EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR WASHINGTON, D.C. 20210	**CLASSIFICATION** Foreign Labor Certification
	CORRESPONDENCE SYMBOL OFLC
	DATE March 19, 2008

ADVISORY: **TRAINING AND EMPLOYMENT GUIDANCE LETTER NO.** 21-07

TO: **STATE WORKFORCE AGENCY ADMINISTRATORS**

FROM: **DOUGLAS F. SMALL** Douglas F. Small
Deputy Assistant Secretary

SUBJECT: **FISCAL YEAR (FY) 2008 FOREIGN LABOR CERTIFICATION GRANT GUIDANCE**

1. **Purpose.** To provide guidance for the funding and management of FY 2008 annual grant allocations for the Foreign Labor Certification (FLC) programs.

2. **References.**
   - Immigration and Nationality Act (INA), Sections 101(a), 212(n), 212 (t), 214(c), 214(i), and 218
   - 8 CFR Part 214
   - 2 CFR Part 225
   - Wagner-Peyser Act, Section 7(d)
   - OMB Circular A-87
   - Employment and Training Administration (ETA) Handbook No. 385
   - Guide for Employment Service Reimbursable Grant Activities
   - ETA No. 398, H-2A Program Handbook, January 1988
   - Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs, May 2005
   - Training and Employment Guidance Letter No. 11-07, Change 1 (November 2007)
   - Training and Employment Guidance Letter No. 22-07 (March 2008)
   - Training and Employment Guidance Letter No. 04-06
     Subject: Plans to Phase out Penalty Mail Costs for "Employment Security" Programs and Availability of Supplemental Budget Funds for Conversion to Commercial Mail Methods
   - Other ETA instructions as noted

RESCISSIONS	EXPIRATION DATE
None	Continuing

3. **Background.** The purpose of this memorandum is to define the roles State Workforce Agencies (SWAs) play in the FLC programs, planning figures for funding that will be allocated to support these activities, the necessary actions to request the funds, and the required steps to comply with the grant.

4. **Actions.** SWAs are required to complete the actions listed below.

   - Respond to these guidelines within **thirty (30) days** of receipt to ensure allocation of remaining grant funds.
   - Establish program priorities by identifying how program funds would best be utilized and by splitting the grant allocation between agricultural and nonagricultural activities.
   - Inform the National Office via written communication of the proposed program priorities and the split that will be used to allocate funds between agricultural and nonagricultural activities.

5. **Mailing Address.** Mail completed work plans to Mr. William Rabung, Program Manager, Operations Division, Office of Foreign Labor Certification, U.S. Department of Labor, Room C-4312, 200 Constitution Avenue, NW, Washington, D.C. 20210.

6. **Inquiries.** Please direct questions to Mr. Rabung at (202) 693-3010.

7. **Attachments.**

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Program Planning Guidance and Information Package

Introduction

This document provides the necessary guidelines to be used by State Workforce Agencies (SWAs) to prepare annual plans and request funds in order to administer their Foreign Labor Certification (FLC) responsibilities.

Wagner-Peyser funding allocations for SWA National Activities in Fiscal Year (FY) 2008 are available to support case processing activities associated with applications for temporary labor certification as well as prevailing wage and practice surveys. The estimated FY 2008 appropriation for state FLC activities is approximately $12,517,432, consistent with the omnibus appropriations bill signed into law December 26, 2007. Of this amount, $639,675 is being retained at the National Office level for discretionary activities. The remaining disbursement of $11,877,757 includes the postage allowance withheld in previous years from each state's allocation, but has been reduced commensurate with the decrease in the total FLC grant appropriation since FY 2007. A total of $3,016,208 was provided under the four continuing budget resolutions in effect through December 31, 2007. Distribution of remaining grant funds is in progress and dependent on approval by the Office of Foreign Labor Certification of state workplans. An estimate of each SWA's total FY 2008 funding is provided in Attachment 2.

FY 2008 Annual Plan

The procedures for submission of the twelve (12) month plan (October 1, 2007, through September 30, 2008) are provided in Attachment 4. Upon receipt and approval of the plan at the National Office, Office of Foreign Labor Certification (OFLC), the Grant Officer in ETA's Division of Federal Assistance will issue an additional Notice of Obligation to provide the balance of funds due to each state from its annual allocation.

In FY 2008, SWA responsibilities for FLC activities include, but are not limited to, the following:

- Providing prevailing wage determinations for all non-agricultural labor certification programs in accordance with the Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs;
- Processing H-2B temporary non-agricultural labor certification applications in accordance with existing policy and time frames;
- Receiving applications for H-2A temporary agricultural labor certification, performing prevailing wage and prevailing practice surveys, ensuring housing inspections are conducted, and processing job orders, and referring eligible U.S. workers to the employer for consideration;
- Verifying employment eligibility on all referrals made to H-2A job orders; and
- Complying with all applicable laws, including those governing freedom of information and privacy.

SWAs are to issue prevailing wage determinations to employers to accompany their applications for permanent labor certification. These wage determinations are to be provided in a responsive and timely manner. Guidance on providing prevailing wage determinations is given in Attachment 3, Number 4. All other functions of permanent labor certification are performed by the National Processing Centers in Atlanta and Chicago.

SWA Responsibilities

SWAs are responsible for administering grant funds for FLC programs within established guidelines. These responsibilities include:

1. **Certifications and Assurances**
   Regulations require recipients of SWA grants to submit various standard certifications and assurances. These have already been provided under the PY 2007/FY 2008 Wagner-Peyser Annual Funding Agreement. Current SWA regulations at 20 CFR Part 658, Subpart E (20 CFR 658.400-658.426) cover the complaint and appeals procedures. Regulations at 20 CFR Part 653, Subpart F and 20 CFR Part 654, Subpart E apply to housing inspection activities under the reimbursable grant. Other applicable regulatory provisions and special assurances are incorporated in the Statements of Work (attached).

