U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2015 H-2B Interim Final Rule FAQs
<u>**Round 12: Job Order and Application Filing and Processing: Emergency
Procedures and Post-Certification Amendments**</u>

Note: The numbering of the FAQs reflects their placement within existing 2015 H-2B
IFR FAQs.

JOB ORDERS AND APPLICATION FILING AND PROCESSING

Emergency Procedures

4. **I am unable to use the H-2B certification I received because the statutory H-
    2B cap administered by the United States Citizenship and Immigration
    Services (USCIS) was reached. Can I file a new H-2B application for the
    remaining portion of my need using the emergency situations procedures?**

    No. Under 20 CFR 655.17, an employer may request a waiver of the time
    period(s) for filing an *H-2B Registration* and/or an *H-2B Application for
    Temporary Employment Certification* based on "good and substantial" cause,
    provided that the employer has sufficient time to thoroughly test the domestic
    labor market on an expedited basis and the Certifying Officer to make a final
    determination as required by the regulation. Good and substantial cause
    includes the substantial loss of U.S. workers due to Acts of God, or a similar
    unforeseeable human-made catastrophic event (e.g., oil spill or controlled
    flooding) that is wholly outside the employer's control, unforeseeable changes in
    market conditions, or pandemic health issues. The burden of proof is on the
    employer to demonstrate the unforeseeable circumstances supporting a request
    for a filing on an emergency basis.

    The Department considers USCIS's announcement that the statutory cap on H-
    2B visas has been reached, which may occur with regularity, every six months
    depending on H-2B visa need, as foreseeable, and therefore not within the
    meaning of "good and substantial cause" that would justify a request for
    emergency procedures.

POST-CERTIFICATION

1. **I received a temporary labor certification for H-2B workers with a start date of work before April 1st. However, the United States Citizenship and Immigration Services (USCIS) announced that the statutory cap on H-2B visas for work start dates between October 1st and March 30th was reached and is no longer available. I now need to access H-2B visas for work start dates beginning April 1st. Can I request an amendment to my certified H-2B application to change my start date of work to April 1st?**

    No. Consistent with the requirements of 20 CFR 655.35, an employer may submit a request to amend its *H-2B Application for Temporary Employment Certification*, Form ETA-9142B, and/or job order to increase the number of H-2B workers, change the period of employment, or make other changes before certification, but the regulations do not permit any amendments after certification. See 20 CFR 655.35(d).

    Accordingly, the dates of need on a certification cannot be amended post certification, even where an employer cannot use the certification due to the statutory cap. **However**, the employer may file a new *H-2B Application for Temporary Employment Certification* and job order with the Chicago National Processing Center (NPC), for the period of need on or after April 1st, and conduct new test of the labor market for that period of need.

    Important Reminder: The Department considers foreseeable USCIS's announcement that the statutory cap on H-2B visas has been reached, because such an announcement may occur with regularity, every six months depending on H-2B visa need. Therefore, the fact that USCIS announces that the statutory H-2B cap was reached after an employer has a labor certification but before USCIS has granted the request for H-2B visas will not be considered good and substantial cause for purposes of justifying a request for emergency procedures under 20 CFR 655.17. If the employer chooses to file a new H-2B application, it must satisfy all filing requirements of a new application (e.g., a prevailing wage determination that is valid at the time of filing and a start date of need no less than 75 calendar days from the filing date).