

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2015 H-2B Interim Final Rule FAQs

Round 10: Integrity Measures

Audit

1. How does the Department select cases for audit in the H-2B program?

The Certifying Officer (CO) retains sole discretion to choose which *Applications for Temporary Employment Certification* will be audited, including selecting applications using a random assignment method.

Important Note: Under the 2015 H-2B Interim Final Rule, the Department retains the ability to audit any adjudicated application, including those applications that are certified, denied or withdrawn.

2. Why would the Department audit H-2B applications that have been denied?

In order to ensure program integrity, the Department has determined that there is value in auditing denied, as well as certified, applications because the consideration of past applications, regardless of adjudicatory outcome, provides a more complete record of the employer's compliance or noncompliance with program requirements.

3. I received a Notice of Audit Examination related to my H-2B certification. What happens next?

An employer who receives a Notification of Audit Examination (NOA) letter must submit the documentation requested to the Certifying Officer (CO) by the deadline stated in the NOA. Upon receipt and review of the employer's documentation, the CO may issue one or more Requests for Supplemental Information, identifying any additional information required prior to making a final determination. After reviewing the full audit file, the CO will inform the employer of the results of the audit.

4. What are the consequences of not responding or not fully complying with the audit process?

An employer's failure to fully comply with the audit process may result in the Certifying Officer ordering assisted recruitment for future filings, revocation of the certification, or the employer's debarment from the H-2B program and any other foreign labor certification program the Department administers.

Assisted Recruitment

5. What is Assisted Recruitment?

The Assisted Recruitment process allows the Certifying Officer (CO) to more closely monitor an employer's advertisement and recruitment process. An employer subject to Assisted Recruitment must comply with all normal recruitment requirements as well as additional instructions from the CO. For example, an employer subject to assisted recruitment may be required to satisfy additional requirements which may include, but are not limited to, the following:

- ✓ Provide the CO with a draft of its newspaper advertisement for review and approval before it places the advertisement;
- ✓ Use specific sources to recruit for U.S. workers (e.g., newspapers or other publications);
- ✓ Keep advertisements and/or the job order posted longer than the normal minimum timeframe.

Moreover, the CO may require the employer to submit evidence of the recruitment and results, such as proof of publication (e.g., tearsheets) for all advertisements, proof of the posting of the job order, and /or proof of contact with all SWA referrals and former U.S. workers.

6. Why would I be ordered to conduct Assisted Recruitment?

The Certifying Officer (CO) may require an employer to engage in Assisted Recruitment for future applications if the CO determines as a result of an audit or otherwise, that a violation occurred that does not merit debarment. In addition to remedying program violations, the Department expects the Assisted Recruitment process to help employers who, due to program inexperience or confusion, have made mistakes that indicate a need for further assistance from the CO.

7. How will an employer know that it has been selected for Assisted Recruitment?

The Certifying Officer (CO) will notify the employer (and its attorney or agent, if applicable) in writing of the requirement to participate in Assisted Recruitment for any future H-2B applications filings. In the notice ordering Assisted Recruitment, the CO will designate the period, which may be up to 2 years, during which the employer must comply with Assisted Recruitment requirements. The notification will state the reason(s) the employer was selected for assisted recruitment and will offer the employer an opportunity to appeal being selected for assisted recruitment. The employer's appeal will be governed by the procedures in 20 CFR 655.61. An employer's agreement to comply with the assisted recruitment requirements will constitute their inclusion as bona fide conditions and terms of the *Application for Temporary Employment Certification*.

8. What will happen if I do not comply with the Assisted Recruitment process?

If an employer materially fails to comply with the Assisted Recruitment requirements ordered, the employer's ETA Form 9142, *Application for Temporary Employment Certification*, will be denied. Additionally, the Certifying Officer may pursue debarment of the employer and/or its attorney or agent. However, an employer may initially appeal being selected for assisted recruitment consistent with 20 CFR 655.71(b) and 655.61. If the employer prevails on its appeal, it will not be required to undergo assisted recruitment.

Revocation

9. What is revocation?

A revocation is an invalidation of an approved temporary labor certification that forecloses the employer's ability to continue to employ H-2B workers in connection with that temporary labor certification.