2. **Utilize Mandated Forms for Inter-Agency Communications**
SWAs must utilize the proper formats to ensure uniform communications. These formats include, but may not be limited to, the following:

- **Form ETA-7147**
  Form ETA-7147 is the Alien Certification State Agency Transmittal of Application for an alien employment certification.

- **Form ETA-232**
  Form ETA-232 is the Domestic Agricultural In-Season Wage Report.

- **Form ETA-232A**
  Form ETA-232A is the Wage Survey Interview Record.

- Other ETA forms that contain a valid Office of Management and Budget (OMB) control number and expiration date.

3. **Reporting Responsibilities**
The required reports are listed below:

- **SF-269**
  The SF-269 is the Financial Status Report and must be submitted by the SWA on a quarterly basis for each fiscal year of funds.

- **SF-9127**
  The SF-9127 is the Quarterly Activity Report and a completed form must be submitted by the SWA on a quarterly basis for each fiscal year. SWAs must correct deficiencies to the form upon request by the National Office.

4. **Fiscal Management Responsibilities**
The National Office will retain flexibility to recommend the modification of the negotiated split of FLC funds between agricultural and non-agricultural FLC activities for a given state. Modifications should be communicated to the Federal Project Officer for approval.

National Office approval must be obtained for all equipment purchases made using FLC funds that are above five thousand dollars ($5,000) in value. If such requests are included in the annual plan and are clearly detailed in a cover memorandum, the National Office can pre-approve the purchases. Otherwise, states must provide a written justification and cost estimate for the purchase(s). The National Office will generally not approve capital purchases such as buildings and vehicles.

Although Employment Service (ES) grants are valid for three (3) years, FLC grants are intended to be used during the fiscal year that they are issued. Any carry over funds in excess of twenty (20) percent of the total grant value are subject to recoupment by the National Office. See the Employment and Training Order "Closeout Procedures for ETA Expired Grants, Agreements, and National Office Contracts" for information regarding the procedures for closing grants.

5. **Training**
SWAs are required to send appropriate staff to program training, when such training is offered. The costs of SWA travel to regional and national meetings and training sessions are included in grant funds. Attendance at these sessions is a condition of the grant. If SWAs do not attend mandatory meetings, funds may be recaptured.

6. **Employment Eligibility Verification**
Section 274A(a)(1)(B)(i) of the INA requires every person or entity who hires workers to verify employment eligibility of every such worker. Section 274A(a)(1)(B)(ii) requires every agricultural association, agricultural employer, or farm labor contractor who hires, recruits, or refers workers for a fee, to verify employment eligibility of every such worker.

Section 274A(b)(1)(A) of the INA sets forth the process for persons or entities -- including agricultural

associations, agricultural employers, or farm labor contractors – that are hiring, recruiting, or referring workers, to meet the requirements for verification. Under section 274A(a)(5), employers hiring workers referred by a SWA will be deemed to have complied with the statute's requirements for verification if they have obtained from the SWA documentation of the referral certifying the SWA has complied with the verification system established by the statute.

Section 218(c)(3)(A) of the INA stipulates that H-2A labor certification may only be issued if the Department of Labor determines there are not sufficient "qualified eligible individuals who have indicated their ability to perform such labor or services." DOL fulfilled its statutory mandate by publishing regulations that confirm that "no U.S. worker applicant shall be referred unless such U.S. worker . . . is able, willing, and eligible to take such a job." 20 CFR 655.106(a). Section 218(i)(1) of the INA defines eligibility, with respect to employment as "an individual who is not an unauthorized alien . . . with respect to that employment."

Taken together, these provisions prohibit SWAs from referring ineligible (including non-work authorized) workers. For the reasons set forth in section 4.B.ii of TEGL 11-07, Change 1 (Nov. 14, 2007), States were instructed in that TEGL to verify the employment eligibility of workers referred against H-2A related job orders. A forthcoming TEGL 22-07 (March 2008) will require SWAs to verify the employment eligibility of workers referred against all agricultural job orders. To provide clarity and consistency among the SWAs, this TEGL requires such verification to be performed through completion of a Form I-9 by the SWA. Use of the E-Verify System continues to be highly recommended. USCIS regulations at 8 CFR 274a.6 set forth the process by which SWAs may complete Form I-9 prior to referral and issue certifications to employers. Employers in possession of a SWA-issued certification are not required to complete Form I-9 for the certified worker.

National Office Responsibilities

The National OFLC's responsibilities include, but are not limited to, the review and approval of the grant plan applications, analysis of expenditure and performance data, execution of programmatic plan modifications, on-site reviews, and administering SWA sanctions for non-compliance with the requirements stipulated in this package. States are advised to administer the plan in accordance with the approved plan and the terms and conditions of the Wagner-Peyser Annual Funding Agreement. The National Office Grant Officer funding authority remains with the National Office, Division of Federal Assistance.

The state's non-compliance with the employment eligibility verification function under the INA, as well as any other ETA policies, directives, or advisories concerning foreign labor certification activities may require ETA to administer sanctions on the SWA. The Grant Officer will make the final determination regarding sanctions for non-compliance with applicable statutory and regulatory provisions and policy guidance, directives, or advisories. The Grant Officer may ultimately require the removal of funding for such activities under the Cost Reimbursable Grant package.

Labor certification funds are provided for labor certification activities only and cannot be used for other Wagner-Peyser activities, such as the routine referral of workers on job bank orders, Migrant Seasonal Farmworker (MSFW) activities, and processing of complaints under the SWA complaint system.

Conclusion

Grant funding balances will be issued to SWAs upon availability of funds. The National Office Grant Officer will issue a Notice of Obligation (NOO) to SWAs upon approval of the SWA Alien Labor Certification Annual Plan. Budgets can only be approved for annual plans after the National Office (Office of Foreign Labor Certification) has approved the Annual Plan Narrative for the Agricultural/Non-Agricultural programs.

