

Chapter 46

ENFORCEMENT OF H-2B

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Table of Contents

46a GENERAL

- 46a00 Purpose of this chapter.
- 46a01 H-2B petition process.
- 46a02 Enforcement authority.
- 46a03 Coverage.
- 46a04 Guam.

46b TEMPORARY EMPLOYMENT CERTIFICATION APPLICATION

- 46b00 General requirements.
- 46b01 U.S. worker protections.
- 46b02 Employers seeking to participate in the H-2B visa program.
- 46b03 Employer's pre-filing requirements.
- 46b04 Filing the TEC Application.
- 46b05 Processing the employer's TEC Application.
- 46b06 Requirements for employers employing H-2B workers under the 2017, 2018, 2019, and 2021 H-2B visa cap temporary final rules.

46c EMPLOYER OBLIGATIONS AND CONDITIONS OF EMPLOYMENT

- 46c00 Disclosure of terms and conditions.
- 46c01 Corresponding employment.
- 46c02 Recruited workers.
- 46c03 Certified occupation.
- 46c04 Accuracy of temporary need.
- 46c05 Area of intended employment.
- 46c06 Rate of pay.
- 46c07 Facilities furnished to workers.
- 46c08 Deductions and employer-provided items.
- 46c09 Prohibited fees and contracts with third parties.
- 46c10 Three-fourths (3/4) guarantee.
- 46c11 Inbound/outbound transportation and subsistence.
- 46c12 Recordkeeping.
- 46c13 Employer-provided transportation.
- 46c14 No unfair treatment.
- 46c15 Compliance with other laws.

46d ENFORCEMENT PROCESS

- 46d00 WHD's authority.
- 46d01 Types of violations.
- 46d02 Employer cooperation.

46a GENERAL

46a00 Purpose of this chapter.

The H-2B portion of the Immigration and Nationality Act (INA) governs the admission of nonimmigrants to the United States to perform temporary nonagricultural labor or services. WHD's enforcement authority over that program is described in [29 CFR part 503](#) and [20 CFR part 655](#). This chapter discusses that program and WHD's enforcement authority.

The H-2B visa program allows U.S. employers to bring foreign workers to the United States to perform non-agricultural labor or services of a temporary nature—that is, based on a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

Before filing a petition with USCIS for a worker through the H-2B visa program, employer must generally obtain an approved temporary labor certification (TLC) from DOL or, if the worker(s) will be employed in Guam, from the Governor of Guam.

The employer must demonstrate to and receive a certification from DOL that there are not sufficient U.S. workers who are qualified and who will be available to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

References:

8 U.S.C. 1101(a)(15)(H)(ii)(b)

[8 CFR 214.2\(h\)\(6\)](#)

[29 CFR part 503](#)

[20 CFR part 655](#)

46a01 H-2B petition process.

(a) Employment and Training Administration.

- (1) An employer seeking to employ temporary nonimmigrant workers through the H-2B visa program must first submit an Application for Prevailing Wage Determination (the Form ETA-9141), also called a "PWD Application," to DOL's Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC).
- (2) After ETA has approved a prevailing wage rate for the occupation, geographic location, and time indicated in the PWD Application, the employer seeking to participate in the H-2B visa program may submit an Application for Temporary

Employment Certification (the Form ETA-9142B and its Appendices), also called a “TEC Application,” to ETA.

- (3) If the TEC Application complies with the requirements, ETA gives the employer instructions on recruiting U.S. workers. After recruiting, the employer must submit a recruitment report explaining its efforts and, if any U.S. applicants were rejected, the reasons it rejected those workers.
- (4) ETA then either certifies or denies the TEC Application based on its determinations of, among other things, the need for and classification of temporary workers, the sufficiency of the employer’s recruitment efforts, and the validity of the employer’s submitted prevailing wage.

(b) Department of Homeland Security, U.S. Citizenship and Immigration Services.

After ETA has certified the TEC Application, the employer may submit the certified TEC to the Department of Homeland Security’s (DHS) U.S. Citizenship and Immigration Services (USCIS), along with a Form I-129 Petition for a Nonimmigrant Worker and other required documentation. USCIS reviews the petition and sends its determination to the employer using a Form I-797 Notice of Action. DHS makes the final determination as to whether the prospective employer’s need is temporary in nature.

(c) Department of State.

After receiving a Form I-797 indicating USCIS’s approval, the employer may direct prospective workers to apply for a visa with the State Department, typically at a U.S. Consulate in the worker’s home country. The State Department reviews each prospective H-2B worker’s application and documents to determine eligibility for admission into the United States. If it issues the H-2B visa, the employer may employ the nonimmigrant worker.

46a02 Enforcement authority.

(a) History of enforcement authority.

- (1) Effective in 2009, DHS delegated enforcement authority over certain portions of the H-2B visa program to DOL. The Secretary of Labor, in turn, delegated that authority to WHD.
- (2) DOL’s 2008 Final Rule introduced WHD’s enforcement procedures. The 2008 Rule also established conditions and procedures for the debarment of employers, attorneys, and agents participating in the H-2B foreign labor certification process. WHD continues to enforce the 2008 Rule for TEC Applications certified before April 29, 2015.
- (3) In 2015, DOL and DHS jointly issued an Interim Final Rule. WHD enforces the 2015 Rule for all H-2B TEC Applications certified on or after April 29, 2015.

- (4) This Chapter discusses primarily the 2015 Rule. Questions relating to the enforcement of the 2008 Rule should be directed to the nearest WHD district office.

(b) Rights WHD enforces and remedies available.

WHD enforces certain employer obligations, including offering employment to qualified U.S. workers and not laying off or displacing U.S. workers in violation of program requirements. WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and, in appropriate instances, to impose penalties; debar from future certifications; recommend revoking existing certifications; and seek remedies for violations, including recovery of unpaid wages and reinstatement of improperly laid off or displaced U.S. workers. In general, the H-2B regulations include protections and provisions for the following workers:

- (1) H-2B workers, meaning those foreign workers employed in the United States pursuant to an H-2B visa.
- (2) Recruited workers, meaning those U.S. workers hired in response to the employer's recruitment obligations. This includes: workers who applied to or were referred to the job order; former workers from the previous year contacted by the employer in compliance with [20 CFR 655.43](#); U.S. workers laid off within 120 calendar days of the employer's date of need and rehired in compliance with [20 CFR 655.20\(v\)](#) and [655.20\(w\)](#) and [29 CFR 503.16\(v\)](#) and [503.16\(w\)](#); and any other workers who applied to the job opportunity or were hired until 21 days before the date of need listed on the TEC Application. See [FOH 46c02](#) for further discussion of recruited workers. Whether a U.S. worker constitutes a recruited worker is dependent on the date the worker was recruited, referred, or hired, or the manner in which the worker was referred to the job opportunity. Consequently, the definition of recruited worker is narrower than that of corresponding worker (see below).
- (3) Corresponding workers, meaning those workers without H-2B visas employed by employers holding TEC Applications and performing substantially the same work as included in the job order or performed by H-2B workers, with certain exceptions as described in [20 CFR 655.5](#) and [29 CFR 503.4](#). As the definition of corresponding worker is dependent on the nature of the work, this definition is broader than that of a recruited worker (see above). (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

(c) WHD's authority to investigate.

WHD may investigate compliance with H-2B visa program obligations under a complaint or otherwise. In connection with such an investigation, WHD may enter and inspect any premises, land, property, worksite, vehicles, structure, facility, place, and records (and make transcriptions, photographs, scans, videos, photocopies, or use any other means to record the content of the records or preserve images of places or objects), question any person, or gather any information, in whatever form, as may be appropriate. WHD conducts investigations in a manner that protects the confidentiality of any complainant or other source to the extent permitted by the law.

(d) Enforcement of corresponding employment and three-fourths guarantee.

