Employment and Training Administration
Office of Foreign Labor Certification
EMERGENCY GUIDANCE
Implementation of 2016 DOL Appropriations Act
January 5, 2016 (UPDATED)

Due to new requirements contained in the 2016 Department of Labor Appropriations Act, (Division H, Title I of Public Law 114-113) (2016 DOL Appropriations Act), which was signed into law on December 18, 2015, the Department of Labor's (Department's) Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC), is providing this emergency guidance to employers who are seeking to employ nonimmigrant workers in temporary or seasonal nonagricultural employment. This document is intended to provide operational guidance for employers seeking to obtain prevailing wage determinations and temporary labor certifications under the H-2B nonimmigrant visa classification. In the coming weeks, OFLC will integrate the guidance contained in this document into the applicable program pages on its website at http://www.foreignlaborcert.doleta.gov.

The guidance contained within this document supersedes all other related program guidance and Frequently Asked Questions (FAQs).

This document contains the following sections:

- New Requirements of 2016 DOL Appropriations Act,
- Guidance Concerning Requests for H-2B Prevailing Wage Determinations
- Guidance Concerning Requests for H-2B Temporary Labor Certification

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I. Relevant Sections of 2016 DOL Appropriations Act

The 2016 DOL Appropriations Act contained the following provisions that affect the H-2B program administered by the OFLC:

SEC. 111. (a) FLEXIBILITY WITH RESPECT TO THE CROSSING OF H–2B NONIMMIGRANTS WORKING IN THE SEAFOOD INDUSTRY.—

(1) IN GENERAL.—Subject to paragraph (2), if a petition for H–2B nonimmigrants filed by an employer in the seafood industry is granted, the employer may bring the nonimmigrants described in the petition into the United States at any time during the 120-day period beginning on the start date for which the employer is seeking the services of the nonimmigrants without filing another petition.

(2) REQUIREMENTS FOR CROSSINGS AFTER 90TH DAY.—An employer in the seafood industry may not bring H–2B nonimmigrants into the United States after the date that is 90

days after the start date for which the employer is seeking the services of the nonimmigrants unless the employer—

(A) completes a new assessment of the local labor market by—

(i) listing job orders in local newspapers on 2 separate Sundays; and

(ii) posting the job opportunity on the appropriate Department of Labor Electronic Job Registry and at the employer's place of employment; and

(B) offers the job to an equally or better qualified United States worker who—

(i) applies for the job; and

(ii) will be available at the time and place of need.

(3) EXEMPTION FROM RULES WITH RESPECT TO STAGGERING.— The Secretary of Labor shall not consider an employer in the seafood industry who brings H–2B nonimmigrants into the United States during the 120-day period specified in paragraph (1) to be staggering the date of need in violation of section 655.20(d) of title 20, Code of Federal Regulations, or any other applicable provision of law.

(b) H–2B NONIMMIGRANTS DEFINED.—In this section, the term ''H–2B nonimmigrants'' means aliens admitted to the United States pursuant to section 101(a)(15)(H)(ii)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(B)).

SEC. 112. The determination of prevailing wage for the purposes of the H–2B program shall be the greater of— (1) the actual wage level paid by the employer to other employees with similar experience and qualifications for such position in the same location; or (2) the prevailing wage level for the occupational classification of the position in the geographic area in which the H–2B nonimmigrant will be employed, based on the best information available at the time of filing the petition. In the determination of prevailing wage for the purposes of the H–2B program, the Secretary shall accept private wage surveys even in instances where Occupational Employment Statistics survey data are available unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.

SEC. 113. None of the funds in this Act shall be used 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, or any references thereto. Further, for the purpose of regulating admission of temporary workers under the H–2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B).

SEC. 114. None of the funds in this Act shall be used to implement 20 CFR 655.70 and 20 CFR 655.71.

II. Guidance Concerning Requests for H-2B Prevailing Wage Determinations

Guidance on H-2B Prevailing Wage Determinations is set forth in a number of FAQs that can be accessed by clicking here.

IMPORTANT NOTICE (*UPDATED January 5, 2016*)

Issuance of Prevailing Wage Determinations requesting use of a private wage survey

Certain provisions contained in the 2016 DOL Appropriations Act require non-substantive modifications to Form ETA-9165. In order to be in compliance with the 2016 DOL Appropriations Act, OFLC received emergency approval under the Paperwork Reduction Act from the Office of Management and Budget (OMB) on non-substantive changes to Form ETA-9165. To obtain a copy of the revised Form ETA-9165 and instructions, please visit the OFLC website at https://www.foreignlaborcert.doleta.gov/form.cfm.

Employer requests for a prevailing wage determination based on a private wage survey submitted on or after December 19, 2015, must be accompanied by the revised Form ETA-9165. The CO will issue a Request for Information requiring the employer submit the revised Form ETA-9165 for any survey-based request for a prevailing wage determination submitted without the revised Form ETA-9165.

III. Guidance Concerning Requests for H-2B Temporary Labor Certification

A. Implementation of Seafood Staggered Entry of Workers Provision

Sections 111(a) and (b) of the 2016 DOL Appropriations Act permit the staggered entry of H-2B workers employed in the seafood industry under certain conditions. The H-2B Interim Final Rule (Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042 (April 29, 2015) (2015 IFR)), which became effective on April 29, 2015, already implements this statutory provision under the procedures set forth at 20 Code of Federal Regulations 655.15(f).