Estimated FY 2008 FLC Funding Levels*

Atlanta National Processing Center
U.S. Department of Labor
Employment and Training Administration
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, Georgia 30303
Phone: (404)-893-0101
Fax: (404) 893-4642

Alabama	$61,107
Connecticut	$203,815
Delaware	$77,542
Florida	$460,217
Georgia	$428,153
Kentucky	$257,277
Maine	$228,771
Maryland	$399,352
Massachusetts	$605,633
Mississippi	$73,328
New Hampshire	$68,437
New Jersey	$473,589
New York	$1,078,067
North Carolina	$159,177
Pennsylvania	$440,760
Puerto Rico	$52,377
Rhode Island	$55,869
South Carolina	$70,362
Tennessee	$131,056
Vermont	$79,863
Virgin Islands	$52,377
Virginia	$665,726
Washington, DC	$92,206
West Virginia	$57,615

Chicago National Processing Center
U.S. Department of Labor
Employment and Training Administration
844 North Rush Street, 12th Floor
Chicago, Illinois 60611
Phone: (312) 886-8000
Fax: (312) 886-1688

Alaska	$55,869
Arizona	$209,291
Arkansas	$64,598
California	$1,908,194
Colorado	$181,926
Guam	$52,377
Hawaii	$52,377
Idaho	$166,369
Illinois	$332,346
Indiana	$55,869
Iowa	$62,853
Kansas	$94,015
Louisiana	$127,730
Michigan	$232,092
Minnesota	$79,143
Missouri	$97,677
Montana	$59,361
Nebraska	$82,346
Nevada	$63,139
New Mexico	$64,598
North Dakota	$71,484
Ohio	$160,334
Oklahoma	$61,107
Oregon	$67,938
South Dakota	$62,853
Texas	$739,782
Utah	$77,592
Washington	$163,964
Wisconsin	$100,242
Wyoming	$57,615

*Amount includes funds distributed during the Continuing Resolution periods.

FLC Annual Plan Narrative

As a condition for receiving funds in support of the Secretary of Labor's responsibilities under Sections 101(a)(15)(H)(i)(b) and 212(n), Sections 101(a)(15)(H)(ii)(a) and 218, Sections 101(a)(15)(E) and 212(t), Sections 101(a)(15)(H)(i)(b)(1) and 212(t) and Section 212(a)(5)(A) of the Immigration and Nationality Act (Act), under the United States Citizenship and Immigration Services (USCIS) regulations at 8 CFR Part 214.2(h)(6) under Sections 101(a)(15)(H)(ii)(b) and 214(c) of the Act, under Section 221 of the Immigration Act of 1990, and under Department of Labor (DOL) regulations at 20 CFR Parts 655 and 656, ___(agency name)_____ agrees to assist the Employment and Training Administration (ETA) to determine the availability of U.S. workers and the potential adverse effect on wages and working conditions that the admission of alien workers might have on similarly employed U.S. workers before employers can obtain a labor certification, and agrees to assist ETA by conducting appropriate agricultural surveys and providing wage determination information to employers wishing to file or update a labor attestation, Labor Condition Application, Application for Alien Employment Certification (Form ETA 750), or an Application for Permanent Employment Certification (Form ETA 9089).

The sections of the Act and regulations cited above relate to DOL programs involving foreign workers as follows:

- Section 101(a)(15)(E) (8 U.S.C. 1101(a)(15)(E), called E-3 nonimmigrant classification, applies to professionals in specialty occupations who are nationals of Australia; Section 212(t) (8 U.S.C. 1182(t)), specifies the requirements or labor condition applications which must be filed by employers seeking to employ such workers.

- Section 101(a)(15)(H)(i)(b) (8 U.S.C. 1101(a)(15)(H)(i)(b)), called H-1B nonimmigrant classification, applies to professionals in specialty occupations and certain models; Section 212(n) (8 U.S.C. 1182(n)), specifies the requirements or labor condition applications which must be filed by employers seeking to employ such workers.

- Section 101(a)(15)(H)(i)(b)(1) (8 U.S.C. 1101(a)(15)(H)(i)(b)(1)), called H-1B1 nonimmigrant classification, applies to professionals in specialty occupations who are nationals of Chile or Singapore; Section 212(t) (8 U.S.C. 1182(n)), specifies the requirements or labor condition applications which must be filed by employers seeking to employ such workers.

- Section 101(a)(15)(H)(ii)(a) (8 U.S.C. 1101(a)(15)(H)(ii)(a)), called H-2A nonimmigrant classification, applies to agricultural workers; Section 218 (8 U.S.C. 1188) specifies the conditions for admission of temporary H-2A workers. DOL regulations at 20 CFR Part 655 specify the labor certification requirements.

- Section 101(a)(15)(H)(ii)(b) (8 U.S.C. 1101(a)(15)(H)(ii)(b)), called H-2B nonimmigrant classification, applies to temporary non-agricultural workers. USCIS regulations at 8 CFR Part 214.2(h)(6) and section 214(c) of the Act require consultation with DOL before aliens are admitted to the United States. The regulations for the H-2B program are found in DOL regulations at 20 CFR Part 655. Procedures pursuant to those regulations are documented in General Administration Letter (GAL) No. 1-95; GAL No. 1-95, Change 1; and Field Memorandum No. 25-98. The H-2B program is authorized only if two conditions are met:
  - The alien must be coming temporarily to the U.S., and
  - The services or labor which the alien will be performing must also be temporary in nature.

- Section 212(a)(5)(A), "Labor certification," prohibits entry of an alien into the U.S. for the purpose of seeking employment unless the Secretary of Labor certifies there are not sufficient U.S. workers who are able, willing, qualified, and available and employment of the alien will not adversely affect the U.S. workers wages and working conditions. The regulations implementing the determination and granting of labor certifications for aliens seeking permanent employment are found at 20 CFR Part 656. Provisions governing prevailing wage determinations are found in § 656.40.