- (1) The 2016 Department of Labor Appropriations Act prohibited DOL from using any funds to enforce the definition of corresponding employment found in [20 CFR 655.5](#) or the three-fourths guarantee rule definition found in [20 CFR 655.20](#). Corresponding employment is, very generally, the employment of workers without H-2B visas in the same work included in the job order or performed by the H-2B workers (with some exceptions). The three-fourths guarantee is, very generally, the guarantee of a minimum number of hours within the work contract period. (See definitions in [FOH 46c01](#) of corresponding employment and in [FOH46c10](#) of the three-fourths guarantee). This prohibition has been included in each successive budget authorization since 2016. These laws do not limit WHD's authority to enforce the H-2B requirements on behalf of U.S. workers hired in response to recruitment obligations of employers participating in the H-2B visa program, U.S. applicants for H-2B jobs, or any similarly employed U.S. workers laid off during the period 120 days before the date of need throughout the period of H-2B certification.
- (2) None of those acts vacated the regulations regarding corresponding employment and the three-fourths guarantee. Employers participating in the H-2B visa program have a legal obligation to comply with these requirements (and thus they are described in this chapter), even though DOL may not currently use any funds to enforce them.

(e) Definition of prevailing wages.

The 2016 DOL Appropriations Act and successive budget authorizations also amended the definition of *prevailing wages*, making the H-2B wage rate the higher of:

- (1) The actual wage level paid by the employer to other employees with similar experience and qualifications for the occupation in the same location; and
- (2) The prevailing wage level for the occupational classification in which the H-2B nonimmigrant will be employed.

The acts also permit employers to submit methodologically sound private wage surveys.

References:

[20 CFR 655.6](#)

8 U.S.C. 1184(c)(14)

2016 Department of Labor Appropriations Act, Pub. L. 114-113, Title I, Division H

[20 CFR 655.2\(b\)](#)

[29 CFR 503.1\(c\)](#)

Adm'r v. Strates Shows, Inc., ARB Case No. 15-069 (Aug. 16, 2017)

Adm'r v. Wade Shows, ARB Case No. 15-052 (Sept. 11, 2017)

46a03 Coverage.

(a) Employers with approved TEC Applications.

In general, employers who have an approved TEC Application must comply with the H-2B visa program requirements.

- (1) In general, the employer participating in the H-2B visa program identified on the TEC Application is the employer responsible for compliance with H-2B requirements and is the subject of the H-2B investigation. In appropriate circumstances, DOL may hold individuals personally liable to more effectively remedy any violations found.
- (2) An established “successor-in-interest” to the employer listed on the TEC Application may be held liable for its predecessor’s actions and obligations. When determining whether an entity is a successor in interest to an employer, WHD examines factors such as substantial continuity of the same business operations, use of the same facilities, continuity of the workforce, and similarity of supervisory personnel.
- (3) A TEC Application cannot be transferred from one employer to another, unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.
- (4) In appropriate circumstances, WHD will seek remedies from an employer’s agent or attorney and may seek debarment of an agent or attorney.

References:

[20 CFR 655.5](#)
[20 CFR 655.55](#)
[29 CFR 503.4](#)
[29 CFR 503.20\(b\)](#)
[29 CFR 503.24\(a\)-\(b\)](#)
[80 FR 24084](#)

(b) Other protections for H-2B workers.

H-2B workers are also entitled to protections under all other applicable programs enforced by the WHD when covered by these statutes. For example, H-2B workers are frequently covered by the FLSA and may be covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), OSHA Field Sanitation, the Davis-Bacon Act (DBA), and the McNamara-O’Hara Service Contract Act (SCA).

References:

[29 CFR 4.110](#)
[29 CFR 5.5](#)
[29 CFR 500.20](#)
[29 CFR 776](#)
[29 CFR 1928.110](#)

DOL does not certify to USCIS the temporary employment of H-2B workers, or enforce compliance with the H-2B visa program, in Guam. Those functions are performed by the Governor of Guam or a designated representative.

References:

[20 CFR 655.3](#)

[29 CFR 503.2](#)

[8 CFR 214.2\(h\)\(1\)\(ii\)\(D\)](#)

46b TEMPORARY EMPLOYMENT CERTIFICATION APPLICATION

46b00 General requirements.

As part of the certification process, the employer filing a TEC Application must agree to comply with the requirements set forth in the 2015 Rule. The employer must perform pre- and post-filing activities demonstrating the need for temporary, nonimmigrant workers, and that hiring such workers will not displace qualified U.S. workers.

Reference:

[20 CFR 655.40](#)

46b01 U.S. worker protections.

DHS regulations require that the employment of nonimmigrant workers not adversely affect the wages and working conditions of similarly employed U.S. workers. As such, many of the H-2B provisions relate to protecting the wages and working conditions of U.S. workers, and WHD will review compliance with these provisions in any investigation. Possible sanctions and remedies for violations of these provisions include: the recovery of unpaid wages for workers (including for U.S. workers hired within the recruitment period); reinstatement and make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced; the assessment of civil money penalties; debarment; and/or the recommendation of revocation of the current certificate. The highest penalties are reserved for any willful failures involving harm to U.S. workers.

References:

[29 CFR 503.20](#)

[29 CFR 503.23](#)

(a) Authorization from DHS.

The INA allows DHS to approve petitions for H-2B workers after consulting with appropriate government agencies, and DHS has determined that DOL is the appropriate agency.

(b) Requirement to recruit U.S. workers.

Before employing H-2B workers, the employer must test the labor market in the intended area of employment – the geographic area within normal commuting distance of the worksite – to ensure that there are no qualified U.S. workers available for the position for which the

employer is seeking certification (see discussion in [FOH 46c05\(a\)](#) regarding area of intended employment). Recruitment must begin once ETA gives the employer the instruction to begin recruitment (see discussion in [FOH 46a01\(a\)\(3\)](#)). The employer must accept referrals and applications of all U.S. applicants interested in the position until 21 days before the date of need listed on the TEC Application. As described more fully in [FOH 46b01\(c\)](#), the employer must pay recruited U.S. workers at least the same wages as the H-2B workers, and offer at least the same benefits, wages, and working conditions as offered to the H-2B workers. For example, if the employer offers \$15 per hour, 45 hours per week, and overtime pay to H-2B workers, it must pay the same wages and offer the same conditions to recruited U.S. workers.

References:

[20 CFR 655.40\(c\)](#)

[20 CFR 655.40–655.48](#)

(c) Obligation to hire U.S. workers.

The employer must consider all U.S. applicants for the job opportunity and must hire any applicants who are qualified and will be available. The employer must consider for employment all qualified U.S. workers regardless of race, color, national origin, age, sex, religion, disability, or citizenship. A U.S. worker who applies for the job may be rejected only for lawful, job-related reasons.

References:

[20 CFR 655.20\(r\)](#)

[20 CFR 655.40\(e\)](#)

[29 CFR 503.16\(r\)](#)

(d) Procedure for interviewing U.S. workers.

The employer must conduct interviews by phone or use a procedure for the interviews to be conducted in the location where the worker is recruited so that the worker incurs little or no cost. Employers cannot give potential H-2B workers more favorable treatment for such interviews.

Reference:

[20 CFR 655.40\(d\)](#)

(e) Laying off U.S. workers prohibited.

Layoff means any involuntary separation of one or more U.S. workers without cause. For 120 days before the date of need through the end of the certification period, the employer may not lay off similarly employed U.S. workers in the occupation that is the subject of the TEC Application in the area of intended employment. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if the employer lays off all H-2B workers before any worker in corresponding employment (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[29 CFR 503.4](#)
[29 CFR 503.16\(v\)](#)

(f) Obligation to solicit return of U.S. workers.

The employer must contact and solicit the return of U.S. workers employed during the previous year in the occupation and place of employment for which the employer is requesting the H-2B workers. This includes employees laid off within 120 calendar days before the date of need, but not those employees who the employer dismissed for cause or who abandoned the worksite. The employer may contact the U.S. workers by mail or other effective means; it must disclose the terms of the work for which it plans to solicit the H-2B workers and solicit the worker's return. The employer must maintain documents sufficient to prove such contact.

References:

[29 CFR 503.16\(w\)](#)
[20 CFR 655.20\(w\)](#)
[20 CFR 655.43](#)

(g) Strikes and lockouts prohibited.

