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**DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services**

[CIS No. 2659-20; DHS Docket No. USCIS-2019-0025]

Notice of DHS's Requirement of the Temporary Labor Certification Final Determination under the H-2B Temporary Worker Program

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: The Department of Homeland Security, U.S. Citizenship and Immigration Services, is announcing, through this notice, that a printed copy of the electronic final determination form granting temporary labor certification under the H-2B program through the U.S. Department of Labor's new Foreign Labor Application Gateway system must be submitted with an H-2B petition as evidence of an original approved temporary labor certification.

DATES: This notice is applicable [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529-2120, Telephone Number (202)-272-8377 (not a toll-free call). Individuals with a hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

The Immigration and Nationality Act (INA), as amended, establishes the H-2B nonimmigrant classification for a nonagricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS), for classification of prospective temporary workers as H-2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa. *Id.* Finally, the INA requires that “[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],¹ after consultation with appropriate agencies of the Government.” INA section 214(c)(1), 8 U.S.C. 1184(c)(1).

DHS regulations provide that an H-2B petition for temporary employment in the United States other than on Guam must be accompanied by an approved temporary labor certification (TLC) from the U.S. Department of Labor (DOL) issued pursuant to regulations established at 20 CFR part 655.² 8 CFR 214.2(h)(6)(iii)(A), (C)-(E), (h)(6)(iv)(A); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6), INA section 214(c)(1), 8 U.S.C. 1184(c)(1). The TLC serves as DHS’s

¹ As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

² In situations involving employment on Guam, the petitioning employer shall apply for a temporary labor certification with the Governor of Guam. *See* 8 CFR 214.2(h)(6)(iii).

consultation with DOL regarding: (i) whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity, and (ii) whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iv)(A).

Historically, when a TLC was granted, DOL sent an original approved Form ETA-9142B, Application for Temporary Employment Certification, and a Final Determination letter to the employer with a copy, if applicable, to the employer's authorized attorney or agent. 20 CFR 655.52. The original paper TLC was sent by means normally ensuring next day delivery, and the employer retained a signed copy of the certified Form ETA-9142B and the original signed Appendix B, as required by 20 CFR 655.56(c)(12). The employer or its authorized attorney or agent then attached the original paper TLC, along with all other supporting documentation and appropriate fees, to the Form I-129, Petition for a Nonimmigrant Worker, and filed the Form I-129 with USCIS. On October 15, 2012, DOL implemented electronic filing in the H-2B labor certification program, but continued to issue original certified ETA-9142 TLCs on paper.³

On May 17, 2019, and in accordance with the Paperwork Reduction Act (PRA), the Office of Management and Budget (OMB) approved revisions to DOL's H-2B Foreign Labor Certification Program information collection.⁴ To promote greater efficiency in issuing TLCs and minimize delays associated with employers filing H-2B petitions with DHS, DOL received approval to issue electronic TLCs using the new Form ETA-9142B, Final Determination: H-2B Temporary Labor Certification Approval. On June 6, 2019, DOL then announced on the Office

³ *Electronic Filing of H-2A and H-2B Labor Certification Applications Through the iCERT Visa Portal System*, 77 FR 59670, 69672 (Sept. 28, 2012).

⁴ *See* OMB's Notice of Action issued on May 17, 2019, on DOL's information collection control number 1205-0509 at <https://www.reginfo.gov>.

of Foreign Labor Certification's (OFLC's) website a transition schedule for employers to submit the new H-2B application forms beginning July 3, 2019, through its new FLAG system.⁵ As of July 3, 2019, employers who file the new Form ETA-9142B, including all applicable appendices, through the FLAG system and are granted a TLC will receive an ETA-9142B, Final Determination: H-2B Temporary Labor Certification Approval, and Final Determination letter electronically.⁶

In circumstances where the employer or, if applicable, its authorized attorney or agent, is not able to receive the approved TLC documents electronically, DOL will send the ETA-9142B and Final Determination letter on paper and in a manner that ensures next day delivery.