- Section 274A(a) "Making employment of unauthorized aliens unlawful," requires every person or entity who hires workers to verify employment eligibility of every such worker and additionally, every agricultural association, agricultural employer, or farm labor contractor who hires, recruits, or refers workers for a fee, to verify employment eligibility of every such worker.

- Section 274A(b), "Employment Verification System," requires every person or entity who hires workers to verify employment eligibility of every such worker. Section 274A(b) also requires every agricultural association, agricultural employer, or farm labor contractor who hires, recruits, or refers workers for a fee, to verify employment eligibility of every such worker.

- Section 274(A)(5), "Use of State employment agency documentation," deems employers hiring workers referred by a SWA to have complied with the statute's requirements for verification if they have obtained from the SWA documentation of the referral certifying the SWA has complied the verification system established by the statute.

- Section 218(c)(3)(A), "Issuance of certification," stipulates that H-2A labor certification may only be issued if the Department of Labor determines there are not sufficient eligible individuals who have indicated their ability to perform such labor or services.

State Workforce Agency Requirements and Responsibilities

(Agency Name) shall perform, but is not limited to, the following functions:

- Provide prevailing wage determinations for all non-agricultural labor certification programs in accordance with the Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs;

- Process H-2B temporary non-agricultural labor certification applications in accordance with existing policy and time frames; and

- Receive applications for H-2A temporary agricultural labor certification, perform prevailing wage and prevailing practice surveys, ensure on-site housing inspections are conducted by SWA staff, process job orders and verify work authorization by completing the I-9 and/or E-Verify processes to determine whether a worker is eligible to work in the job opportunity prior to referring such worker to an H-2A job opportunity.

SWAs are to issue prevailing wage determinations to employers to accompany their applications for permanent labor certification. These wage determinations are to be provided in a responsive and timely manner. All other functions of permanent labor certification will be performed by the National Processing Centers in Atlanta and Chicago.

1. **SWA Responsibilities under Labor Certification Programs**

- Employers requesting H-2A temporary agricultural certification or H-2B temporary non-agricultural certification for alien workers are required to (a) demonstrate that they have made good faith efforts to recruit U.S. workers for the job opportunity being requested for labor certification and (b) offer wages and working conditions that will not adversely affect similarly employed U.S. workers.

- SWA responsibilities include, but are not limited to, the following duties listed in 20 CFR Part 656.21:

    - Performing initial processing of non-agricultural applications
    - Conducting supervised or special recruitment (outside of regular SWA recruitment and referral activities) for U.S. workers
    - Referring workers; facilitating referrals from other states and maintaining records of referrals and actions taken thereon. In order to perform their referral function for temporary labor certifications in agriculture, SWAs must verify work authorization by completing the I-9 and/or E-Verify processes to determine whether a worker is eligible to work in the job opportunity prior to referring such worker to an H-2A job opportunity.
    - Conducting prevailing wage surveys for agricultural occupations

- Determining prevailing wage rates using the Occupational Employment Statistics system and review of employer supplied surveys
- Preparing Form ETA 232 and Form ETA 232A reports
- Obtaining data needed for making prevailing practice determinations
- Submitting other required reports to the Department of Labor
- Gathering other information which forms the basis for OFLC determinations to grant or deny labor certification applications

2. **Major SWA Responsibilities for the FLC Agricultural Program**

Before Required Filing Date:

- Meet with employers to encourage early filing, inform employers of any new/emerging requirements, and assist employers in preparing job offers/orders. Special emphasis shall be placed by SWAs in the areas of Agricultural Prevailing Wage Surveys, assisting employers to prepare job orders and positive recruitment plans which are most likely to reach and encourage response by U.S. workers.

- Conduct prevailing wage surveys and submit them to the National OFLC for verification.

- Conduct housing inspections (where conditional access is not involved). Housing inspections should be scheduled by the State Agency prior to the filing of applications for those employers who regularly use the H-2A program.

- Gather information and provide advice to the respective National Processing Center (Atlanta or Chicago) on prevailing practices (family housing, utilization of crewleaders and crewleader overrides, transportation advances, and frequency of payment). Copies of all prevailing practice surveys must be provided to the appropriate National Processing Center.

- Gather current information on U.S. worker availability to assist the National Processing Center in determining positive recruitment requirements.

Forty-Five (45) Days Before Date of Need:

- Receive duplicate of employer application and job offer.

- Prepare local job order and begin local recruitment.

- Advise the National Processing Center if any components appear unacceptable for H-2A clearance purposes.

- Maintain record of referrals and actions taken thereon; report to the National Processing Center any "questionable" refusals to hire.

- Respond to National Processing Center requests for assistance/clarification on employer's application.

- Begin preparation of clearance order based on employer's job offer portion of application (if not done before).

- Assist employer in preparing advertisement plans based on the requirements from the National Processing Center.

Upon Receiving Notification by Telephone (or E-mail) from the National Processing Center on Whether or not the Application is Accepted:

- If application accepted, finalize clearance order; clear to states designated by the National Processing Center.

- If application not accepted, revise clearance order to incorporate modifications required by the National Processing Center (but do not submit).
- Consult with employer to determine if employer agrees to modifications.
- If employer intends to appeal to the Administrative Law Judge (ALJ), put clearance order in abeyance.
- Assist employer in making modifications, if appropriate (Form ETA 795 if clearance order already prepared and ready for transmittal).

After Clearance Order Approved by the National Processing Center:

- Mail order to other areas specified by the National Processing Center.
- Perform other actions related to recruitment specified by the National Processing Center.
- Review employer advertising--ensure it is published/broadcast.
- Verify employment eligibility of workers seeking referral; refer eligible workers; facilitate referrals from other states (maintain records of referrals and actions taken thereon).
- Assist employer in processing requests for amendments (the National Processing Center must approve).
- Ensure that approved amendments are included in job order package.
- Ensure previous editions of job orders are corrected or updated.