At the time the employer files the TEC Application, there may not be strikes or lockouts at any of the worksites within the area of intended employment for which it is requesting H-2B certification.

References:

[29 CFR 503.16\(u\)](#)
[20 CFR 655.20\(u\)](#)

(h) Requirement that U.S. and H-2B workers be treated equally.

- (1) *Obligation to offer same wages, benefits, and working conditions offered to H-2B workers.*

The employer's job offer during the recruitment period must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer offers the H-2B workers. *Job offer* in this context includes the job order and other required recruitment documentation, which must inform the potential U.S. workers of terms and conditions of employment that are at least as favorable as those that will be offered to H-2B workers. This ensures that employers do not understate wages or benefits in an attempt to discourage U.S. worker applicants or give preferential treatment to H-2B workers.

For example, an employer intending to offer a higher rate of pay than required by the H-2B visa program, overtime hours paid at time and a half, or lodging assistance must disclose these benefits in recruitment and ensure that these benefits are available to U.S. workers on at least the same basis as offered to H-2B workers.

- (2) *Prohibition against restrictions not imposed on H-2B workers.*

- a. Similarly, job offers during the recruitment period may not impose on U.S. workers restrictions, obligations, job qualifications, or job requirements that are not imposed on the employer's H-2B workers. Each job qualification and requirement must be listed in the job order and must be bona-fide and consistent with the normal and accepted qualifications and requirements imposed by employers not participating in the H-2B visa program in the same occupation and area of intended employment.
- b. For example, an employer that is not intending to require a pre-employment drug test or criminal background checks for H-2B workers may not advertise or require these qualifications for U.S. workers. Similarly, an employer may not advertise or require on-the-job experience or skills for U.S. workers if not intending to enforce these qualifications for H-2B workers.
- c. Under DOL's longstanding policy, job qualifications and requirements must be customary; that is, they may not be used to discourage U.S. applicants from applying for the job opportunity.

References:

[29 CFR 503.4](#)

[29 CFR 503.16\(e\), \(q\)](#)

[20 CFR 655.18\(a\)](#)

[20 CFR 655.20\(e\), \(q\)](#)

[20 CFR 655.41](#)

[80 FR 24042, 24062](#)

(i) Requirement to file and update recruitment report.

The employer must prepare and maintain a recruitment report that details the results of the required recruitment activities. The report must include, among other information, the names and contact information for all U.S. applicants, whether the employer hired or did not hire the applicant, and the lawful, job-related reasons for not hiring a U.S. worker. The employer must update the report through the recruitment period. *See* [20 CFR 655.48](#) for the full requirements relating to the recruitment report.

References:

8 U.S.C. 1101(a)(15)(H)(ii)(b)

[20 CFR 655.40\(d\)](#)

[20 CFR 655.5](#)

[29 CFR 503.4](#)

46b02 Employers seeking to participate in the H-2B visa program.

(a) Need for workers must be temporary.

An employer seeking certification must establish to OFLC that its need is temporary, regardless of whether the underlying job is permanent or temporary. With the exception of a one-time occurrence need, which can last up to three years, OFLC may not approve a

temporary need for longer than nine months due to a Congressional budget rider. Temporary need falls under one of these four categories:

- (1) One-time occurrence;
- (2) Seasonal need;
- (3) Peakload; or
- (4) Intermittent need.

(b) Type of work that may be offered.

- (1) The employer must offer a full-time—meaning at least 35 hours per workweek—position. A workweek is a regularly recurring period of 168 hours (7 consecutive 24-hour days).
- (2) The work must be in non-agricultural employment within the specified area(s) of intended employment. The *area of intended employment* is the geographic area within a normal commuting distance of the worksite address(es) of the job opportunity for which the certification is sought (see [FOH 46c05](#) for detailed information on the area of intended employment).
- (3) A *worksite*, for purposes of the H-2B visa program, is any location where the worker performs one or more duties of the job opportunity. Generally, the employer may file only one TEC Application per area of intended employment, even if there are multiple worksites within the area of intended employment.

(c) Attorneys and agents may file.

An attorney or agent may file a TEC Application on an employer's behalf. The employer must sign the TEC Application and all documentation submitted to ETA.

(d) Job contractors.

Job contractors with their own genuine temporary need for workers may participate on a seasonal or one-time occurrence basis. The job contractor and its clients (the end-employers) must file as a joint employer, and both must sign the TEC Application agreeing to comply with the H-2B terms and conditions.

(e) Seafood-industry employers.

An employer in the seafood industry may begin employing H-2B workers at any time through 120 days after the starting date indicated on the employer's certified TEC, but only if it performs certain additional required recruitment activities before starting to employ H-2B workers between 90 and 120 days after the start date. Specifically the employer must:

- (1) Complete a new assessment of the labor market between 45 and 90 days after the certified start date of need; and

- (2) Offer the job to an equally or better qualified U.S. worker who applies for the job and will be available at the time and place of need.

These employers must also sign an additional attestation form for DHS or the State Department and retain additional recruitment documents.

References:

[20 CFR 655.15](#)

[20 CFR 655.19](#)

[20 CFR 655.6](#)

[29 CFR 503.5](#)

46b03 Employer's pre-filing requirements.

- (a) The employer requests a prevailing wage from the National Prevailing Wage Center by submitting a completed PWD Application at least 60 calendar days before its date of need. The Prevailing Wage Center will return the form, indicating the prevailing wage rate, the source, and the validity period.
- (b) The employer may submit the PWD Application electronically through OFLC's Foreign Labor Application Gateway System (FLAG System). Instructions to obtain a prevailing wage determination can be found at www.foreignlaborcert.doleta.gov/.
- (c) The employer prepares a job order and TEC Application with appropriate appendices to submit to the authorizing agencies.

46b04 Filing the TEC Application.

(a) Contents of TEC Application package.

The TEC Application package consists of:

- (1) Form ETA-9142B,
- (2) Appendices to the form,
- (3) The PWD case tracking number issued by the Prevailing Wage Center (which the FLAG system can link to the Form ETA-9142B),
- (4) A copy of the job order, and
- (5) Applicable supporting documentation.

(b) Required submissions: TEC Application package, agreements, and job order.

- (1) The employer must submit its TEC Application package to the Chicago National Processing Center (Chicago NPC) between 75 and 90 days before the date of need. It may file the package electronically through the FLAG System (similar to electronic filing of its PWD Application).

- (2) The employer must also include a copy of all agreements with any agent or recruiter whom it engages or plans to engage, either directly or indirectly, to recruit the H-2B workers under its TEC Application. These agreements must prohibit the agent or recruiter from charging impermissible fees to the H-2B workers.
- (3) At the same time it submits the TEC Application package, the employer must submit a job order to the state workforce agency serving the area of intended employment. The employer must inform the state agency that it is placing the job order in connection with a concurrently submitted TEC Application. The job order must comply with the state-specific requirements governing job orders, as well as the requirements established by the H-2B regulations at [20 CFR part 655](#) and [29 CFR part 503](#), including wages to be paid, prohibition of recruitment fees and impermissible deductions, and requirements relating to certain transportation reimbursements and U.S. worker recruitment requirements.

References:

[20 CFR 655.15\(a\)](#)

[20 CFR 655.20\(p\)](#)

[20 CFR 655.18](#)

[20 CFR 655.9](#)

[29 CFR 503.16\(p\)](#)

46b05 Processing the employer's TEC Application.

(a) Chicago NPC: Notice of Acceptance or Notice of Deficiency.

Within seven business days of receiving the TEC Application package, the Chicago NPC will notify the employer in writing of its decision on the employer's application. If it accepts the application, it will send a Notice of Acceptance. If not, it will send a Notice of Deficiency.

(b) State workforce agency: Referral of applicants.

Upon receiving the employer's Notice of Acceptance from the Chicago NPC, the state workforce agency places the job order into intra- and interstate clearance. A state workforce agency that receives the employer's job order must keep the order on its active file until the recruitment period ends, which is 21 days before the date of need. ETA also places a copy of the job order on the publicly available <https://seasonaljobs.dol.gov/>. The state workforce agency refers to the employer all qualified U.S. applicants who apply for the job, either directly or through someone acting on the applicant's behalf.

