



DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request; H-2A Frequently Asked Questions Guidance - Round

17: Temporary or Seasonal Need Assessments; Relevant Information or Factors Related to H-2A Labor Contractors Operating in an Area of Intended Employment Where Agricultural Production May Occur Year-Round

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice; request for comments.

SUMMARY: The Department of Labor's (Department or DOL) Employment and Training Administration (ETA) invites employers and other interested parties to comment on draft guidance, in the form of Frequently Asked Questions (FAQs), pertaining to the Office of Foreign Labor Certification's (OFLC) assessment of the nature of an employer's need for agricultural labor or services during the review of an *H-2A Application for Temporary Employment Certification* (H-2A application). ETA's OFLC developed this guidance, and is publishing it for public comment, consistent with a directive from the Secretary of Labor (Secretary) for interpretive guidance clarifying how the Department assesses an H-2A employer's need for agricultural labor or services to determine whether the employer has demonstrated a need of a temporary or seasonal nature, as required for certification. ETA invites the public to review the draft FAQs presented in this notice and provide written comments to OFLC, which will further inform the Department's development of guidance regarding OFLC's assessment of temporary or seasonal need for the H-2A program. The Department will publish this final guidance in the *Federal Register*.

DATES: Submit written comments on or before [INSERT DATE **30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: You may submit written comments electronically by email to ETA.OFLC.H2ARound17@dol.gov, or by submitting your comment(s) through <https://www.regulations.gov/> using the docket number ETA-2022-0007. OFLC will receive comments through both means, so there is no need to duplicate your comment submissions through both means.

Comments are invited only on: (1) the clarity of the agency's guidance; (2) whether aspects of the guidance require further explanation or detail; and (3) suggestions for ways to clarify the guidance or complexities of the subject matter. Comments must be made in writing and pertain to the guidance (i.e., FAQs) accompanying this notice directly.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW, Room N-5311, Washington, DC 20210, telephone (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

Under the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), the H-2A visa program permits U.S. employers to employ foreign workers on a temporary basis to perform agricultural labor or services. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1) and 1188.¹ The INA further authorizes the Secretary of the Department of Homeland Security (DHS) to permit employers to employ foreign workers to perform temporary agricultural labor or services of a temporary or seasonal nature if the Secretary of Labor certifies that: there are not

¹ For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and the employment of H-2A workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* 8 U.S.C. 1188(a)(1). The Secretary has delegated the authority to issue H-2A temporary labor certifications to the Assistant Secretary for ETA, who in turn has assigned that authority to ETA's OFLC. In addition, the Secretary has delegated to the Administrator, Wage and Hour Division (WHD), the responsibility under Section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to ensure employer compliance with the terms and conditions of employment under the H-2A program.²

OFLC receives H-2A application filings and reviews each filing for compliance with the Department's regulatory requirements at 20 CFR part 655, subpart B.³ Once OFLC determines an H-2A application meets the requirements for H-2A certification, OFLC issues a temporary labor certification, and the employer may then petition DHS to employ a foreign worker in the United States in the H-2A visa classification. The Department's regulations at 20 CFR 655.161 provide that the criteria for certification include, among other things, "whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis." Where temporary or seasonal need for agricultural labor or services cannot be established, the employer may apply for labor certification, if applicable, through another visa program appropriate to its need for labor or services.

Pursuant to these authorities, OFLC reviews H-2A applications on a case-by-case basis to determine whether the employer has established a need "of a temporary or

² *See* Secretary's Order 06-2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010); *see also* Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

³ The information collection for H-2A applications, as well as related forms, instructions, appendices, and addenda for the H-2A program, and their associated burdens, are approved under OMB Control Number 1205-0466.