Housing Inspections:

- Complete all scheduled housing inspections.
- If deficiencies are found, inform employer(s) that they have five calendar days to correct. Re-inspect five days later.
- If housing not approved after the re-inspection, the clearance order must be canceled and referred workers should be notified.
- The Immigration and Nationality Act requires that employers furnish housing that meets applicable standards before certification can be issued (INA sec. 218(c)(4)). Documentation that the employer's housing meets applicable standards must be received by the Certifying Officer prior to certification being granted. SWAs should encourage employers who expect to obtain their certification 30 days before the date of need to have housing ready for inspection at the time of filing their application or earlier. SWAs should be prepared to conduct housing inspections prior to the filing of applications, as appropriate, and should even plan to schedule housing inspections prior to filing for those employers who regularly use the H-2A program.

Twenty-Four (24) Hours Before Date of Need (Suggested):

- Submit report on SWA recruitment to the National Processing Center.

After Certification Determination:

- Continue to refer workers who apply for the job and whose employment eligibility has been verified.
- If proof of advertising is not received prior to the granting of the labor certification, obtain from employer.

- Respond to National Processing Center requests for assistance/advice on re-determination requests.

After Date of Need:

- Continue to refer eligible workers who apply if comparable alternative employment is not available (up to 50 percent of the contract period).
- Advise the National Processing Center if employer refuses to accept eligible U.S. workers referred for employment.
- Respond to National Processing Center requests for assistance/advice on re-determination requests and recruitment of replacement workers (employer must report workers not accepted or fired to the SWA; the National Processing Center has 72 hours to act on re-determination requests).
- Refer worker complaints on non-performance of contracts to the Wage and Hour Division (ESA).
- Provide information (and other assistance) to the ESA Wage and Hour Division in its investigations.
- Investigate employer complaints on 50 percent rule violations (20 CFR 655.106(g) and 655.203(e) (logging)).
- Advise employers, and the National Processing Center if appropriate, of legal or regulatory actions mandating changes in work situation.
- Conduct field checks at job sites only where U.S. workers have been placed through the clearance system (coordinate with the National Processing Center and ESA Wage and Hour Division; do not duplicate Wage and Hour targeted enforcement visits).
- Cancel job order when 50 percent of work contract has elapsed.
- Advise the National Processing Center if worker terminations come to their attention.

3. **Major SWA Responsibilities for the FLC Non-Agricultural Program**

Before Filing of Application:

- Respond to inquiries about non-agricultural certification programs.
- Advise employers, applicants, and aliens, as appropriate, about requirements of non-agricultural labor certification programs.
- Refer employers, applicants, and aliens, as appropriate, to the National Processing Center for further information regarding non-agricultural labor certification and attestation programs.
- Provide prevailing wage information.
- Mail forms, regulations, instructions, etc., to employers, attorneys, and other interested members of the public.

After Filing of Application (H-2B program):

- Review application for completeness.
- Advise employers, as appropriate, of deficiencies and corrections that should be made to application.

- Provide prevailing wage determinations to employers and include in the case file.
- Prepare job orders from the ETA 750 for regular SWA recruitment activity.
- Monitor and collect referrals from SWA verification system.
- Advise employers of recruitment and other regulatory requirements.
- Screen applicant resumes received against advertisements to assure that applicants meet employer requirements and make referrals of only qualified applicants to employers.
- Collect recruitment results from employers on all applicants who responded to the employer's recruitment efforts, including those who responded directly to the employer.
- Prepare case file for review by the Certifying Officer.
- Transmit case file to the National Processing Center with state recommendations.
- Furnish information on applications to the U.S. Citizenship and Immigration Services (USCIS) and other law enforcement agencies.

After Transmission of Case File to the National Processing Center (H-2B program):

- Respond to requests for further information from the National Processing Center and law enforcement agencies, such as USCIS and the Office of the Inspector General.

4. SWA Responsibilities under Labor Attestation and Labor Condition Application Programs

Employers filing labor condition applications for H-1B, H-1B1, or E-3 nonimmigrant workers must file their application electronically via the Department of Labor's website at http://www.lca.doleta.gov/. Employers filing labor condition applications have the option of requesting prevailing wage data from the SWA or using other legitimate sources such as appropriate published wage surveys.

If requested to do so, the SWA must provide to employers or their representatives requesting such information the prevailing wage data for the occupation in the area of intended employment. This wage determination must be made from the Occupational Employment Statistics data unless the SWA is requested by an employer or employer's representative to review a survey provided for prevailing wage purposes to determine if the survey meets standards published by DOL. If so requested, the SWA must inform the employer or the employer's representative if the survey may be used as the prevailing wage in that instance.

Prevailing Wage Determinations:

Each Prevailing Wage Determination must include the following elements in order to make the determination usable in support of a form ETA 750, 9035 or 9089.

- Employer information
  - Name & address
- Work location
  - City (County) and State
- Job duties
  - Employer's job title
  - The activities performed while doing this job
  - Any requirements that are not included elsewhere such as travel (where not inherent in the job), special skills, licenses unless inherent in the occupation/job or work conditions such as live on site or split shifts.
- Employer's education, training and experience requirements
- SOC Code and SOC Title
- Wage ($/time)

- Determination Date
- End date of the validity period
- The SWA organization that issued the PWD
- A tracking number (any appropriate combination of letters, numerals and symbols) - to be used for linking the PWD to the SWA file.

Additionally it would be useful to include the following statements on the determination, thus providing needed information to the employer.

This prevailing wage determination may be used for more than one application, as long as all job related details and the area of intended employment remain the same.

Under 20 CFR Part 656.40(i) *Wage cannot be lower than required by any other law.* No prevailing wage determination for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, state, or local law.

5. Special Assurances

- Services provided for activities shall conform with regulations at 20 CFR Parts 655 and 656, Training and Employment Guidance Letters (TEGLs), field directives, and other advisories approved and issued by the U.S. Department of Labor, Employment and Training Administration, and made available on the OFLC website at: http://www.foreignlaborcert.doleta.gov/reg.cfm.

