Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations

I. General

A. An H–2B temporary nonagricultural worker is an alien who is coming temporarily to the U.S. to perform temporary services or labor if qualified U.S. workers capable of performing such services or labor are not available, and whose employment will not adversely affect the wages and working conditions of similarly employed U.S. workers.

B. Immigration and Naturalization Service (INS) regulations at 8 CFR 214.2(h)(6) establish requirements for the H-2B visa classification. INS regulations require: (1) That the H-2B petitioner be a U.S. employer, or the authorized representative of a foreign employer having a location in the Untied States; and (2) that the employer apply for temporary labor certification with the Department of Labor (DOL) prior to filing a petition with INS to classify an alien as an H-2B worker in all areas of the United States, except the Territory of Guam. In Guam, an employer must apply to the Governor of Guam for an H-2B temporary labor certification.

C. A temporary labor certification is advice from the Secretary of Labor to INS on whether or not U.S. workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers. The INS is not bound by DOL's certification or notice that certification cannot be made.

D. DOL regulations at 20 CFR 655 Subpart A—Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States (H-2B Workers) govern the labor certification process for temporary employment in the U.S. under the H-2B visa classification. They require that DOL, through the appropriate Regional Administrator of the Employment and Training Administration, issue a temporary labor certification if it finds that qualified persons in the U.S. are not available and that the terms of employment will not adversely affect the wages and working conditions of similarly employed workers in the U.S. In making its findings, DOL considers such matters as the employer's attempts to recruit U.S. workers and the appropriateness of the wages and working conditions offered, and the policies for the U.S. Employment Service set forth at 20 CFR 652 and 20 CFR 655, subparts A, B and C.

E. This document clarifies and updates procedures issued by ETA in General Administration Letter (GAL) 10–84 and Changes 1 and 2, to carry out responsibilities of making labor certification determinations pursuant to regulations at 8 CFR 214.2(h)(6) and 20 CFR 655, subpart A. It conforms DOL standards for determining the temporary nature of a job offer under the H–2B classification with those of INS and modifies DOL recruitment requirements to provide for a more effective test of the labor market for available U.S. workers. These procedures do not apply to applications filed on behalf of

aliens in the entertainment industry and in professional team sports.

II. Standards for Determining the Temporary Nature of a Job Offer Under the H–2B Classification

A. A job opportunity is temporary under the H–2B classification if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. As a general rule, the period of the employer's need must be 1 year or less, although there may be extraordinary circumstances where the need may be for longer than 1 year. The labor certification application may be filed for up to, but not exceeding, 12 months. If there are unforeseen circumstances where the employer's need exceeds 1 year, a new certification is required for each period beyond 1 year.

Temporary employment should not be confused with part-time employment which does not qualify for temporary (or permanent) labor certification.

B. The employer's need for the services or labor shall be either: (1) A one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need.

1. One-time Occurrence

The employer must establish: (1) that it has not employed workers to perform the services or labor in the past; and (2) that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

2. Seasonal Need

The employer must establish that the service or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is needed is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees.

3. Peakload Need

The employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and its needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand with temporary employees who will not become a part of the regular operation.

4. Intermittent Need

The employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers for short periods.

III. Filing Instructions

A. An employer that wants to use foreign workers for temporary employment must file a temporary labor certification application with the State Employment Security Agency (SESA) serving the area of employment.

- B. Every temporary application shall include:
- 1. An original and one copy of Form ETA 750, Part A, the offer of employment portion of the Application for Alien Employment Certification form signed by the employer. Part B, Statement of Qualifications of Alien, is not required.
- 2. Documentation of any efforts to recruit U.S. workers the employer may have made before filing the application.
- 3. A statement explaining why the job opportunity is temporary and why the employer's need for the work to be done meets the standard of either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.
- C. To allow for enough recruitment of U.S. workers and enough processing time by State and Regional Offices, the State Employment Security Agency (SESA) shall advise employers to file requests for temporary labor certification at least 60 days before the labor certification is needed in order to receive a timely determination.
- D. Unless the Certifying Officer specifies otherwise, the SESA should return to employers requests for temporary labor certification filed more than 120 days before the worker is needed and advise them to refile the application no more than 120 days before the worker is needed. This is necessary since the availability of temporary U.S. workers changes over short periods of time and an adequate test of the labor market cannot be made for a longer period.
- E. More than one alien may be requested on an application if they are to do the same type of work on the same terms and conditions, in the same occupation, in the same area(s) of employment during the same period. However, the number requested may not exceed the actual number of job openings. The number of openings the employer intends to fill must also be specified in the advertisement and the job order required in section IV of these instructions.
- F. If the employer's agent files the application, the employer must sign the "authorization of agent" statement on the Application for Alien Employment Certification which authorizes the agent to act on the employer's behalf. The employer is fully responsible for the accuracy of all representations made by the agent on the employer's behalf. An attorney must file a Notice of Appearance (Form G–28) naming the attorney's client(s).
- G. If extraordinary circumstances establish a need that requires the services of the alien beneficiary for more than a year, a new application must be filed (see section II.A). However, in no instance may the time for which a particular job be certified exceed 3 unbroken years.
- H. When the job opportunity requires the work to be done in more than one location, the application must include the itinerary of locations and dates of work in each location. Such applications will be filled with the SESA having jurisdiction over the area where the employment will begin.

IV. State Job Service Processing

A. Upon receiving a request for temporary labor certification, the SESA shall review the