(c) Employer: Requirement to recruit within 14 days.

(1) An employer that receives a Notice of Acceptance must follow the Notice's instructions and recruit U.S. workers as described in [FOH 46b01](#). This includes:

- a. Contacting former U.S. workers as detailed in 46b01(f);

- b. Contacting the bargaining representative (if applicable), or if no CBA exists, posting the job opportunity in two conspicuous locations at the intended worksite(s) for at least 15 consecutive business days; and
 - c. Conducting any additional recruitment directed in the Notice.
- (2) The employer must begin its recruitment activities within 14 calendar days from the Notice's date. The employer will be able to both begin and complete many of these activities within the 14-day period. If an activity takes longer than 14 days to complete, the employer must start the recruitment activity within the 14-day period and continue the activity until it is completed before submitting the recruitment report to the Chicago NPC.

(d) Employer: Requirement to file recruitment report.

A Notice of Acceptance will specify a date by which the employer must submit a recruitment report to the Chicago NPC. If an activity begun during the 14-day period takes longer than 14 days to complete, the employer must complete the activity before submitting the report. The employer must continue to update its recruitment report during the recruitment period. The employer must also retain the report and supporting documents.

(e) Chicago NPC: Final determination on application.

After receiving the recruitment report, the Chicago NPC will certify or deny the application and issue a final determination that approves or denies the application. If approved, the Chicago NPC sends that determination to the employer on a document entitled Form ETA-9142B Final Determination: H-2B Temporary Labor Certification Approval.

(f) Employer: Requirement to submit documents to USCIS.

The employer must then petition USCIS on the worker's behalf for an H-2B visa. To do so, the employer submits the final determination form, a copy of Appendix B, and all other information required by USCIS, including the Form I-129, to the USCIS Service Center.

References:

[20 CFR 655.33](#), [655.43](#), [655.47–655.48](#)

ETA FAQ: Recruitment Procedures and Recruitment Report

46b06 Requirements for employers employing H-2B workers under the 2017, 2018, 2019, and 2021 H-2B visa cap temporary final rules.

- (a) To address high demand for the H-2B visa program in Fiscal Years (FY) 2017, 2018, 2019, and 2021, Congress permitted DOL and DHS to promulgate rules allowing employers to employ H-2B workers beyond the statutory cap of 66,000 per fiscal year under certain circumstances. DOL and DHS then jointly issued temporary final rules in each year implementing the increase. In FY 2020, Congress enacted the same permission, but DOL and DHS did not issue a rule implementing the proposed increase.

- (b)** Any employer petitioning for H-2B workers under the FY 2017, 2018, 2019, or 2021 visa cap increase was required to attest to additional requirements on forms ETA 9142B-CAA (FY 2017), 9142B-CAA-2 (FY 2018), 9142B-CAA-3 (FY 2019), or 9142B-CAA-4 (FY 2021), which was submitted to USCIS with the certified TEC Application and completed I-129. The employer must retain these forms and any supporting documentation for three years from the date of the TEC certification, which must be available for DOL or DHS inspection upon request.
- (c)** An employer petitioning for H-2B workers under the temporary visa cap increase was required to affirm, under penalty of perjury, that its business would likely suffer irreparable harm if it could not hire all the requested H-2B workers before the end of the respective fiscal year. The employer must retain evidence demonstrating this need and provide this evidence to DOL or DHS upon request. Examples of such evidence may include:
- (1) Evidence that the business would not have been able to meet financial or contractual obligations without H-2B workers;
 - (2) Evidence that the business has suffered or will suffer permanent and severe financial loss during the period of need, as compared to the period of need in prior years;
 - (3) Evidence showing the number of workers needed in previous seasons to meet the employer's temporary need as compared to those currently employed; and
 - (4) Evidence that the business is dependent on H-2B workers.
- (d)** Depending on the start date for the petition, ETA may also have required the employer to conduct additional recruitment of U.S. workers. Employers that petitioned under these rules were required to conduct additional recruitment if the initial start date listed on the TEC application was before June 1, 2017, in FY 2017; before April 15, 2018, in FY 2018; at least 45 days before the I-129 petition was filed in FY 2019; or if filing the I-129 petition 45 days or more after the certified start date of the TEC in FY 2021.
- (e)** Employers petitioning for workers pursuant to the FY 2019 and 2021 visa cap increases also were required to attest that each worker requested was a returning worker (meaning employed as an H-2B worker in the previous three years) or, in FY 2021, a national of Guatemala, El Salvador, or Honduras.
- (f)** Employers petitioning for workers pursuant to the FY 2021 visa cap increase were also required to attest that they would comply with all employment-related laws and regulations, including those related to COVID-19 worker protections, and notify workers of vaccination rights.

References:

Consolidated Appropriations Act of 2017, Pub. L. 115-31, Division F, § 543
Consolidated Appropriations Act of 2018, Pub. L. 115-14, Division M, § 205
Consolidated Appropriations Act of 2019, Pub. L. 116-6, Division H, § 105
Consolidated Appropriations Act of 2021, Pub. L. 116-260, Division O, § 105
[82 FR 32987](#)

[83 FR 24905](#)
[84 FR 20005](#)
[84 FR 2000586 FR 28198](#)

46c EMPLOYER OBLIGATIONS AND CONDITIONS OF EMPLOYMENT

46c00 Disclosure of terms and conditions.

(a) Importance of disclosure requirement.

Worker notification is a vital component of worker protection and program compliance. The disclosure requirement is meant to ensure that workers have sufficient notice of the terms and conditions so that they may make an informed decision about taking the job.

References:

[80 FR 24042, 24069](#)

(b) Employer must give copy of job order to workers.

Worker notification is performed by giving the H-2B workers or corresponding workers (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)) a copy of the job order. The job order is the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite, and other benefits that is filed with the state workforce agency. Required job order assurances and contents can be found at [20 CFR 655.18](#).

References:

[20 CFR 655.18](#)
[20 CFR 655.20\(1\)](#)
[29 CFR 503.4](#)
[29 CFR 503.16\(1\)](#)

(c) Job order must be in language worker understands.

The employer must give a copy of the job order to all H-2B or corresponding workers in a language the worker understands, as necessary or reasonable. Stating the terms and conditions of employment to each employee in a language the individual understands is a key element of this protection, and thus WHD interprets the phrase “as necessary or reasonable” broadly. Failure to translate the job order into a particular language understood by the worker is acceptable only when (1) the translation would place an undue burden on the employer; and (2) failure to translate does not significantly disadvantage an H-2B or corresponding worker (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.20\(1\)](#)
[29 CFR 503.16\(1\)](#)
[80 FR 24042, 24069](#)

(d) Timing of disclosure.

The required timing of the disclosure depends on the location and classification of worker. For an H-2B worker who is outside the United States, the employer must give a copy of the job order no later than when the worker applies for the visa. The time at which the worker applies for the visa means *before* the worker has made any payment, whether to a recruiter or directly to the consulate, to initiate the visa application process. For an H-2B worker located in the United States but changing employment, the copy of the job order must be given no later than the time an offer of employment is made. The employer must give a copy of the job order to all workers in corresponding employment (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)) no later than the day the work begins.

(e) When a violation occurs, WHD may impose civil money penalties.

References:

[29 CFR 503.16\(1\)](#)

[20 CFR 655.20\(1\)](#)

[80 FR 24042](#)

[80 FR 24069](#)

46c01 Corresponding employment.

- (a)** *Corresponding workers* are workers who are not H-2B workers employed by the employer that has a certified TEC Application who perform substantially the same work included in the job order, or substantially the same work performed by the H-2B workers during the job order's validity period (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).
- (b)** Employers must provide workers in corresponding employment at least the same protections and benefits as those offered or given to the H-2B workers (except for visa fee requirements, which do not apply) (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.5](#)

[20 CFR 655.18\(a\)\(1\)](#)

[29 CFR 503.4](#)

46c02 Recruited workers.