- Services provided for temporary agricultural and logging alien certification activity shall conform with regulations at 20 CFR Part 655, handbooks, field issuances, and other instructions issued by DOL, *e.g.,* ETA Handbook No. 398, issued March 4, 1988.

- Summary data relating to prevailing wage surveys conducted by the SWA shall be released to those who request it. However, data identifying, or which might contain information leading to the identification of a specific employer surveyed shall not be released by the SWA, since such action could result in possible competitive damage to the employer and could inhibit the employer from cooperating in future surveys.

- The state shall assure that job orders placed into the regular SWA recruitment system pursuant to regulations at 20 CFR Part 656.21(f) do not contain symbols or words which identify the job order as a foreign labor certification order, and that SWA staff are instructed to refrain from discouraging eligible U.S. workers who seek referral to employers on such job orders.

- Contracting out any aspects of the FLC programs will not be allowed without a pre-approval in writing from the National OFLC. If such requests are included in the annual plan and are clearly detailed in a cover memorandum, the National OFLC can provide pre-approval. Otherwise, states must provide a written justification and cost estimate.

- Advertisements, though they must include many specific elements of information, should be written in a style consistent with non-FLC advertisements, organized, titled, and placed in a logical section of the publication so as to reach the maximum number of U.S. workers.

6. Enforcement

- The state's non-compliance with the employment eligibility verification function under the INA, as well as any other ETA policies, directives, or advisories concerning foreign labor certification activities may require ETA to administer sanctions on the SWA. The Grant Officer will make the final determination regarding sanctions for non-compliance with applicable statutory and regulatory provisions and policy guidance, directives, or advisories. The Grant Officer may ultimately require the removal of funding for such activities under the Cost Reimbursable Grant package.

7. Allowable Costs

- Costs may be attributed to activities directly in support of the ALC programs (regulations at 20 CFR Part 656; 20 CFR Part 655, Subparts A, B, C, H and L), including costs for all activities related to the preparation of and submittal of ETA 232 and ETA 9037 reports, and for indirect support as a fair share of overhead.

- Regular workforce agency activities under Wagner-Peyser, such as referring workers to job bank orders, migrant and seasonal farmworker recruitment, and the processing of complaints under the SWA complaint system, are not allowable costs unless the activity can be directly attributed to extraordinary functions in the processing of a specific labor certification application.

8. **Performance Standards**

- The state's performance shall be reviewed in accordance with labor certification procedures set forth under TEGL 21-06, Change 1, TEGL 27-06, and TEGL 31-05 for H-2B applications, "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs" (May 2005); ETA Handbooks Nos. 398 and 385; and any subsequent ETA policies, directives, and other advisories concerning the administration of foreign labor certification activities. Fund utilization will be reviewed against the Funding Plan and actual workload levels, and when expenditures are significantly below plan, ETA may de-obligate funds for redistribution.

- The state shall continue to provide prevailing wage activities for labor certification/attestation programs with individuals who have relevant skills. Current programs, however, require enhanced knowledge, skills, and expertise in evaluating prevailing wage surveys and in making prevailing wage determinations. To increase the state's capacity to perform this work, and to assure credibility, validity, and reliability of wage surveys and determinations, state allocations include funding to support a prevailing wage expert function. In states with a small labor certification workload, it is appropriate for that function to be filled on a part-time basis. Each state shall:

    1. Staff this function with an individual who has at least a bachelor's degree in statistics or economics, or a degree in another field with a minimum of six (6) hours in statistics, and at least two years of experience in data collection, statistical analysis, sampling techniques, labor market analysis, or conducting wage surveys and classifying jobs.

    2. Make the incumbent responsible for implementing national prevailing wage policies, evaluating prevailing wage surveys for labor certification/attestation programs, training other staff, responding to prevailing wage issues and challenges, and giving expert testimony in litigation cases.

- When requested by the National OFLC/National Processing Center, States shall ensure that appropriate labor certification staff travel within or outside the state to attend meetings, training sessions, speaking engagements, or other activities deemed necessary by the National Office to carry out effective program operations. Travel for such activities is accounted for within program funding levels.

- The state shall continue to maintain an automated Foreign Labor Certification Processing System(s) for receiving and tracking applications, writing letters, and maintaining a prevailing wage database.

- Due to continued growth of the H-2B non-agricultural temporary labor program, States are expected to initially screen each H-2B application to ensure that the employer's need for the duties to be performed is truly temporary. That need may be neither ongoing nor continuous. The employer has the burden of establishing the facts necessary to support such a finding in the application. ***States should immediately consult with their respective National Processing Center when there is doubt***. Because of the need to make a determination on applications within 60 days of receipt by states, the state is responsible for informing its Certifying Officer regarding the status of the H-2B case workload on a monthly basis to ensure timely completion. ***H-2B applications should be processed in an expedited manner and only completed applications should be transmitted to the Certifying Officer within 30 days from the date the application was received by the state.***

9. Reporting Requirements

- Basic reporting requirements for Labor Certification include financial and program reporting requirements as specified by ETA. The required program reports, including the Form ETA 9127, Form ETA 232 and Form ETA 232A, will be submitted in accordance with ETA Handbook No. 385 and ETA Handbook No. 398.

- Financial reports relating to staff time and other charges to the alien certification reimbursable grant shall be available to National Office staff. Inappropriate charges shall be questioned and may be disallowed.

- Informally, states will report to the National Processing Center increases in H-2A and H-2B activity. In addition, states should report all new occupations or crop activity for these programs.