seasonal nature” for the agricultural labor or services requested, as defined in the Department’s regulations at 20 CFR 655.103(d). The Department’s definition of a “temporary or seasonal nature” has largely remained unchanged for the H-2A program since the 1987 regulations, notwithstanding the H-2A provision for herding and the open range production of livestock.⁴ *See Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496, 20498 (June 1, 1987); United States Citizenship and Immigration Services (USCIS) interpretive guidance: Policy Memorandum 602-0176.1, *Updated Guidance on Temporary or Seasonal Need for H-2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production*, dated February 28, 2020 (USCIS PM-602-0176.1); *see also Temporary Workers Under § 301 of the Immigration and Reform Act*, 11 Op. O.L.C. 39, 40 (1987) (*Temporary Workers*). When promulgating the 2010 H-2A Final Rule,⁵ the Department’s current regulatory framework, the Department adopted DHS’s definition of “temporary or seasonal nature” at 20 CFR 655.103(d), in order to promote greater consistency between the two departments’ definitions of these terms and to reduce stakeholder confusion concerning the definition of temporary or seasonal need, which both DHS and DOL assess; however, this alignment of definitions did not create any

⁴ On December 16, 2021, the Department published a final rule to rescind 20 CFR 655.215(b)(2), a regulatory provision which permitted employers of range sheep and goat herders to apply for a temporary agricultural labor certification for a period of up to 364 days. *See Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H-2A Program*, 86 FR 71373 (Dec. 16, 2021). Consistent with a court-approved settlement agreement, the final rule rescinded the regulatory provision to ensure the Department’s adjudication of temporary or seasonal need is conducted in the same manner for all applications for temporary agricultural labor certification.

⁵ The Department’s reference to “the 2010 H-2A Final Rule” herein includes the regulatory text adopted through that rulemaking, 75 FR 6884, and other minor revisions that took effect prior to the issuance of this draft guidance. 2019 H-2A Recruitment Final Rule, 84 FR 49439 (rescinding the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment; expanding and enhancing the Department’s electronic job registry; and leveraging the expertise and existing outreach activities of SWAs to promote agricultural job opportunities); *see also* Final Rule, *Rules Concerning Discretionary Review by the Secretary*, 85 FR 30608 (establishing a system of discretionary secretarial review over cases pending before or decided by the BALCA and to make technical changes to Departmental regulations governing the timing and finality of decisions of the ARB and the BALCA); 2021 H-2A Herder Final Rule, 86 FR 71373 (amending the regulations regarding the adjudication of temporary need for employers seeking to employ nonimmigrant workers in job opportunities covering the herding or production of livestock on the range).

substantive change in how DOL assesses “temporary” or “seasonal” need for the H-2A program. *See* Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884, 6890 (Feb. 12, 2010) (2010 H-2A Final Rule); *compare* 20 CFR 655.103(d) *with* 8 CFR 214.2(h)(5)(iv)(A); *see also* USCIS PM-602-0176.1; *Temporary Workers*. Under this definition, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. 20 CFR 655.103(d). Employment is of a temporary nature where the employer’s need to fill the position with a temporary, as opposed to seasonal, worker will, except in extraordinary circumstances, last no longer than one year. *See id.* As stated in the Department’s 1987 rule, “the longer the employer needs a ‘temporary’ worker, the more likely it would seem that the job has in fact become a permanent one.” 52 FR 20496, 20498 (June 1, 1987).

II. Need for Guidance

On August 4, 2021, OFLC’s Certifying Officer issued a final determination on an application filed by an H-2A labor contractor (H-2ALC), denying certification because the employer did not establish a temporary or seasonal need for its H-2A application and the agricultural labor requested. The employer appealed the denial by requesting a *de novo* hearing before an Administrative Law Judge (ALJ). After the *de novo* hearing, the ALJ reversed OFLC’s denial on September 9, 2021, and remanded the application to OFLC for further processing.⁶ Under 29 CFR 18.95(b)(2) and (c)(2)(i), the Secretary has discretion to exercise review of H-2A decisions that have been decided by the Board of Alien Labor Certification (BALCA). Pursuant to this authority, following a