(a) Definition of recruited workers.

Recruited workers are workers recruited in connection with the employer's use of the H-2B visa program. They include:

- (1) U.S. workers who applied to the employer's job order or any other recruitment efforts until 21 days before the date of need, or those that were hired within this time frame;

- (2) U.S. workers from the previous year (employed by the employer in the occupation at the place of employment) that were recruited in compliance with [20 CFR 655.20\(w\)](#) and [655.43](#); and
- (3) U.S. workers laid off within 120 calendar days of the employer's date of need and rehired in compliance with [20 CFR 655.20\(v\)](#) and [655.20\(w\)](#).

(b) Requirement that employer recruit U.S. workers.

An employer using the H-2B visa program must first attempt to recruit U.S. workers, and must employ any qualified U.S. worker who applies for the job opportunity until 21 days before the date of need. Additionally, the employer's job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will furnish to H-2B workers. Recruited workers are entitled to the same worker protections as the H-2B workers, including those described below in [FOH 46c05-46c12](#).

(c) If a violation occurs, WHD may recover unpaid wages for recruited U.S. workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; recommend to ETA/OFLC that existing certifications be revoked; and/or seek reinstatement or make-whole relief of improperly laid off, displaced, or rejected U.S. workers.

References:

- [20 CFR 655.18\(a\)\(1\)](#)
- [20 CFR 655.20\(q\)](#)
- [20 CFR 655.40](#)
- [29 CFR 503.16\(q\)](#)

46c03 Certified occupation.

- (a) The employer must accurately state all duties of the non-agricultural job classification in its PWD Application as described in [FOH 46b03](#). ETA depends on the employer's disclosure of all job duties to accurately determine the prevailing wage rate.
- (b) A prevailing wage determination is specific to an occupation and area of intended employment. Employers may not employ H-2B workers in a job classification not disclosed on its PWD Application or certified on its TEC Application.
- (c) H-2B workers may not work in job duties outside the certified occupation. Violating this prohibition may result in an incorrect prevailing wage being paid to the H-2B worker and incomplete recruitment efforts, both of which may result in an adverse effect on U.S. workers. WHD enforces the higher of the offered wage or the applicable prevailing wage for the specific occupation in which the actual work was performed.
- (d) The employer may request certification for more than one H-2B worker on the TEC Application as long as all H-2B workers will perform the same services or labor under the

same terms and conditions, in the same occupation, in the same area of intended employment, and during the same employment period.

- (e) If a violation occurs, WHD may recover unpaid wages for H-2B, recruited, and corresponding workers; impose civil money penalties; debar employers and/or agents or attorneys who commit certain violations or participate in the employer's violations from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.15\(e\)](#)

[20 CFR 655.20\(x\)](#)

[20 CFR 655.55](#)

[29 CFR 503.16\(x\)](#)

[29 CFR 503.18](#)

[29 CFR 503.19\(a\)\(1\)-\(2\), \(d\)](#)

46c04 Accuracy of temporary need.

- (a) The employer must accurately state all information related to the temporary need in its H-2B Registration, PWD Application, TEC Application, and H-2B Petition. Willfully misrepresenting a material fact in these documents violates the H-2B visa program requirements.
- (b) *Material facts* are significant items of information and include, but are not limited to:
 - (1) Occupation and job duties of the offered position;
 - (2) Full-time status of the position;
 - (3) Dates of need;
 - (4) Number of positions needed;
 - (5) Worksites;
 - (6) The nature of the employer's temporary need;
 - (7) Minimum job requirements; and
 - (8) Hours of work or work schedule.
- (c) A *willful misrepresentation* is a statement by the employer, attorney, or agent that, at the time the statement is made, the employer knows is false or shows reckless disregard for whether it is true.

- (d) If a violation occurs, WHD may impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked.

References:

[29 CFR 503.5](#)

[29 CFR 503.19](#)

46c05 Area of intended employment.

(a) Definition of area of intended employment.

The *area of intended employment* is the geographic area within normal commuting distance of the worksite where the employer's job opportunity exists. There is no rigid measure of distance that constitutes a normal commuting distance or area, because there may be widely varying factual circumstances among different areas (for example, average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multi-state MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. However, the borders of MSAs do not determine the normal commuting area; a location outside of the MSA may be within the normal commuting distance of a location inside the MSA.

(b) Limited to one area of intended employment per TEC Application, but may have multiple worksites.

- (1) An employer may not include more than one area of intended employment on a single TEC Application (excepting itinerant reforestation and entertainment employers, discussed below). If the employer has multiple worksites within the area of intended employment, it may employ the workers at any of the worksites if the job duties are identical and it has listed all of the worksites on the PWD Application and TEC Applications.
- (2) Employers should ensure that they accurately list all worksites on the PWD Application so that ETA can accurately determine the prevailing wage. If there are multiple prevailing wage rates among the worksites within one area of intended employment, the prevailing wage is the highest applicable wage among all the worksites.

(c) Exception for reforestation and entertainment industries.

Employers in the reforestation and entertainment industries have been granted special procedures by ETA permitting them to place H-2B workers in multiple areas of intended employment, based on a multi-state itinerary. These employers must attach an itinerary to the TEC Application, and list all of the work locations and the duration of work at each location. The employer is required to pay the appropriate prevailing wage at each work location as identified on the certified PWD Application.

(d) Prohibition against placing H-2B workers outside area of intended employment.

The employer must not place H-2B workers employed under the TEC Application outside the area of intended employment listed in the approved TEC Application. Such a placement might result in an incorrect prevailing wage being paid to the H-2B worker and incomplete recruitment efforts, both of which may result in an adverse effect on U.S. workers. WHD will enforce the highest of the offered wage or the applicable prevailing wage for the specific geographic area in which the actual work was performed.

- (e)** If a violation occurs, WHD may recover unpaid wages for H-2B, recruited, or corresponding workers; impose civil money penalties; debar employers and/or agents or from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.10\(d\)](#)

[29 CFR 503.4](#)

[Training and Employment Guidance Letter 31-05](#)

[Training and Employment Guidance Letter 27-06](#)

46c06 Rate of pay.

- (a)** The offered wage in the job order must equal or exceed the highest prevailing wage or applicable minimum wage.
- (b)** The employer must pay H-2B workers, corresponding workers (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)), and other recruited workers at least the offered wage, free and clear, during the entire validity period of the certified TEC Application for all hours worked. Additionally, in the job order the employer must offer U.S. workers no less than the same wages and working conditions that the employer is offering, intends to offer, or will furnish to H-2B workers. Additionally, workers may be owed a higher wage rate pursuant to state or local laws, or other statutes enforced by WHD.
- (c)** The offered wage may not be based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.
- (d)** If applicable, the offer must specify that overtime hours will be available and specify the offered wage for those hours. If this rate is higher than what is required by the FLSA, WHD will enforce the rate(s) disclosed in the job order.
- (e)** An employer that pays on a piece-rate basis must demonstrate that the piece rate is not less than the normal rate paid to workers without H-2B visas performing the same occupation in the area of intended employment. The employer must supplement the piece rate pay to ensure the worker earns at least the offered wage for all its hours worked each workweek when the piece rate earnings themselves are not sufficient to meet this requirement.

- (f) If the employer requires one or more minimum productivity standards as a condition of job retention, it must specify the standards in the job order and the employer must demonstrate that they are normal and usual for employers not participating in the H-2B visa program for the same occupation in the area of intended employment.
- (g) The employer must pay whichever is most frequent: at least every two weeks, or according to the prevailing practice for that occupation in the area of intended employment. For example, if the prevailing practice is to pay workers in the construction industry at least weekly in the area of intended employment, the employer must pay at least weekly. The employer must pay all wages on the established payday.
- (h) If a violation occurs, WHD may recover unpaid wages for H-2B, recruited, or corresponding workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.2\(a\)–\(b\)](#)

[29 CFR 503.16\(a\)–\(b\)](#)

[Field Assistance Bulletin No. 2021-3](#)

46c07 Facilities furnished to workers.

