

FAQs – Implementation of Final H-2B Regulations for Temporary Labor Certifications in the Entertainment Industry

Question: I am an employer in the entertainment industry. We recruited our H-2B support personnel and filed pursuant to special procedures for entertainers. Now that the regulations have changed, are my special procedures gone?

Answer: The new H-2B regulations contain a provision that permits the development of special procedures. Where special procedures were in place prior to the effective date of the H-2B regulations (January 18, 2009), the Department will continue to honor those special procedures to the extent they are consistent with the new regulations. The special procedures contained in TEGL 31-05 will continue almost in their entirety. The Department will not, however, be able to honor the special procedures in areas in which they are in direct contravention of the regulation, as outlined in these FAQs.

Question: Who qualifies as an entertainer for H-2B status?

Answer: Occupations in the entertainment industry, for purposes of applying for a labor certification for H-2B workers, shall include performers and all technical and support personnel involved with a performance, including carnival workers.

Question: As an employer of entertainers who enter the US in H-2B status, where do I file?

Answer: All H-2B applications are filed with the Certifying Officer at the Chicago National Processing Center (CNPC). Employers are no longer required to submit applications for H-2B temporary employment of foreign workers to one of the Offices Specializing in Entertainment (OSEs) in New York, New York; Austin, Texas; or Sacramento, California.

Question: I hire musicians from Canada. Has how their recruitment changed?

Answer: It has not changed. As discussed in TEGL 31-05, where you recruit depends on where the musicians appear. Canadian musicians who enter the US to perform within a 50-mile area adjacent to the Canadian border for a period of 30 days or less are pre-certified and are not subject to these procedures. In such cases, employers may file petitions to employ nonimmigrant workers (I-129) directly with USCIS in accordance with that agency's guidelines; no pre-recruitment is necessary. If the entertainers you seek to bring to the US in H-2B status are not able to fall within this limited exemption, you must follow the procedures outlined in the H-2B regulations, subject only to special procedures outlined in TEGL 31-05 (such as an itinerary).

Question: I hire workers in the Virgin Islands. There used to be special procedures for them. Are they still in place?

Answer: Yes. There continue to be in place the special procedures with respect to the amount of time that an H-2B worker in the entertainment industry may enter the U.S. Virgin Islands. The Virgin Islands Nonimmigrant Alien Adjustment Act of 1981, Pub. L. 97-271, limits temporary employment of entertainers in the U.S. Virgin Islands to periods not to exceed 45 days. Therefore, the period of labor certification for such applications may not exceed 45 days.

Question: My workers appear in several places. I used to be able to file one application and submit an itinerary. Can I still do that?

Answer: An employer seeking H-2B workers in the entertainment industry may still utilize an itinerary when filing an application. The application must include an itinerary of locations and duration of work in each location.

Question: Has when I may file an H-2B application changed?

Answer: Yes. The final regulation requires employers, including those seeking H-2B workers in the entertainment industry, to file their H-2B application after completion of the recruitment report detailing their efforts and the outcome of U.S. worker applicants. The creation of the required recruitment report cannot occur, pursuant to 20 CFR 655.15(j)(1), until after the completion of the US worker recruitment, specifically no earlier than 2 days after the last date on which the job order was posted and at least 5 days after the last date on which the newspaper or journal ad was placed. Recruitment may not start until 120 days prior to the employer's date of need.

Question: How do I begin the filing process?

Answer: Before recruiting US workers, the employer must request and obtain a prevailing wage determination from the CNPC, in accordance with the procedures specified at 20 CFR 655.10. The rate must be valid either on the date recruitment begins or on the date of filing a complete ETA Form 9142. The employer will request a prevailing wage determination by completing the ETA Form 9141, *Application for Prevailing Wage Determination*, and including a listing of all worksites covered by the job opportunity. The CNPC will enter its wage determination on the ETA Form 9141, indicate the sources, and return the form with its endorsement to the employer within 30 days of receipt of the request. The validity period of the wage determination may be for no more than 1 year or less than 3 months from the wage determination date.

Question: How do I get a prevailing wage if I have multiple worksites?

Answer: The employer must list all worksites within an area of intended employment on its ETA Form 9141 when requesting a prevailing wage. If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the same opportunity within the area of intended employment, the prevailing wage shall be the highest wage among all relevant worksites. Employers submitting a prevailing wage determination covering itinerary locations will receive a wage determination for each location listed on the itinerary for work to be performed in that location.

Question: I have just received my prevailing wage from the CNPC. Can I offer that salary only to my H-2B workers?