ANNUAL PLAN NARRATIVE

SUPPLEMENT I

__(Agency Name)____ shall prepare a narrative plan which explains how it will deliver labor certification/attestation services in FY 2008. This narrative should include, at a minimum, the following completed chart:

		Number Planned
A. The projected number of job orders related to temporary agricultural alien certification applications to be processed.		
B. The projected number of temporary non-agricultural alien certification applications to be processed.		
C. The projected number of prevailing wage surveys to be conducted in agricultural activities, including projected wage surveys in anticipation of H-2A requests (this includes logging).		
D. The projected number of housing inspections to be conducted in anticipation of H-2A orders (this includes logging).		
E. The projected number of prevailing wage determinations to be provided to employers for non-agricultural occupations by the following categories:		
	PERM	
	H-1B	
	H-2B	
	H-1B1	
	E-3	
F. Number of Full Time Equivalent (FTE) staff funded by this grant.		
G. Any plans for changes in existing operations, including the prevailing wage program, which will substantially affect negotiated goals.		

Statement of Work for Housing Inspections

Note: Due to the special nature of housing inspections, a separate Statement of Work is included.

___(Agency Name)_____ shall prepare a narrative plan which explains how it will deliver this activity in FY 2008. This narrative should include, at a minimum, the following:

A. Statement of the negotiated goals to be achieved.

B. The number of pre-occupancy housing inspections to be conducted on-site.

C. Plans for changes in the existing operations, if any, which may substantially affect negotiated goals.

In addition, as a condition for receiving funds in support of the Secretary's responsibility, ___(Agency Name)____ agrees to do the following:

- Conduct pre-occupancy inspections of housing to be furnished to migrant and seasonal farmworkers or other U.S. workers, or to nonimmigrant aliens admitted to the United States under temporary labor certification programs for temporary employment in agriculture or logging.

- Assist employers in recruiting agricultural and logging workers. These employers are required to provide housing at no cost, or public housing, for workers who are not reasonably able to return to their place of residence the same day. In the case of employers seeking H-2A agricultural or H-2B logging labor, free housing must be provided. The housing must meet ETA standards described in 20 CFR Part 654, subpart E or OSHA standards at 29 CFR 1910.142 and be sufficient to house the number of workers requested.

- Determine, through a pre-occupancy inspection, that such housing is, in fact, available and meets appropriate standards. The employer seeking labor certification may also provide rental or other public accommodation-type housing. Such housing must meet applicable local or state standards, and does not have to be inspected by state agency staff when such standards exist. However, in the absence of applicable local or state standards, such housing must meet Federal standards at 29 CFR 1910.142 (OSHA) and must be inspected by the state agency or other appropriate public agency prior to occupancy.

1. **Special Assurances.**

   - The state shall adhere to regulations at: 20 CFR Part 655, Subparts B and C, Labor Certification Process for Temporary Agricultural and Logging Employment; Part 654, Subpart E, Housing for Agricultural Workers; and Part 653, Subpart F, Agricultural Clearance Order Activity. Actual housing inspections may be conducted under certain conditions in accordance with OSHA standards at 29 CFR 1910.142, Temporary Labor Camps.

   - SWAs should encourage employers who expect to obtain their certification 30 days before the date of need to have housing ready for inspection at the time of filing their H-2A application or earlier.

   - SWAs should be prepared to conduct housing inspections prior to the filing of applications, if so requested by the employer.

   - SWAs should plan to schedule housing inspections prior to the filing of H-2A applications for those employers who regularly use the H-2A program.

- SWAs should be encouraged to evaluate alternative methods of conducting pre-occupancy housing inspections (i.e., State Health Department, Agricultural Department, etc.) and must explain any such alternative methods in their plan narratives. Self-attestation by employers that housing meets standards will not be accepted as an alternative method.

2. **Allowable Costs.**

- Costs may be attributed to activities in support of tasks described in 20 CFR Part 654 Subpart E, Housing for Agricultural Workers and/or 29 CFR 1910.142, Temporary Labor Camps, and for indirect support as a fair share of overhead.

3. **Performance Standards.**

- The state's performance will be reviewed according to the applicable Housing Inspection Checklist in ETA Handbook No. 398 and the applicable Federal housing standards.

4. **Reporting.**

- Required reporting of activity as specified on Office of Management and Budget (OMB) approved ETA forms. Financial reporting will be as specified by ETA.

- States should plan to track the costs associated with conducting pre-occupancy housing inspections to assist the National Office in the allocation of future resources. The costs include, but are not limited to, staff resources, travel expenditures, and administrative costs (see Supplement IV).

- **States should submit an estimate of their annual cost for conducting pre-occupancy housing inspections along with this annual plan (see Supplement IV).**

Statement of Work for Agricultural Wage Surveys

Note: Due to the special nature and importance of agricultural prevailing wage surveys, a separate Statement of Work is included.

___(Agency Name)____ shall prepare a narrative plan which explains how it will deliver this activity in FY 2008. This narrative should include the number of prevailing wage surveys to be conducted and for which crop activity.

As a condition for receiving funds in support of the Secretary's responsibility, ____(Agency Name) agrees to conduct prevailing wage surveys of agricultural and logging activities in accordance with ETA Handbook No. 385. The SWA assists employers in recruiting agricultural and logging workers. Since those workers do not have knowledge of wages in distant locations, the SWA provides a level of wage protection by requiring that intra- and inter-state clearance orders offer a prevailing wage (20 CFR 653.501(d)(4)), if it is higher than the state or Federal minimum. For H-2A orders involving alien workers, the prevailing wage must be offered if it is higher than the state or Federal minimum and the Adverse Effect Wage Rate (AEWR) (20 CFR 655.102(b)(9)).

In order to establish the required prevailing wages, surveys must be done in accordance with ETA Handbook No. 385 for each agricultural reporting area in which a crop activity meets the threshold specified in Section I, C. 1. a. of the Handbook. When the data are collected and compiled in accordance with the Handbook, a signed Form ETA 232 must be submitted to the National Office for review and confirmation before publication.