(a) Requirement to disclose facilities on job order.

If the employer provides the worker with the option of board, lodging, or other facilities, or intends to assist workers to secure such lodging, this benefit must be listed in the job order along with any wage deductions related to providing that benefit. Assisting workers in securing lodging consists of more than an employer's simply furnishing information (such as giving workers coming from remote locations a list of short-term rental facilities or a list of extended stay motels). Assistance could be reserving a block of rooms for employees and negotiating a discounted rate on the workers' behalf, or arranging to have housing provided at a subsidized cost for employees. Any such assistance may make it more feasible for a U.S. worker from outside the area of intended employment to accept the job, and therefore it should be included in the job order. The employer must furnish covered workers without H-2B visas, including corresponding workers (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)), or recruited workers, at least the same benefits as those offered to H-2B workers, including any housing.

Reference:

[80 FR 24042, 24062](#)

(b) Requirement to disclose wage deductions for facilities on job order.

Any cost that the employer charges for housing or other facilities must meet the criteria for permissible deductions listed in ETA's and WHD's regulations. Specifically, the job order must list all deductions not required by law (including those for housing or other facilities),

and these deductions must be limited to the reasonable cost or fair value of the lodging or other facilities. Deductions or costs incurred for facilities that are primarily for the benefit or convenience of the employer are not reasonable and may not be charged to the worker.

See [FOH 30c](#), discussing [29 CFR part 531](#), for further guidance on whether deductions are permissible or impermissible and, if permissible, at reasonable cost and fair value.

References:

[20 CFR 655.20\(c\)](#)

[29 CFR 503.16\(c\)](#)

[29 CFR part 531](#)

[FOH 30c](#)

(c) Deductions for housing.

- (1) Lodging is commonly recognized as being for the benefit and convenience of the employee, but there may be circumstances where housing is of little benefit to the employee. For example, lodging is primarily to the benefit of the employer where an employee must live on the employer's premises to meet some need of the employer, or where the employee must travel away from home to further the employer's business. The term "home," in this context, means the U.S. worker's residence or H-2B worker's temporary residence in the United States. Housing provided by employers with a need for a mobile workforce, such as those in the entertainment or reforestation industries where workers are in an area for a short period, need to be available for work immediately, or may not be able to easily procure temporary housing, is primarily for the employer's benefit and convenience and cannot be charged to the workers.
- (2) Employers may not include the cost of lodging as part of employees' wages if the lodging does not satisfy federal, state, or local laws, ordinances, or other requirements. For example, WHD will not permit the cost of housing to be credited toward wages if the lodging does not have or has been denied a required occupancy permit or is not zoned for residential use.

References:

[29 CFR 531.31](#)

[80 FR 24042, 24063](#)

[WHD Field Assistance Bulletin No. 2015-1 \(Dec. 17, 2015\)](#)

(d) Employee must receive benefit of facility.

Employees must receive the benefit of the facility for which the employer is taking a wage credit. If the employee does not reside in the housing (for example, in the period after the worker's visa has elapsed), no wage credit may be taken for the period in which the employee does not receive the benefit of the housing. The reasonable cost of the facility is determined on a workweek-by-workweek basis.

References:

[FOH 30c01\(c\)](#)
[WHD Field Assistance Bulletin 2015-1 \(Dec. 17, 2015\)](#)

(e) Reasonable cost of facilities.

- (1) Reasonable cost cannot exceed the actual cost to the employer of the board, lodging, or other facilities. Reasonable cost does not include a profit to the employer or to any affiliated person, and the employer must be able to show that the amounts charged to the worker are no more than the actual cost to the employer. Further details on items that may be considered in the actual cost of lodging can be found at [FOH 30c06\(c\)](#). If the employer does not maintain or provide WHD with records with respect to the actual cost of the lodging, WHD will not permit the employer to take the lodging deduction to reduce the worker below the required wage rate.

References:

[WHD Field Assistance Bulletin No. 2015-1 \(Dec. 17, 2015\)](#)

- (2) If the actual cost to the employer exceeds the rental value of the lodging, or if the reasonable cost otherwise appears to be excessive in relation to the facilities furnished, the employer may count only the lower “fair value” of the lodging toward wages. There is no specific formula for determining fair value, but the employer may consider average rental prices in the area for similar homes, or fair market rent data for a particular locality as published by the U.S. Department of Housing and Urban Development available at <http://www.huduser.org/portal/datasets/fmr.html>, by searching for comparable rental units online, or requesting information from local real estate brokers or other experts.

(f) If a violation occurs, WHD may recover unpaid wages for H-2B workers, recruited workers, or corresponding workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[29 CFR 531.3](#)

[80 FR 24042, 24062](#)

[WHD Field Assistance Bulletin 2015-1 \(Dec. 17, 2015\)](#)

46c08 Deductions and employer-provided items.

(a) Must make deductions required by law.

The employer must make all deductions from the worker’s paycheck required by law. Examples of deductions required by law include taxes payable by workers that are required to be withheld by the employer, and amounts due workers that the employer is required by court order to pay to another.

(b) Deductions not required by law.

- (1) The job order must specify all deductions not required by law that the employer will make from the worker's pay. The employer must disclose all deductions in the job order that it intends to make, as DOL considers the disclosure to be essential for giving workers sufficient information to make informed employment decisions. Any deductions not disclosed in the job order are prohibited.
- (2) The employer may make reasonable deductions from wages at the worker's request so long as the deduction is primarily for the benefit or convenience of the employee and the employer (or affiliated person) does not make a profit from the deduction. Union dues and health insurance premiums are examples of deductions that are often permissible.

(c) Prohibited deductions.

- (1) The employer may not make any deduction in which it, its agent, or its recruiter (or any affiliated person) derives any payment, rebate, commission, profit, or benefit, either directly or indirectly.
- (2) In addition to other requirements, any deductions not required by law must be truly voluntary and may not be a condition of employment. Deductions for any costs that are primarily for the benefit of the employer are never reasonable and therefore are never permitted to the extent that it brings the worker below the H-2B offered wage rate. There is no legal distinction between deducting a cost from a worker's wages and shifting a cost to an employee to bear directly. WHD applies the principles set forth in [29 CFR part 531](#) when determining which deductions have an effect on the H-2B offered wage. Examples of costs that DOL has long held to be primarily for the benefit of the employer include tools of the trade and other materials and services incidental to carrying on the employer's business; the cost of any construction by and for the employer; the cost of uniforms (whether purchased or rented) and their laundering, where the nature of the business requires the employee to wear a uniform; and transportation charges where the transportation is an incident of and necessary for employment.

(d) Deductions for required tools.

The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. Deductions for items such as damaged and lost equipment are not allowed if those deductions bring a worker's wage below the offered wage. Employers must provide standard equipment that allows employees to perform their job fully, but they are not required to provide, for example, equipment such as custom-made skis that may be preferred, but not needed by, ski instructors. This requirement does not prohibit employees from electing to use their own equipment, nor does it penalize employers whose employees voluntarily do so, so long as a bona fide offer of adequate, appropriate equipment has been made.

(e) If a violation occurs, WHD may recover unpaid wages for H-2B workers, recruited workers, or corresponding workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that

existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[80 FR 24042, 24063, 24065](#)

[20 CFR 655.20\(k\)](#)

[29 CFR 503.16\(c\), \(k\)](#)

[FOH 30c04](#)

46c09 Prohibited fees and contracts with third parties.

(a) Definition of agent.

An *agent*, for purposes of H-2B, is a legal entity or person who:

- (1) Is not under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, DOL, DHS, or the Executive Office for Immigration Review; and
- (2) Is authorized to act on behalf of an employer for temporary nonagricultural labor certifications purposes; and
- (3) Is not itself an employer, or a joint employer, with respect to a specific application; and
- (4) Is not an association or other organization of employers.

(b) May not seek or receive payment for certification, visa, or recruitment costs.

