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ADVISORY: **FOREIGN LABOR CERTIFICATION TRAINING AND EMPLOYMENT GUIDANCE LETTER NO.** 11-07

TO: **OFLC NATIONAL PROCESSING CENTER DIRECTORS**
STATE WORKFORCE AGENCY ADMINISTRATORS

FROM: **EMILY STOVER DeROCCO**
Assistant Secretary

SUBJECT: **Clarification of Certain Procedures for Processing H-2A Labor Certification Applications**

1. **Purpose.** To clarify certain procedures for State Workforce Agencies (SWAs) and Employment and Training Administration (ETA) National Processing Centers (NPCs) involved in the processing of H-2A labor certification applications for temporary agricultural employment of foreign workers in the United States (U.S.).

2. **References.** Immigration and Nationality Act (INA) Section 101(a)(15)(H)(ii)(a); INA Section 218; 20 Code of Federal Regulations (CFR) § 651.10; 20 CFR Part 653 Subparts B and F; 20 CFR Part 654, Subpart E; 20 CFR Part 655, Subpart B; 20 CFR Part 658, Subpart F; Field Memorandum No. 16-00; Training and Employment Guidance Letter No. 31-01; General Administration Letter No. 1-02.

3. **Background.** The H-2A nonimmigrant visa program permits employers to hire foreign workers to come temporarily to the U.S. and perform agricultural labor or services of a temporary or seasonal nature. The H-2A visa classification requires the intending employer, prior to filing a petition for one or more H-2A workers with the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), to apply to the Secretary of Labor for a certification that: (1) there are not sufficient workers who are able, willing, qualified, and available at the time and place where the H-2A worker is to perform the work; and (2) employment of the H-2A worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

RESCISSIONS	EXPIRATION DATE
FM No. 16-00; TEGL No. 31-01; GAL No. 1-02	Continuing

The NPC having jurisdiction over the state(s) in which the area of intended employment is located is responsible for processing a request for H-2A labor certification. NPC responsibilities include reviewing the application for acceptance, directing the SWA to clear the job order through the intrastate and interstate clearance system, ensuring the employer meets positive recruitment requirements, and making a final determination with respect to granting or denying certification for all or some of the job opportunities requested.

The SWA serving the area of intended employment, with which the employer files a concurrent request for H-2A labor certification, is responsible for placing a job order, using information submitted by the employer on its job offer for intrastate and interstate clearance, and, where necessary, performing inspections to ensure that housing meets the applicable standards.

4. **Clarification of Procedures for H-2A Applications.** This Training and Employment Guidance Letter (TEGL) clarifies certain procedures the SWAs and NPCs must use in processing temporary labor certification applications under the H-2A program. These clarifications replace and supersede prior corresponding operating procedures issued for the H-2A program, as noted. However, these clarifications do not affect the special procedures established by ETA for sheepherders and goat herders, for occupations involved in the open range production of livestock, for multi-state custom combine owners and operators, and for itinerant animal shearing.

A. **Filing.**

i. **SWA Locations.** The specific location of each SWA may be obtained directly from the Office of Foreign Labor Certification (OFLC) website at http://www.foreignlaborcert.doleta.gov/contacts.cfm. Each SWA must notify the appropriate NPC of any changes to its location or mailing address.

ii. **Worksite(s) Crossing State Jurisdictional Boundaries.** In circumstances where the employer has one or more worksite locations in different states or that lie in the jurisdiction of more than one state, the employer should file a **single** H-2A labor certification application concurrently with the SWA **in the state where the work will begin** and the NPC that covers that state. SWAs are reminded that, in circumstances where work will be performed in multiple states, unless special procedures apply, the job order for recruiting U.S. workers must be transmitted to all other state jurisdictions in which any work will take place.

iii. **Timing.** The Secretary of Labor is required to make a labor certification determination at least 30 calendar days before the employer's date of need, unless the initial or modified application was not filed timely. INA Section 218(c)(3)(A). As such, the SWA must conduct a housing inspection, the employer must provide a recruitment report to the NPC, and the employer must provide evidence of workers' compensation insurance coverage to the NPC, all before the date that is 30 calendar days before the date of need.

B. Recruitment.

i. **Contact Information.** In accordance with the regulatory requirements at 20 CFR § 655.103(d)(2)(ii), each advertisement the employer places in a newspaper of general circulation serving the area of intended employment

must direct interested applicants to apply or send resumes to the nearest office of the SWA for referral to the employer's place of work. This regulatory requirement also applies to job orders placed by the SWA in intrastate and interstate clearance to ensure that all U.S. workers referred through such job orders are apprised of the terms and conditions of employment.

Absent a SWA referral, however, an employer must still respond to employment inquiries from individuals who appear at the employer's place of business or otherwise contact the employer directly. While the employer is not required to be consistently available to answer every inquiry placed by an interested individual, the employer should have a mechanism in place to take messages (e.g., an answering machine) and should respond to such messages within 24 hours. The employer may not reject for other than a lawful, job-related reason any U.S. worker's application.