Answer: Pursuant to statute and regulation, the employer must offer the wage determination from the CNPC (or higher) to both its H-2B workers and any similarly employed U.S. worker hired in response to the recruitment required by the regulations and these special handling procedures.

Question: Do I follow the regulations and recruit before I file the application?

Answer: All H-2B recruitment is undertaken prior to submission of the application. Employers file with the CNPC only after completing the recruitment report detailing their efforts and the outcome of U.S. workers who applied, or on whose behalf an application was made, for the job opportunity.

Question: When do I recruit?

Answer: Recruitment of US workers may not commence more than 120 days before the employer's start date of need for the H-2B workers. An employer seeking H-2B workers may file with the CNPC only after completing the recruitment report as noted above. The creation of a recruitment report cannot occur, pursuant to 20 CFR 655.15(j)(1), until after the completion of the recruitment period, specifically no earlier than 2 days after the last date on which the state job order was posted and at least 5 days after the last date on which the newspaper or journal ad was placed.

Question: How do I recruit?

Answer: An employer seeking certification for H-2B job opportunities, including opportunities in the entertainment industry, must undertake the following recruitment steps:

1. Submit a job order to the SWA serving the area of intended employment as specified in 20 CFR 655.15(e). Where the job opportunity requires the work to be performed in more than one state based on an itinerary, the job order should be submitted to the SWA having jurisdiction over the area where the employment will begin. The SWA receiving the job order shall promptly transmit, on behalf of

the employer, a copy of the active job order to all states listed as anticipated worksites. When submitting the job order to the SWA, the employer must clearly identify it as a job order to be placed in connection with a future application for H-2B workers.

2. Publish advertisements on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement, in a newspaper of general circulation serving the area of intended employment as specified in 20 CFR 655.15(f). The employer may satisfy this requirement by advertising the job opportunity in a national publication that is likely to bring responses from U.S. workers.

3. Where the employer is a party to a collective bargaining agreement governing the job classification that is subject of the H-2B labor certification, the employer must contact the local union that is party to the agreement as specified in 20 CFR 655.15(g)

At the conclusion of the recruitment period, the employer shall prepare a written recruitment report as specified in 20 CFR 655.15(j), to be submitted with the application.

Question: How long will the SWA job order be open?

Answer: The SWA must keep the job order open for a period of not less than 10 calendar days. If the SWA requires a longer period in order to adequately recruit US workers for the job opportunity (e.g., 30 calendar days), the employer must comply with the requirement and continue to accept referrals of US workers until the end of the recruitment period.

Question: Can I reject workers who are not willing to join the itinerary? For example, I have worksites in 6 states. If a worker sees the recruitment in the third state, can he join for just that state?

Answer: He can if you are willing to have him join in only that state, and the certification will be reduced accordingly for the entire itinerary. If you prefer, you may reject that worker, unless he is in fact willing to work for the rest of the itinerary.

Question: Where do I file my application?

Answer: Temporary labor certification applications for foreign workers in the entertainment industry shall be filed by employer with the CNPC at the following address:

Chicago National Processing Center
Office of Foreign Labor Certification
U.S. Department of Labor

844 North Rush Street
12th Floor
Chicago, IL 60611
Attn: CNPC Certifying Officer, H-2B Application for Entertainers

Question: How do I include my itinerary with the application?

Answer: When filed, the application must include: A completed ETA Form 9142, Application for Temporary Employment Certification signed by the employer; an itinerary of locations and duration of work in each location, where there is more than one worksite, and a wage offer for each location listed on the itinerary for work performed in that location which can be submitted as an attachment to the ETA Form 9142. The completed application must also include a copy of the recruitment report completed in accordance with 20 CFR 655.15(j).

Question: Once the CNPC has my application, what can I expect?

Answer: The CNPC will make a determination to either grant or deny the *Application for Temporary Employment Certification*. The CNPC will notify the employer in writing (either electronically or by US Mail) of the labor certification determination. The CNPC will review complete applications for an absence of errors that would prevent certification and for compliance with the criteria for certification. Criteria for certification include whether the employer has established the need for the nonagricultural services or labor to be performed is temporary in nature; established that the number of worker positions being requested is justified and represent bona fide job opportunities; made all the assurances and met all the obligations required by § 655.22; and complied with all requirements of the program.

If the CNPC determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification, the CNPC will issue a Request for Information (RFI) to the employer. The CNPC will issue the written (RFI) within 7 calendar days of the receipt of the application, and send it by means normally assuring next-day delivery.