10. What recourse do I have if I receive a Notice of Revocation?

An employer may contest the Office of Foreign Labor Certification (OFLC) Administrator's determination to revoke a temporary labor certification. The Notice of Revocation will contain a detailed statement of the grounds for the revocation. Within 10 business days of the Notice of Revocation issuance date, the employer may submit rebuttal evidence to the OFLC Administrator for consideration. Alternatively, within the same timeframe, the employer may appeal to the Chief Administrative Law Judge of the Board of Alien Labor Certification Appeals.

11. What are the criteria for revoking an H-2B temporary labor certification?

The Office of Foreign Labor Certification (OFLC) Administrator has the authority to revoke an approved H-2B labor certification under certain conditions. Revocation is intended as a remedy for substantial violations, such as fraud or willful misrepresentation of a material fact in the application process, that would make the issuance of the temporary labor certification not justified. The Department also considers revocation an appropriate remedy where an employer substantially fails to comply with any of the terms and conditions of the certification, fails to cooperate with a Departmental investigation, audit, or law enforcement function, or fails to comply with one or more sanctions or remedies imposed by the Department.

12. I received a Notice of Revocation. What happens if I do not submit rebuttal evidence or appeal the notice?

Unless an employer either submits rebuttal evidence to the Office of Foreign Labor Certification (OFLC) Administrator or an appeal to the Department of Labor's Board of Alien Labor Certification Appeals (BALCA) within 10 business days of the Notice of Revocation issuance date, the Notice of Revocation is the final agency action, taking effect at the end of the 10-day period.

13. I submitted rebuttal evidence to the Office of Foreign Labor Certification (OFLC) after receiving a Notice of Revocation. What will happen next?

Within 10 business days of receiving rebuttal evidence from an employer in response to a Notice of Revocation, the OFLC Administrator will inform the employer of the final determination on the revocation. If the OFLC Administrator determines the certification should be revoked, the employer may appeal the final determination in writing to the Chief Administrative Law Judge of the Department of Labor's Board of Alien Labor Certification (BALCA) at the following address:

Chief Administrative Law Judge
U.S. Department of Labor
800 K Street NW, Suite 400-N
Washington, DC 20001-8002

Unless the employer submits an appeal to BALCA, the final determination becomes the final agency action.

14. What obligations does an employer have in the event of a revocation?

If an H-2B temporary labor certification is revoked, the employer remains responsible for:

- ✓ Reimbursing the workers for the cost of actual inbound transportation and other expenses;
- ✓ Paying the workers' outbound transportation expenses;
- ✓ Paying the workers' wages in the amount due under the three-fourths guarantee; and
- ✓ Providing any other wages, benefits, and working conditions due or owing to the workers.

Debarment

15. What is debarment?

Debarment is the disqualification of an employer or its successor in interest, or an attorney or agent that has willfully misrepresented a material fact or substantially failed to comply with the terms and conditions of the program. from receiving future labor certifications for a period of up to 5 years.

16. When may the Department debar an employer, attorney, or agent?

The Department may debar an employer or its successor in interest, or an attorney or agent when it determines that the party willfully misrepresented material facts or substantially failed to comply with the terms and conditions set forth in any of the following:

- H-2B Registration
- Application for Prevailing Wage Determination
- H-2B Application for Temporary Employment Certification
- H-2B Petition for a Non-Immigrant Worker

17. What constitutes substantial failure to meet the required terms and conditions?

A substantial failure to meet a term or condition of an *H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition* occurs when an employer or its successor in interest, or an attorney, or agent willfully fails to comply in a way that results in a significant deviation from the required terms or conditions.

The Department may pursue debarment for substantial failure (i.e., willful failure) to meet any of the terms and conditions of an *H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition* or to the Department of State during the visa application process.

18. What constitutes a willful violation?

A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer or successor in interest, or an attorney, or agent: 1) knows a statement is false, 2) knows that the conduct is in violation, or 3) shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions. The Department may pursue debarment for willful misrepresentation of a material fact in the *H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition* or to the Department of State during the visa application process.

19. What constitutes a significant violation?

To determine whether a violation is significant, the Department may consider factors including, but not limited to, the following:

- Previous history of violation(s) under the H-2B program;

- The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);
- The gravity of the violation(s);
- 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
- Whether U.S. workers have been harmed by the violation.