An employer is required to engage in positive recruitment of U.S. workers in the area of intended employment until the foreign worker(s) have departed for the employer's place of work (20 CFR § 655.103(d)). Unless special procedures apply, the Department is no longer requiring employers to advertise in print or broadcast media (e.g., radio) that are outside the employer's area of intended employment.

ii. **Verification of Employment Eligibility.** The Department's statutory duties under the H-2A program require it to ascertain the employment eligibility of all referred workers. INA Section 218(c)(3)(A) mandates that the Department issue a labor certification "not later than 30 days before the date such labor or services are first required to be performed ... if (1) the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and (2) the employer does not actually have, or has not been provided referrals of, qualified eligible individuals who have indicated their ability to perform such labor or services...." The Department has fulfilled its statutory mandate by instructing SWAs via regulation and through this guidance letter that workers cannot be referred to employers unless the SWA has determined that the worker is "able, willing, and eligible" to take the job. 20 CFR § 655.106(a). Eligibility is clearly defined by statute to mean "with respect to employment, an individual who is not an unauthorized alien . . . with respect to that employment." INA Section 218(i)(1).

The Department has also required by regulation that all local SWA offices must "determine whether or not applicants are MSFWs [migrant and seasonal farmworkers] as defined at 20 CFR § 651.10 of this chapter." "Farmworker" is defined by 20 CFR § 651.10 as an "agricultural worker," which is in turn defined as "a worker, whose primary work experience has been in farmwork ... whether alien or citizen, who is legally authorized to work in the United States."

Accordingly, SWAs must verify the employment eligibility of any worker referred to an employer in response to an H-2A job order. The Department strongly recommends that SWAs use the e-Verify web-based system administered by U.S. Citizenship and Immigration Services (USCIS). Information on the e-Verify system may be obtained directly from USCIS by clicking on the "e-Verify" link at www.uscis.gov. The Department is aware that many, and perhaps most, SWAs do not currently have reliable employment verification systems in place. Therefore, the Department will not enforce the

employment verification requirements specified in this Training and Employment Guidance Letter against the SWAs until December 15, 2007.

SWAs should be aware that employers can rely on INA Section 274A(a)(5) only where the documentation complies with all statutory and regulatory requirements, including 8 CFR § 274a.6. SWAs are strongly encouraged to provide this documentation. The Department will offer training between now and December 15 to provide SWAs additional guidance on how to comply with the applicable requirements.

iii. **SWA Referrals during Contract Period.** Once an employer's H-2A workers have departed for the employer's place of work, SWAs should, in order to minimize disruption during the H-2A contract period, first make all reasonable efforts to refer an interested U.S. worker to a non-H-2A job order in the area of intended employment or to an unfilled H-2A job order in the area of intended employment in which the H-2A workers have not yet departed for the place of employment.

C. **Housing.**

Housing Standards. SWAs are reminded that employers must provide housing at no cost to any worker not reasonably able to return to his/her residence within the same day. Employer-provided housing, depending on when it was built, must meet either the USDOL Occupational Safety and Health Administration (OSHA) standards set forth under 29 CFR § 1910.142 (standards for temporary labor camps), or the ETA standards at 20 CFR § 654.404-654.417 (standards for H-2A housing), whichever are applicable pursuant to the regulations. In circumstances where rental, public accommodation, or another substantially similar class of habitation is used, the housing must first meet any local standards for such housing or, in the absence of applicable local standards, any applicable state standards. In the absence of both local and state standards, the housing must meet the OSHA standards for temporary labor camps. In accordance with the Federal regulations at 20 CFR 655.102(b)(1)(vi), when it is the prevailing practice in the area of intended employment and for the occupation to provide family housing, the employer must provide family housing to all workers who request it. Open range housing – for sheepherders or others engaged primarily in the range production of livestock – must comply with OSHA housing standards or, alternatively, DOL guidance. In the absence of OSHA standards, ETA has added housing-related guidance to its TEGL 15-06 (February 9, 2007), which governs the processing of H-2A labor certification applications for occupations involved in the open range production of livestock.

i. **Housing Inspections.** SWAs are encouraged to perform housing inspections in a timely manner so that processing of an employer's application is not unduly delayed. SWAs should be prepared to conduct housing inspections prior to the date an employer will file an H-2A labor certification application, if so requested by the employer.

ii. **Certified Housing that Becomes Unavailable.** For situations in which housing certified by the SWA later becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that possesses a valid certificate of occupancy. The

employer must notify the SWA of the change in accommodations and the reason(s) for such change. The SWA may inspect such accommodations, prior to or during occupation, to ensure it meets applicable housing standards.

5. **Effective Date.** This guidance applies to all H-2A labor certification applications pending with or received by the NPC and SWA on or after the date this TEGL is issued.

6. **Action Required.** NPC Directors and SWA Administrators are directed to provide NPC, SWA and other state staff involved in the processing of H-2A applications with a copy of these procedures.

7. **Inquiries.** Questions from SWA staff should be directed to the OFLC.