⁶ *See In the Matter of Overlook Harvesting Company, LLC* (thereafter *Overlook*), 2021-TLC-00205 (Sept. 9, 2021), *Sec’y assumed juris.* (Sept. 30, 2021), *Sec’y juris. withdrawn* (Dec. 3, 2021); *see* [https://www.oalj.dol.gov/DECISIONS/ALJ/TLC/2021/In_re_Overlook_Harvesting__2021TLC00205_\(DEC_09_2021\)_124914_ORDER_PD.PDF](https://www.oalj.dol.gov/DECISIONS/ALJ/TLC/2021/In_re_Overlook_Harvesting__2021TLC00205_(DEC_09_2021)_124914_ORDER_PD.PDF).

recommendation from the Chair of BALCA, the Secretary exercised his authority of review and assumed jurisdiction over the decision.⁷ Accordingly, on September 30, 2021, BALCA issued a *Notice of Secretarial Review*, notifying the public that the Secretary had exercised discretionary review authority over the decision.

On December 3, 2021, after careful consideration of the record on review, the Secretary issued a notice withdrawing jurisdiction over the decision and affirming that the ALJ's September 9, 2021, Decision and Order was the Department's final determination.⁸ As explained in the notice of withdrawal of jurisdiction, the Secretary determined that "a precedential decision in this case is not the best vehicle to resolve the complex factual and regulatory issues involved in assessing whether this, or any other, Employer has a temporary or seasonal need for agricultural labor or services."⁹ Rather, the Secretary considered interpretive guidance to be the appropriate vehicle to provide clarification to both BALCA and the regulated community regarding the Department's assessment of an employer's temporary or seasonal need for agricultural labor or services in the H-2A program.

The Secretary directed ETA to engage stakeholders and issue interpretive guidance on this topic. In particular, the Secretary requested ETA provide guidance "in the context of H-2A Labor Contractors (H-2ALCs) who operate in localities that can support agricultural activities year-round."¹⁰ The Secretary requested the guidance include how the Department evaluates factors that frequently "arise when determining whether an employer has met its burden to establish a temporary or seasonal need for agricultural labor or services...the types of evidence relevant to making this determination" and how

⁷ See *Overlook*, *supra* note 6 (Sept. 30, 2021).

⁸ See *Overlook*, *supra* note 6 (Dec. 3, 2021).

⁹ *Id.*

¹⁰ *Id.*

this evidence is assessed, “including the impact and relevance of an employer’s previous history of filing *Applications for Temporary Employment Certification*.”¹¹

III. ETA’s Guidance

At the Secretary’s direction, ETA has drafted guidance in the form of Frequently Asked Questions (FAQs), *Round 17: Temporary or Seasonal Need Assessments; Relevant Information or Factors Related to H-2A Labor Contractors Operating in an Area of Intended Employment Where Agricultural Production May Occur Year-Round*, to clarify for the public the Department’s assessment of temporary or seasonal need for the certification of H-2A applications. In the guidance, ETA discusses the considerations relevant to assessing temporary or seasonal need (*e.g.*, impact and relevance of an employer’s previous filing history in the area of intended employment) for H-2A applications in a user-friendly FAQ format that employers can use to apply to their own situations and H-2A applications. ETA has developed this guidance to assist employers, and to further that effort, is providing the public with a draft of the guidance for review and an opportunity to submit written comments on the guidance before it is officially issued.

Request for Comments

ETA seeks comments on the FAQ guidance referenced in this notice. The FAQ guidance is available for review at www.regulations.gov [ETA-2022-0007] and on OFLC’s website at <https://www.dol.gov/agencies/eta/foreign-labor/news>. Written comments may be sent by email to ETA.OFLC.H2ARound17@dol.gov until **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, or by submitting your comment(s) through <https://www.regulations.gov/> using the docket number ETA-2022-0007. OFLC will receive comments through both

¹¹ *Id.*

means, so there is no need to duplicate your comment submissions through both means. ETA will review all written comments that are timely submitted in the manner specified above and will modify the draft guidance, as appropriate. Once ETA reviews the comments, it will publish final FAQs through a future *Federal Register* notice and on the OFLC website at <https://www.dol.gov/agencies/eta/foreign-labor>.

Brent Parton,

Acting Assistant Secretary for Employment and Training, Labor.

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