20. What violations warrant debarment?

The OFLC Administrator must debar an employer who committed a:

(1) Willful misrepresentation of a material fact in its *H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition*;

(2) Substantial failure to meet any of the terms and conditions of its *H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, 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 U.S. Department of State during the visa application process.

Specific debarable violations must be willful or significant and include but are not limited to:

- Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2B workers and/or workers in corresponding employment;
- Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
- Failure to comply with the employer's obligations to recruit U.S. workers;
- Improper layoff or displacement of U.S. workers or workers in corresponding employment;
- Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under 20 CFR part 655 or 29 CFR part 503;
- Failure to comply with the Notice of Deficiency process under 20 CFR part 655;
- Failure to comply with the assisted recruitment process under 20 CFR part 655;

- Impeding an investigation of an employer under 29 CFR part 503 or an audit under 20 CFR part 655;
- Employing an H-2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;
- A violation of the requirements of 20 CFR 655.20(o) or (p), addressing prohibition on employees' paying fees and contractual prohibition of passing fees to employees by third parties;
- A violation of any of the provisions listed in 20 CFR 655.20(r), addressing discriminatory hiring practices;
- Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;
- Fraud involving the *H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or the H-2B Petition*; or
- A material misrepresentation of fact during the registration or application process.

21. I received a Notice of Debarment. What are my options?

Upon receipt of a Notice of Debarment, the party subject to the notice may either submit rebuttal evidence or request a hearing within 30 calendar days of the Notice of Debarment issuance date. The Notice of Debarment will include an explanation of the grounds for the debarment and the duration of the debarment period to be imposed. If the party does not file rebuttal evidence or request a hearing within 30 calendar days, the Notice of Debarment becomes the final agency action and takes effect immediately when the 30-day response period ends.

Submit Rebuttal Evidence: Filing rebuttal evidence stays the debarment pending the outcome of proceedings. Within 30 calendar days of receiving rebuttal evidence, the OFLC Administrator will review the evidence and inform the party of the final determination on the debarment. If the OFLC Administrator determines that the party should be debarred, OFLC will inform the party of its right to request a hearing within 30 calendar days. Where the party does not request a hearing, OFLC's decision becomes final and will take effect immediately at the end of the 30-day period.

Request a Hearing: To request a debarment hearing within 30 calendar days of the date of issuance of the Notice of Debarment or, if the party chose to submit rebuttal evidence, the OFLC Administrator's final determination, the party must submit its request in writing to the Chief Administrative Law Judge (ALJ) of the Department of Labor's Board of Alien Labor Certification (BALCA) at the following address:

Chief Administrative Law Judge

U.S. Department of Labor
800 K Street NW, Suite 400-N
Washington, DC 20001-8002

The party must simultaneously send a copy of the request for hearing to the OFLC Administrator. Within 60 calendar days after the hearing process is complete, the ALJ will issue a decision affirming, reversing, or modifying the OFLC Administrator's determination.

22. I requested a hearing of the OFLC Administrator's debarment decision. I disagree with the Board of Alien Labor Certification (BALCA) decision. What are my options?

Either party may, within 30 calendar days of BALCA's decision, petition the Administrative Review Board (ARB) to review BALCA's decision. Absent an appeal to the ARB, BALCA's decision is the final decision.

If either party requests review, ARB will decide whether to accept the petition within 30 calendar days of receipt. Unless ARB accepts the petition, the decision of BALCA is the final decision. If ARB accepts the petition, the acceptance stays BALCA's decision pending the outcome of proceedings. The ARB will issue a final decision within 90 calendar days of accepting the petition. Its decision will be served on all parties and BALCA.

23. Is Office of Foreign Labor Certification (OFLC) the only office able to debar me from the H-2B Program?

No. Under the 2015 H-2B Interim Final Rule, OFLC and the Wage and Hour Division (WHD) have concurrent authority to debar. OFLC and WHD make efforts to coordinate their activities to avoid duplicating program integrity efforts.

24. How will debarment from the H-2B Program impact my ability to participate in other employment-based immigration programs administered by the Department?

Debarment from the H-2B program will simultaneously disqualify a party from participating in any labor certification programs the Department administers for the period of time set forth in the final debarment decision.

25. How long will a debarment from the H-2B program last?

Under the 2015 H-2B Interim Final Rule, the Office of Foreign Labor Certification Administrator may impose a debarment period ranging from one to five years.