- (1) *Prohibition against seeking or receiving payment.*

The employer, its agent, its attorney, and employees may not seek or receive payment for any costs associated with obtaining either the H-2B labor certification or H-2B employment, including attorney/agent fees, TEC Application costs, DHS petition fees, or recruitment fees. This prohibition is also true for any travel and visa expenses regardless of whether the employer discloses them (see [FOH 46c11](#) for further information on travel expenses). Payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor.

- (2) *Recruiting expenses must be borne by employer.*

The recruitment of H-2B workers is an expense to be borne by the employer, and not by the H-2B worker. The exploitation of H-2B workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, has been widely reported. DOL remains concerned about exploitation of workers who have heavily indebted themselves to secure a place in the H-2B visa program. Such exploitation may adversely affect the wages and working conditions of U.S. workers, driving down wages and working conditions for all workers in the United States.

(3) *Requirement to reimburse costs incurred by worker.*

The employer must pay or reimburse the H-2B worker in the first workweek for any visa, border crossing, visa processing, recruitment, and other related fees incurred by the worker. Any fee that facilitates an employee obtaining the visa to work for the employer is considered a recruitment fee that must be borne by the employer. The employer need not pay passport or other charges primarily for the worker's benefit.

(c) **Recruiting contracts must incorporate prohibition against seeking or receiving payment.**

(1) *Contract must prohibit fees; requirement to reimburse fees paid.*

The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of H-2B workers, to seek or receive payments or other compensation from prospective workers. [29 CFR 503.16\(p\)](#) includes specific language that must be included in any contract with a foreign recruiter. Where WHD determines that workers have paid fees to foreign recruiters and the employer cannot demonstrate the requisite bona-fide contractual prohibitions, WHD will require the employer to reimburse the workers in the amount of these prohibited fees. Evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or has continued to use a recruiter about whom the employer has received credible complaints, could be an indication that the contract was not bona fide.

(2) *Partial defense of good faith.*

However, where a recruiter or agent has collected fees, but the employer has complied in good faith with this requirement and has contractually prohibited collecting prohibited fees from workers, and exercised reasonable diligence to ensure that its agents and others involved in the recruitment process, whether in the United States or abroad, adhere to this contractual prohibition, there is no willful violation.

(d) If a violation occurs, WHD may recover unpaid wages for H-2B workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[29 CFR 503.16\(j\)\(2\), \(o\)-\(p\)](#)
[80 FR 24042, 24087](#)

46c10 Three-fourths (3/4) guarantee.

(a) The employer must offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 12-week or 6-week period (Congress has

prohibited DOL from enforcing the three-fourths guarantee; see [FOH 46a02\(d\)](#)). A workday means the number of hours in a workday as stated in the job order.

- (b) For these calculations, the employer must consider a 12-week period (for certified periods of employment lasting at least 120 days), or a 6-week period (for certified periods of employment lasting fewer than 120 days).
- (c) The employer may count all hours actually worked by the worker during the applicable period in calculating whether the guarantee has been met.
- (d) The employer may count any hours that it offers but the worker fails to work (up to a maximum of the number of hours specified in the job order for a workday).
- (e) The employer's obligation to fulfill the three-fourths guarantee (Congress has prohibited DOL from enforcing the three-fourths guarantee; see [FOH 46a02\(d\)](#)) abates when the worker is terminated for cause or voluntarily abandons the job before the end of the employment period, and the employer notifies the OFLC (and DHS in the case of an H-2B worker) within two days.
- (f) If a violation occurs, WHD may recover unpaid wages for H-2B workers, recruited workers, or corresponding workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment and the three-fourths guarantee; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.20\(f\)](#)

[20 CFR 655.20\(y\)](#)

46c11 Inbound/outbound transportation and subsistence.

- (a) The employer must give to or reimburse the H-2B worker, corresponding worker (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)), or recruited worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. This obligation applies to workers who complete 50 percent of the employment period covered by the job order (not counting any extensions).
- (b) The FLSA requires the employer to pay at least the federal minimum wage in all workweeks. Therefore, although the H-2B regulations require payment of inbound travel and subsistence costs only for those workers who complete 50 percent of the period of employment, any travel/subsistence costs incurred by any FLSA-covered worker may not bring the worker's pay below the FLSA's requirement in the first workweek. Note that the Fifth Circuit, which covers Texas, Louisiana, and Mississippi, does not agree with WHD's interpretation that this reimbursement is required under the FLSA. *Castellanos Contreras v. Decatur Hotels LLC III*, 622 F.3d 393 (5th Cir. 2010).

- (c) The employer may arrange and pay for the transportation and subsistence directly, advance costs to the worker before his or her departure (at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence), or pay the worker for the reasonable costs incurred by the worker.
- (d) If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment, and the worker has no immediate subsequent H-2B employment, the employer must pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment departed to work for the employer.
- (e) DOL establishes the daily subsistence rate, which it updates annually, in a Federal Register Notice. More information can be found at: <https://www.dol.gov/agencies/eta/foreign-labor/wages/meals-travel-subsistence>.
- (f) If a violation occurs, WHD may recover unpaid wages for H-2B workers, recruited workers, or corresponding workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.20\(j\)](#)

[29 CFR 503.16\(j\)](#)

46c12 Recordkeeping.

- (a) The employer must furnish to the worker on or before each payday a written statement (*e.g.*, pay stub) detailing the worker's earnings for that pay period. The specific requirements for the earning statements are contained in [20 CFR 655.20\(i\)](#) and [29 CFR 503.16\(i\)\(2\)](#).
- (b) The employer must maintain and update accordingly proof of its recruitment efforts (see discussion in [FOH 46b01\(i\)](#)). [20 CFR 655.48](#) details the scope of the recruitment report.
- (c) The employer must maintain accurate and adequate records with respect to the workers' earnings, including but not limited to records showing the nature, amount, and location(s) of work performed; the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay; the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions or additions made to the worker's wages.
- (d) The employer must display and maintain in a conspicuous location at the place of employment a poster provided by DOL that sets out the rights and protections for H-2B workers and workers in corresponding employment. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)). The employer must display the poster in English, and in any language common to a significant portion of the workers if a poster in that language is made available by WHD. WHD will not require that an employer post a poster translated into a language that it does not print. However,

translations will be made in response to demand; employers and organizations that work with H-2B workers are encouraged to inform DOL about the language needs of the U.S. worker population.

- (e) If any worker(s) employed under the TEC Application or in corresponding employment (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)) abandons, absconds, or the employer terminates for cause before the end date of the employment specified in the TEC Application, the employer must notify OFLC in writing of the separation from employment not later than two workdays after the employer discovers the separation. In addition, the employer must notify DHS in writing of the separation of an H-2B worker. Abandonment or abscondment occurs after a worker fails to report to work at the regularly scheduled time for five consecutive working days without the employer's consent.
- (f) The employer participating in the H-2B visa program must retain records and documents for three years from the date the TEC Application is certified; or the date the TEC Application is denied, if adjudicated; or the date the DOL receives the letter of withdrawal sent in accordance with [20 CFR 655.62](#). Employers must retain, among other records, the job order placement, each worker's earnings, and hours worked. For the complete list of records to be retained, see [FOH 46d02\(d\)](#) and [20 CFR 655.56](#).
- (g) If a violation occurs, WHD may impose civil money penalties.

References:

[20 CFR 655.20\(i\), \(m\), \(y\)](#)

[20 CFR 655.56](#)

[29 CFR 503.16\(i\), \(m\), \(y\)](#)

[80 FR 24042, 24069](#)

[FOH 46d02\(d\)](#)

46c13 Employer-provided transportation.

- (a) All employer-provided transportation must comply with all applicable federal, state, and local laws and regulations.
- (b) At a minimum, the employer must use the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under the Federal Motor Carrier Safety Regulations at [49 CFR parts 390, 393, and 396](#).
- (c) If a violation occurs, WHD may impose civil money penalties.

References:

[49 CFR part 390](#)

[49 CFR part 393](#)

[49 CFR part 396](#)

46c14 No unfair treatment.

