



## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

#### **Notification of Rescission of Frequently Asked Question Issued on July 22, 2011**

**AGENCY:** Employment and Training Administration, Department of Labor.

**ACTION:** Notice.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (DOL or the Department) provides notice that it is rescinding a Frequently Asked Question (FAQ) issued by the Office of Foreign Labor Certification (OFLC) on July 22, 2011, prohibiting employers from filing a single temporary agricultural labor certification to hire nonimmigrant workers under the H-2A visa classification into the United States after the first date of need.

**DATES:** The rescission of informal guidance announced in this notice is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, telephone (202) 693-8200 (this is not a toll-free number). For persons with a hearing or speech disability who need assistance to use the telephone system, please dial 711 to access telecommunications relay services.

#### **SUPPLEMENTARY INFORMATION:**

The Department is reviewing applicable regulations and administrative guidance documents to eliminate unnecessary and burdensome requirements. As part of this review, the Department has determined that the FAQ identified below, the issuance of which no longer represents the considered policy judgment of the Department, required employers to file multiple labor certification applications for agricultural labor or services to be performed in the same or

comparable occupations and crops, covering the same area of intended employment, where the only difference is the expected start date of work, and is otherwise appropriate for rescission.

Under 8 U.S.C. § 1188(a)(1) of the Immigration and Nationality Act, the admission of foreign workers under the H-2A visa classification involves a multi-step process before several Federal agencies. A prospective H-2A employer must first apply to the Secretary of Labor (Secretary) for a certification that (1) there are not 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 (2) the employment of the alien 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). To carry out these statutory mandates, Congress delegated discretionary authority to the Secretary under § 1188 to issue regulations, including “regulations to ensure that the certification requirements of § 1188(a) are met before the DOL issues such a certification. *See, e.g.,* § 1188(c)(3)(A) (requiring that employers seeking H-2A visas comply with “the criteria for certification,” “including criteria for the recruitment of eligible individuals as prescribed by the Secretary”).

Accordingly, the Department promulgated regulations at 20 CFR 655, subpart B, establishing the criteria for labor certification necessary to meet these statutory mandates. The FAQ identified below and published on July 22, 2011, which interprets the regulations, prohibits an employer from using a single temporary agricultural labor certification to bring nonimmigrant workers under the H-2A visa classification into the United States. The Department has reconsidered this guidance. Accordingly, the following guidance in the form of a frequently asked question issued by OFLC on July 22, 2011, is hereby rescinded, effective immediately.

**Can an employer file a single Application for Temporary Employment Certification for staggered dates of need?**

No. An application must contain a single date of need for all workers under that application. Under the H-2A program, a date of need is defined as the first date the employer requires the

services of H-2A and U.S workers as indicated in the Application for Temporary Employment Certification. The date is not an indication of the first date of need for some workers, but for all the workers that are the subject of the application. We expect that the filing of an Application indicates that the employer has full-time work available for all positions it is requesting for that single start date and that all information reflects the employer's true need. Changing the date of need for some or all workers invalidates the validity of the labor market test, which eliminates the Department's basis for granting the labor certification. A different date was not advertised to U.S. workers, in particular those who, if they had been apprised of the later date, could have made themselves available for the job opportunity, and therefore made the approval of the certification unnecessary. Where the employer has staggered dates of need, the employer must file a separate application for each date of need.

(Authority: 8 U.S.C. 1188(a)(1); 20 CFR 655, subpart B)

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