

DRAFT AGENDA

NATIONAL FORESTRY WORKERS CONFERENCE

Tuesday, August 26, 1997

Closed meeting with Federal and State staff
(Facilitator: Ms. Charlene Giles)

Welcome and Briefing on GAL	9:00-10:00
Open discussion/questions on GAL	10:00-10:45
Break	10:45-11:00
Open discussion/questions on GAL	11:00-12:00
Lunch	12:00-1:30
Martinez Court Case and Open discussion/questions on GAL	1:30-4:00

Wednesday, August 27, 1997

Briefing for Employers and Worker Advocates	9:00-10:00
Break	10:00-10:15
Open discussion/questions on GAL (Employers, Worker Advocates, Federal and State Staff)	10:15-12:00
Lunch	12:00-1:15
Demonstration of Planting Tools	1:15-2:15
NS issues related to forestry workers	2:15-2:45
Open discussion/questions on GAL (Employers, Worker Advocates, Federal and State Staff)	2:45-4:00

Thursday, August 28, 1997

Closed meeting with Federal and State staff to discuss changes to GAL 9:00-12:00

Note:

Regional Monitor Advocates are welcome all three days
NS and Wage and Hour representatives will be in attendance to serve as a resource on August 27th.

DIRECTIVE : GENERAL ADMINISTRATION LETTER NO. 1-95, Change 1
TO : ALL STATE EMPLOYMENT SECURITY AGENCIES
FROM : BARBARA ANN FARMER
Administrator
for Regional Management
SUBJECT : Procedures for H-2B Temporary Labor Certification in
Nonagricultural Occupations

1. Purpose. To add "D. Forestry Workers." to the list of nonagricultural occupations which vary from the standard GAL No. 1-95 procedures and to provide instructions for special processing of applications for those occupations.
 2. References. Title 20 CFR Parts 652, 655 and 656.40, 8 CFR 214.2(h), 408 FR 2587, GAL No. 1-95, FM No. 57-88.
 3. Background. Although the occupations of Tree Planter (452.687-018) and Laborer, Brush Clearing (459.687-010) have many similarities to agriculture, they are not so classified under either the Internal Revenue Code or the Fair Labor Standards Act (FLSA). Therefore, under the Immigration and Nationality Act (INA) they are not authorized for the H-2A visa and must be processed as H-2B. However, two court decisions (Bresgal v. Brock, 833 F. 2d 763 (9th Cir. 1987) and Bracamantes v. Weyerhaeuser Co., 840 F.2d 271 (5th Cir. 1988)) directed the Department to treat migrant and seasonal forestry workers as covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).
- Because these forestry occupations have elements of both agricultural and nonagricultural occupations and also often involve multi-state itineraries, these applications cannot be effectively processed according to the general procedures for H-2B in GAL 1-95. These special procedures are intended to clarify the differences in processing Forestry Worker H-2B applications from other H-2B occupations.
4. Action Required. State Administrators are requested to inform staff of the attached procedures for processing applications for Forestry Workers.

5. Inquiries. Direct questions to the appropriate Regional Certifying Officer.

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6. Attachment. Procedures for processing applications for Forestry Workers.

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IX. Applications Requiring Special Processing (continued)

D. Forestry Workers.

1. General - Tree planter and related forestry occupations are to be processed as H-2B. Because the occupation is nationwide and applications in one State can have implications for many other States, the SESA should immediately inform the regional Certifying Officer upon receipt of a Tree Planter application.

2. Operating Procedures - The following procedures are in the format of frequently asked questions and should be used as a checklist for staff who process forestry related H-2B applications. The responses reflect DOL policy regarding processing of these applications.

a. WHEN IS A TREE PLANTER (FORESTRY) APPLICATION ACCEPTABLE AS AN H-2B APPLICATION?