1. **Special Assurances.**

- The state shall submit to the National OFLC a plan for the surveys it is scheduling for the coming year. This plan must include all the surveys which will be conducted by the state in the upcoming season. Accordingly, the state's survey targets should be based on estimated job order activity to be produced by H-2A applications. Prevailing wage surveys must be completed in the following instances: (1) when there were more than 100 workers in one crop last season or you expect more than 100 workers in the current season; (2) when there were H-2A workers last season or you expect H-2A workers in the current season; (3) when it is a very complex method of payment (i.e., piece rates); and, (4) for all mandatory national interest surveys such as Custom Combine, Sheep and Goat Herding, Nurseries, and East Coast Apples. Wage surveys should not be conducted if they do not fit into the above categories. The plans should be mailed to Mr. Ben Orona, Office of Foreign Labor Certification, 200 Constitution Avenue, NW, Room C-4312, Washington, D.C. 20210, or faxed to (202) 693-2768.

- The state shall submit the results of its prevailing wage surveys (ETA form 232) promptly to the National OFLC as well as to the respective National Processing Center (Atlanta or Chicago), so the correct wage is established for the next cycle of crop activity. Timely submission is critical to ensure release of wage determinations by the National Office well ahead of the crop activity start date. The ETA 232 forms should be mailed to Mr. Ben Orona, Office of Foreign Labor Certification, 200 Constitution Avenue, NW, Room C-4312, Washington, D.C. 20210, or faxed to (202) 693-2768.

2. **Allowable Costs.**

- Costs may be attributed to tasks described in ETA Handbook No. 385 for crop activities which meet the criteria specified above and for indirect support as a fair share of overhead.

3. **Performance Standards.**

- The state's performance will be reviewed according to its adherence to the procedures for wage surveys in ETA Handbook No. 385. Irrespective of the Adverse Effect Rate (AEWR) published for a given state each year, the procedures contained in the ETA Handbook No. 385 require that prevailing wage surveys be conducted for any crop activity that is anticipated in the upcoming season.

4. **Reporting**.

- Completed surveys will be submitted on the ETA-232. Financial reporting will be as specified by ETA.

- States should plan to track the costs associated with conducting prevailing wages in order to assist the National Office in the allocation of future resources. The costs include, but are not limited to, staff resources, travel expenditures, and administrative costs (see Supplement IV).

- **States should submit an estimate of their annual cost for conducting H-2A prevailing wage surveys along with their annual plan (see Supplement IV).**

ANNUAL PLAN NARRATIVE

SUPPLEMENT IV

Costing of H-2A Activities
FY 2008 Estimate

1. Instructions

Complete the table below using data from the prior fiscal year to estimate the cost of conducting H-2A activities. The completed table should be attached to the annual plan.

(1) Housing Inspections:

- Include in the total cost estimate: travel time, inspection time, travel mileage, and completion of paperwork. Include in the total, all housing inspections started in FY 2007 regardless of the final completion date.

- If housing inspections are done by another organization, estimate the cost that the H-2A portion adds to their total cost and include this amount in the table.

(2) Prevailing Wage/Practice Surveys:

- Include in the total cost estimate the development of the survey instrument, postage, collection of responses, collation of information, and publication of results.
- Include in the total, all surveys started in FY 2007 regardless of the final completion date.

(3) Job Orders Processed:

- Include in the total cost estimate the creation and maintenance of files, taking into account the cost associated with receiving applications, referring applicants, and releasing orders into inter/intra-state job system.

2. Costing Sheet (Do not include logging.)

Activity	Total Number	Total Cost	Average Cost
Housing Inspections			
Prevailing Wage/Practice Surveys			
Job Orders Processed			
Total Cost of H-2A Activities			

3. Calculations

- Average Cost = Total Cost / Total Number

- Total Cost of H-2A Activities = Total Cost of Housing Inspections + Total Cost of Prevailing Wage/Practice Surveys + Total Cost of Job Orders Processed

ANNUAL PLAN NARRATIVE

SUPPLEMENT V

Contact Information

1. Instructions

Contact information for this grant should be attached to the annual plan. If more than one contact person is appropriate, please provide the additional information.

Name:	
Title:	
Address:	
Telephone Number:	
E-mail Address:	
Fax Number:	

Annual Plan Procedures

1. Annual Funding Agreement.

The current agreement includes an Assurances and Certifications package to encompass all Program Year 2007/Fiscal Year 2008 program activities. Notice of Obligation documents for the allotment balances will be issued by the National Office Grant Officer based upon National Office approval of Annual Plans.

2. Annual Plan.

The Annual Plan includes an Application for Federal Assistance (SF-424), transmittal letter, work statements, and budget information. Consistent with National Office guidelines, negotiations between ETA and the Grantee will determine each state's annual level of funding for Alien Labor Certification.

- The Annual Plan will have a performance period of 12 months beginning October 1, 2007, and ending September 30, 2008.

- The plan package submitted from the states to the National Office Grant Officer should consist of a transmittal letter and one original and two copies of the following:

  A. Application for Federal Assistance (SF-424)

  B. Annual Budget and Quarterly Funding Plan (SF-424A—Section D only)
     Note: Please include a budget supplement to explain and list all proposed equipment purchases of $5,000 or more and any subcontracts.

  C. Annual Plan Narrative including completed Supplements I, II, III, IV, and V.

- The National Office will negotiate annual plans with states for each activity to be funded. The state is to prepare a description of the goals to be achieved as negotiated with the National Office.

3. Plan Modifications.

The National Office and the state may jointly modify the Annual Plan including negotiated changes in the plan period and in funding levels during the year. The plan modification requests must include a transmittal letter, a revised annual budget, and the quarterly spending plan. The National Office Grant Officer has the authority to execute funding adjustments where a state is not spending at agreed upon levels. When an adjustment is necessary, a unilateral modification may be issued. In the event that the Secretary of Labor may be required by future legislation to carry out other responsibilities not currently anticipated, the states will be requested to submit a modification to the Annual Plan in order to carry out these additional duties.

4. Financial Reconciliation.

After the end of the fiscal year, a financial reconciliation procedure will be conducted to reconcile accounting records maintained by the grantee and the Department of Labor's original accounts. It may become necessary to revise funding levels in the new plan for a particular state when the reconciliation is completed.