DHS regulations refer to an approved TLC by various terms including "Department of Labor determination" at 8 CFR 214.2(h)(2)(i)(E) and "labor certification determination" at 8 CFR 214.2(h)(6)(iii)(E). Under the current instructions for Form I-129, H-2B petitioners must submit an approved TLC from DOL with the H-2B petition.⁷ Since DOL, generally, will now only provide the approved TLC to an employer electronically, USCIS announced on its website on July 26, 2019, that employers whose application for a TLC was processed in FLAG must include a printed copy of the electronic one-page ETA-9142B, Final Determination: H-2B Temporary Labor Certification Approval, with their Form I-129, and that USCIS will consider this printed copy as an original, approved TLC.⁸ USCIS is formally announcing, through this

⁵ DOL announced that, beginning July 3, 2019, it will only accept H-2B applications submitted using the new Form ETA-9142B (i.e., forms containing an expiration date of May 31, 2022). DOL continued to accept and process H-2B applications it received through the legacy iCERT system until 11:59 p.m. Eastern Time on July 2, 2019. *See* <https://www.foreignlaborcert.doleta.gov/>.

⁶ Employers may obtain a copy of the final decisions from the Historical table in the My Cases tab of their FLAG account. *See* DOL's Frequently Asked Questions; <https://flag.dol.gov/support/FAQ#cases>, [under the question, "How can I find a copy of my issued application?"](#) [

⁷ *See* <https://www.uscis.gov/i-129>.

⁸ *See* <https://www.uscis.gov/news/alerts/h-2b-petitioners-must-include-temporary-labor-certification-final-determination-form-i-129>.

notice, that a printed copy of the ETA-9142B final determination, completed and electronically signed by DOL, must be submitted with an H-2B petition, and that this printed copy of the one-page determination satisfies the requirement that petitioners provide evidence of an approved TLC. As discussed above, this change in USCIS procedure aligns with DOL's change in its procedures, as DOL has transitioned to a new electronic filing and application processing environment through which, generally, DOL no longer provides the employer and, if applicable, the employer's authorized attorney or agent with a paper copy of a certified Form ETA-9142B. This change in process is also appropriate since in most circumstances, USCIS will no longer need to reference a paper copy of a certified Form ETA-9142B (and its appendices) because USCIS and DOL have in place an information sharing process that allows USCIS to validate substantive elements of the approved TLC based on case information supplied by DOL directly to USCIS.⁹

USCIS notes that there may be limited circumstances when an employer (or its authorized agent, if applicable) has a paper-based final determination from DOL because, among other reasons, the employer is unable to receive the final determination electronically.¹⁰ In these limited circumstances, USCIS may accept and consider the paper-based certification documents as an original approved TLC. Additionally, USCIS notes that the submission of a printed copy of the electronic ETA-9142B final determination does not preclude USCIS from issuing a request for evidence or a notice of intent to deny in certain warranted circumstances, including but not limited to, when the electronic systems are unavailable for validation, or the final determination document is substantively inconsistent with the information provided by DOL

⁹ See <https://www.dhs.gov/publication/dhs-uscis-pia-044-validation-instrument-business-enterprises>.

¹⁰ See 84 FR 798, 799 (Jan. 31, 2019) (“In circumstances where the employer or, if applicable, its authorized attorney or agent, is not able to receive the temporary labor certification documents electronically, ETA will send the certification documents printed on standard paper in a manner that ensures overnight delivery.”)

regarding that labor certification determination. In those instances, USCIS will request that an employer (or its authorized agent, if applicable) submit documentation, including but not limited to a copy or copies of the complete certified Form ETA-9142B and its appendices. DOL has agreed that such evidence will be made available to employers (or authorized agents) in certain circumstances, for example, in the event of FLAG system outage or scheduled maintenance.

Joseph Edlow,

Deputy Director for Policy,

U.S. Citizenship and Immigration Services.

[FR Doc. 2020-04666 Filed: 3/5/2020 8:45 am; Publication Date: 3/6/2020]