- (a) The employer (or any person the employer directs) may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has engaged in any of the following actions in relation to protections under the H-2B visa program or INA:
- (1) Filed any complaint, which includes actions a person may take to participate in or cooperate with a WHD investigation, such as speaking to a Wage & Hour investigator;
 - (2) Instituted, caused to be instituted, testified in, or is about to testify in any proceeding;
 - (3) Consulted with a worker's center, community organization, labor union, attorney, or legal assistance program;
 - (4) Exercised or asserted, on behalf of itself or others, any right or protection.
- (b) The employer may not take those prohibited actions against "any person." An employment relationship is not required.
- (c) If a violation occurs, WHD may compute make-whole relief for any person who has been discriminated against; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing certifications be revoked

References:

[20 CFR 655.20\(n\)](#)

[29 CFR 503.16\(n\)](#)

46c15 Compliance with other laws.

- (a) During the employment period specified on the TEC Application, the employer must comply with all applicable federal, state, and local employment-related laws and regulations, including health and safety laws. This includes 18 U.S.C. 1592(a), which prohibits employers, the employer's agents, or their attorneys from knowingly holding, destroying, or confiscating workers' passports, visas, or other immigration documents. An employer must comply with any applicable federal, state, and local laws requiring premium pay for overtime hours worked. Federal, state, and local laws may vary by the hours threshold at which overtime will be paid, the rate at which overtime will be paid, employer coverage, and employee eligibility for overtime. Where multiple overtime laws apply, the employer must comply with the law that provides the greatest benefit to the employee.
- (b) Where the FLSA overtime requirement applies, the employer must pay 1½ times the worker's regular rate of pay for all hours worked in excess of 40 per week. The H-2B worker's regular rate of pay can be no less than the required (or offered, if appropriate) wage.
- (c) If a violation occurs, WHD may recover unpaid wages for H-2B workers, recruited workers, or corresponding workers; impose civil money penalties; debar employers and/or agents or attorneys from participation in the program; and recommend to ETA/OFLC that existing

certifications be revoked. (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.20\(z\)](#)

[29 CFR 503.16\(z\)](#)

[Field Assistance Bulletin No. 2021-3](#)

46d ENFORCEMENT PROCESS

46d00 WHD's authority.

Under INA section 214(c)(14)(B), the Secretary of Homeland Security has delegated to the Secretary of Labor its authority to perform investigative and enforcement functions in the H-2B visa program. The Secretary, in turn, has delegated that authority to WHD. WHD may investigate to determine compliance with obligations under INA section 214(c), [20 CFR 655 subpart A](#), or [29 CFR part 503](#), in response to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, worksite, vehicles, structure, facility, place, and records (and transcribe, photograph, scan, video record, photocopy, or use any other means to record the content of the records or preserve images of places or objects), question any person, or gather any information, in whatever form, as may be appropriate.

Whenever the WHD Administrator determines there has been a violation or violations of the applicable program requirements and obligations, WHD is authorized to recover unpaid wages for workers. WHD may also impose civil money penalties; debar employers who commit certain violations from participation in the H-2B visa program; debar agents or attorneys who commit certain violations or participate in the employer's violations; recommend to ETA/OFLC that existing certifications be revoked; and seek reinstatement of improperly laid off or displaced U.S. workers.

References:

8 U.S.C. 1184(c)(14)(B)

[20 CFR 655 subpart A](#)

[29 CFR 503.7](#)

[29 CFR 503 subpart B](#)

46d01 Types of violations.

- (a) A violation exists when there has been a:
- (1) Willful misrepresentation of a material fact on the H-2B Registration, PWD Application, TEC Application, or H-2B Petition;
 - (2) Substantial failure to meet a term or condition of the H-2B Registration, PWD Application, TEC Application, or H-2B Petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

- (3) Willful misrepresentation of a material fact to the Department of State during the H-2B visa application process.
- (b) A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent:
- (1) knows its statement is false or that its conduct is a violation, or
 - (2) shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.
- (c) Whether a violation is a significant deviation from the terms and conditions of the H-2B Registration, PWD Application, TEC Application, or H-2B Petition, depends on factors that include, but are not limited to:
- (1) Previous history of violation(s) under the H-2B visa program;
 - (2) The number of workers affected by the violation(s);
 - (3) The gravity of the violation(s);
 - (4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and
 - (5) Whether U.S. workers have been harmed by the violation.
- (d) The H-2B requirements begin to apply on the date the employer's TEC Application is accepted. By submitting the approved H-2B Registration, PWD Application, the employer's survey attestation (Form ETA-9165), Appendix B of the Application for Temporary Employment Certification, and H-2B Petition, the employer represents that the statements on the forms are accurate and that it knows and accepts the obligations of the program.

References:

[29 CFR 503.19](#)

46d02 Employer cooperation.

- (a) An employer must cooperate with any DOL employee who is exercising or attempting to exercise DOL's authority to enforce the H-2B regulations.

References:

8 U.S.C. 1184(c)(14)(B)

[29 CFR 503.16\(bb\)](#)

[20 CFR 655.20\(bb\)](#)

- (b) Within 72 hours of a request by WHD, an employer must make available the documents and records required under [20 CFR 655 subpart A](#), and under [29 CFR 503.17](#) for copying, transcription, or inspection.

References:

[29 CFR 503.17\(d\)](#)

- (c) An employer participating in the H-2B visa program must retain records and documents for three years from the certification date of the TEC Application; from the adjudication date, if the TEC Application is denied; or the day DOL receives the letter of withdrawal sent in accordance with [20 CFR 655.62](#).

References:

[20 CFR 655.62](#)

[29 CFR 503.17\(b\)](#)

- (d) All employers filing a TEC Application must retain the following documents and records and must make them available for an audit or investigation:

- (1) Documents and records not previously submitted during the registration process that substantiate temporary need.
- (2) Proof of recruitment efforts, including a copy of the job order, posting of the job opportunity, advertisements, and contact with former U.S. workers, bargaining representatives, and community-based organizations, as well as any additional recruitment efforts that the certifying official may require, if applicable.
- (3) Documents supporting the recruitment report, such as evidence demonstrating that the requirement to contact former U.S. workers did not apply.
- (4) The final recruitment report and any supporting resumes and contact information.
- (5) Records of each worker's earnings, hours offered and worked, and other information as specified in [29 CFR 503.16\(i\)](#).
- (6) If appropriate, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in [29 CFR 503.16\(j\)](#).
- (7) Evidence of contact with U.S. workers who applied for the job opportunity in the TEC Application, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in [29 CFR 503.16\(r\)](#).
- (8) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment, including documents demonstrating that the U.S. worker had been offered the job opportunity, and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in [29 CFR 503.16\(r\)](#).
- (9) The written contracts with agents or recruiters and the list of the identities and locations of persons hired by or working for the agent or recruiter and these entities' agents or employees, as specified in [20 CFR 655.8–655.9](#).

- (10) Written notice to OFLC that an H-2B worker or worker in corresponding employment (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)) has separated from employment before the end date of employment specified in the TEC Application, as specified in [29 CFR 503.16\(y\)](#).
- (11) The H-2B Registration, job order, a copy of the TEC Application, and the original signed Appendix B of the Application.
- (12) The approved TEC Application, including all accompanying documents.
- (13) Any collective bargaining agreement(s), individual employment contract(s), or payroll records from the previous year necessary to substantiate any claim that certain incumbent workers are not included in corresponding employment, as specified in [20 CFR 655.5](#) (Congress has prohibited DOL from enforcing the definition of corresponding employment; see [FOH 46a02\(d\)](#)).

References:

[20 CFR 655.8–655.9](#)
[20 CFR 655.43, 655.48](#)
[29 CFR 503.16–503.17](#)

- (e) No person may interfere with or refuse to cooperate with a DOL official who is exercising or attempting to exercise DOL's investigative or enforcement authority in the H-2B visa program. It is a federal crime to do so.

References:

8 U.S.C. 1184(c)
18 U.S.C. 111
18 U.S.C. 114

- (f) WHD investigates in a manner that protects, to the extent permitted by law, the confidentiality of any complainant or other person who in good faith gives information to the WHD.

References:

[29 CFR 503.7\(c\)](#)