regulations the employer will receive, as part of the notice of acceptance, information that will inform it of the specific efforts that it is expected to undertake in cooperation with the SWA in order to carry out the assurances with respect to the recruitment of U.S. workers.

Question: Once the reinstated regulations are in effect, will I be able to use recruiters who charge recruiter's fees of the employees, and not me?

Answer: Employers who file prior to June 29, 2009 will be held to the standards outlined in the December 2008 Rule. Those employers who file after the

Suspension takes effect on June 29, 2009 will be required to follow the requirements of the reinstated regulations and will not be required to pay the fees of recruiters used to find H-2A workers. However, employers must continue to comply with the Department of Homeland Security's H-2A regulations prohibiting the payment of recruiters' fees.

Question: If US workers apply for the jobs I advertise or through the SWA, will I have to hire these workers during the first half (50 percent) of the work contract or during the first 30 days of the work contract?

Answer: If an employer files an application under the December 2008 Rule, the employer will be required to accept referrals pursuant to the "30 day rule" in that regulation. This means the employer will be obligated to accept referrals of able, willing and qualified U.S. workers for the first 30 days after the first date of need stated in the application. If the employer files an application on or after June 29, 2009, i.e. under the reinstated regulations, then the employer will be required to accept referrals for the duration of the first half of the contract, as required by the "50 percent rule" contained in the reinstated regulations.

Question: If I am a small employer, will I be exempt from the 50 percent rule regarding referrals?

Answer: Once the reinstated regulations are in effect, a small employer will accept U.S. referrals only until its foreign workers depart for the work site, and need not accept referrals through fifty percent of the work contract, as long as the employer meets the following criteria:

(i) Did not during any calendar quarter during the preceding calendar year, use more than 500 "man-days" of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the OFLC Administrator in the H-2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and

(iii) Has not otherwise "associated" with other employers who are applying for H-2A workers under this subpart, and so certifies to the OFLC Administrator.

Question: What procedure should I follow regarding housing inspections?

Answer: Under the December 2008 Rule the CNPC informs the SWA of the need to perform the housing inspection and the application moves forward even if the SWA does not complete the housing inspection 30 days before the date of need, providing that the delay in performing a timely inspection is not the fault of the employer. Under the reinstated regulations the SWA receives a copy of the

application directly from the employer and is required to complete the housing inspection before the application can be approved.

Question: What will happen to the special procedures after the Suspension is in effect on June 29, 2009?

Answer: Special procedures operate under both regulations and have been promulgated as independent guidance issued either as a Training & Employment Guidance Letter (TEGL) or a General Administration Letter.

Question: I own a logging business. What should I do to get an H-2A labor certification for my workers when the December 2008 Rule is suspended?

Answer: Logging is a seasonal activity; almost all logging applications are filed at the same time every year. The Department has reviewed logging application patterns and determined that virtually all logging applications for submission to USCIS in support of an H-2A petition were filed with the Department no later than May 15, 2009 and would therefore be considered to be H-2A applications, and processed by the Department, before the effective date of the Suspension.

Question: I am a joint employer. Do I need to file my own application or will I be able to file a master application?

Answer: Joint employers, by definition, are associations. Associations have always been able to file master applications as long as the dates of need for all the occupations were identical. The concept of the master application was originally developed through policy guidance contained in the Employment and Training Administration H-2A Program Handbook 398 and was in effect until January 16, 2009. The December 2008 Rule codified the concept of master applications. Upon suspension of the December 2008 Rule, the guidance issued pursuant to the reinstated regulations will once again govern master applications.

Question: After the Suspension is in effect, will the SWAs be required to verify the work eligibility of referrals they send employers?

Answer: Under policy guidance in effect before the December 2008 Rule, SWAs had the obligation to verify the employment eligibility of each potential employee and to refer only employment-eligible individuals to job opportunities for which H-2A workers were being sought. This obligation was articulated in TEGL 11-07, Change 1 which will continue as policy guidance after the reinstated regulations are in effect on June 29, 2009.