Therefore, the Department's current regulatory framework complies with requirements contained in Section 111(a). To view frequently asked questions related to implementing these requirements under the H-2B IFR, please click here.

B. Implementation of Prohibitions on Using 2016 DOL Appropriations Act Funds to Enforce the Definitions of Corresponding Employment (20 CFR 655.5) or the Three-Fourths Guarantee (20 CFR 655.20), or any references thereto.

The 2015 IFR requires employers of H-2B workers to provide at least the same wages and other working conditions as they provide to H-2B workers to certain U.S. workers performing substantially the same work identified in the labor certification or performed by

the H-2B workers. Additionally, an employer is required to offer workers full-time employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period (or 6-week period if the employment covered by the job order is less than 120 days).

The 2016 DOL Appropriations Act did not vacate these regulatory provisions, and they remain in effect, thus imposing a legal duty on H-2B employers even though that legislation prohibits the Department from using any Fiscal Year (FY) 2016 funds to enforce them. While the Department will not use any FY 2016 funds to enforce those provisions, the Department will still enforce the requirement that employers must offer at least the same wages and working conditions to U.S. workers who are hired during the recruitment period for positions covered by the relevant H-2B Application for Temporary Employment Certification, Form ETA-9142B.

Therefore, the following guidance to employers is in effect:

1. The Department will not spend 2016 DOL Appropriations Act funds to require employers to offer the three-fourths guarantee as part of the assurance and content of job orders submitted to the State Workforce Agency under 20 CFR 655.18(b)(17);

2. The Department will not spend 2016 DOL Appropriations Act funds to require employers to offer the three-fourths guarantee as part of the content for advertising the job opportunity under 20 CFR 655.41 for all positive recruitment conducted under 20 CFR 655.40-.46;

3. When issuing a Notice of Acceptance, the Certifying Officer (CO) will remind the employer of the following:

   (1) The obligation to offer to H-2B workers and to U.S. workers who are hired during the recruitment period for positions covered by the relevant H-2B Application for Temporary Employment Certification, Form ETA-9142B a wage that equals or exceeds the Prevailing Wage Determination provided by the NPWC; and

   (2) An updated recruitment report must be made available to the Department and/or other Federal agencies in the event of an investigation conducted pursuant to applicable authority.

4. Prior to the issuance of a final determination by the CO, the employer may request amendments to the period of employment or number of workers, or to make other changes to the Form ETA-9142B, Application for Temporary Labor Certification, and/or job order. The CO will continue to evaluate the requested amendments based on the factors identified under 20 CFR 655.35 taking into consideration the applicable 2016 DOL Appropriations Act provisions. For information on the procedures employers must use to request an amendment of an H-2B application and/or job order before the CO issues a final determination, please click here to review FAQ Round 11, Question #21.

Important Reminders:

- A copy of the modified job order must be provided to the CO;
- The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order; and
- In accordance with 20 CFR 655.35(d), amendments to certified H-2B applications are not permitted.

IMPORTANT NOTICE (*UPDATED January 5, 2016*)

Issuance of Temporary Labor Certification Determinations

The new provisions contained in the 2016 DOL Appropriations Act require non-substantive modifications to Appendix B of the Form ETA-9142B. Specifically, the current Appendix B contains references to an employer's compliance with the wage offer guarantee, corresponding employment, three-fourths guarantee, and the definition of temporary need under 20 CFR 655.6. In order to be in compliance with the 2016 DOL Appropriations Act, OFLC received emergency approval under the Paperwork Reduction Act from the Office of Management and Budget (OMB) on non-substantive changes to the Appendix B. Please visit the OFLC website at https://www.foreignlaborcert.doleta.gov/form.cfm to obtain a copy of the revised Appendix B.

Prior to February 1, 2016, employers with either a pending H-2B application or those who file a new H-2B application containing the previous Appendix B will be provided with a copy of the revised Appendix B at the time the CO issues a certification decision. They will also receive instructions in the Final Determination Letter regarding how to complete the revised Appendix B for submission to the United States Citizenship and Immigration Services. To view a sample Final Determination Letter for certifications, please click here.

On or after February 1, 2016, employers or their authorized representatives filing a new H-2B application must submit a signed and dated copy of the revised Appendix B containing the program assurances and obligations that comply with the 2016 DOL Appropriations Act. Otherwise, the CO will issue a Notice of Deficiency requesting that the employer provide a signed and dated copy of the revised Appendix B.

C. Implementation of Prohibition on Conducting Audit Examinations (20 CFR 655.70) and Assisted Recruitment (20 CFR 655.71) Activities

Section 114 of the 2016 DOL Appropriations Act provides that "None of the funds in this Act shall be used to implement 20 CFR 655.70 and 20 CFR 655.71". Therefore the OFLC is not authorized to spend FY 2016 funds to select new H-2B applications for audit examination, maintain the processing of current audit examinations or require the employer to engage in assisted recruitment (also known as supervised recruitment). Therefore, OFLC will issue discontinuation notices to all employers who are currently under the audit examination process. The OFLC will take no further action on pending audit cases and employers are not required to provide any further information or responses to the CO in relation to a pending audit examination.

Similarly, for any employer who received a notification of assisted recruitment, the OFLC will issue a notification discontinuing the period of assisted recruitment and advising the employer to file future H-2B applications under the normal program requirements contained at 20 CFR 655, Subpart A, including the employer-conducted recruitment provisions at 20 CFR 655.40-.46.

To view a sample audit discontinuation notice, please click here.

To view a sample supervised recruitment discontinuation notice, please click here.