The same basic criteria in GAL No. 1-95, Section II apply to forestry workers in determining the temporary nature of a job offer under the H-2B classification. The employer's need for the services or labor shall be either a:

o One-time Occurrence: It is highly unlikely that any forestry employers would meet this criteria.

o Peakload: It is possible that some forestry employers could meet the criteria for relatively short itineraries.

o Intermittent Need: It is highly unlikely forestry employers would meet this criteria.

o Seasonal Need: It is clear that tree planting is a seasonal activity which is determined by climatic conditions. The appropriate time for tree planting occurs once, or in some locations, twice a year. However, in making a determination as to whether a tree planting application is temporary based on seasonality, the total employment opportunity must be considered.

In the case of Tree Planters, the employer (contractor) bids on a sequence of contracts, linking each seasonal activity into an itinerary of a number of months. Since tree planters are covered by MSPA, the MSPA definition of "on a seasonal or other temporary basis" cited at 20 CFR 655.100 provides guidance for determining whether the job offer is for temporary employment. The MSPA definition, in relevant part, provides that "(a) worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year."

However, the phrase "major portion of the year" does not encompass the entire year, virtually the entire year, or almost the entire year. Regional Offices should contact the National Office if they need further guidance in determining whether or not a particular forestry itinerary constitutes temporary employment.

b. MUST AN EMPLOYER BE REGISTERED AS A FARM LABOR CONTRACTOR?

Yes. If the employer is not registered, the application should be returned to the employer with the notification that the SESA cannot accept a job order for this occupation from an employer who is not a registered Farm Labor Contractor.

c. MAY AN EMPLOYER FILE A MASTER ORDER?

Yes. The employer has an option of filing one master order provided that all starting locations States in the itinerary are in the same ETA Region. As an alternative, the employer may file separately in every State where a crew will start its itinerary.

d. UNDER WHAT CONDITIONS MAY AN EMPLOYER FILE A MASTER ORDER?

- i) All starting locations in all itineraries (crews) in a Master Order must be in one ETA Region.
- ii) It must be filed in the State where the largest number of job opportunities (defined as the first location in the itinerary) occurs from the total of all crews or itineraries.

- iii) It must consist only of crews working for one employer, and
- iv) The total range of the crews' start dates cannot be greater than 14 days.

The following examples demonstrate when a Master Order is acceptable and when it is not.

EXAMPLE 1: MASTER APPLICATION

ITINERARY 1

Crew One 200 workers

Alabama	2/01/97 - 2/09/97
Tennessee	2/11/97 - 2/30/97
Georgia	3/04/97 - 3/16/97

ITINERARY 2

Crew Two 250 workers

N. Carolina	2/01/97 - 2/28/97
Texas	3/03/97 - 3/15/97
Mississippi	3/15/97 - 3/30/97

ITINERARY 3

Crew Three 100 workers

Alabama	2/14/97 - 3/20/97
N. Carolina	3/21/97 - 4/10/97

The employer may file a Master Order with ETA Region IV since all starting location States are in Region IV. The employer must file with Alabama, since 200 workers in Crew One and 100 workers in Crew Three clearly is the majority (300 workers) of total job opportunities (550 workers). Even though the second crew will work in Texas (Region VI), it is not at a starting location.

EXAMPLE 2: INDIVIDUAL APPLICATIONS

ITINERARY 1

Crew One (150 workers)

Arkansas	3/01/97	-	3/15/97
Texas	3/19/97	-	3/30/97
Oklahoma	4/15/97	-	4/19/97

ITINERARY 2

Crew Two (275 workers)

Idaho	3/01/97	-	3/15/97
Oregon	3/23/97	-	4/15/97
Washington	4/17/97	-	5/01/97

ITINERARY 3

Crew Three (130 workers)

Arkansas	3/21/97	-	3/29/97
Texas	4/01/97	-	4/14/97
Oklahoma	4/15/97	-	4/30/97

The employer should file three separate applications for the following reasons: a) The itineraries consist of crews starting in two different regions and b) The start dates of the crews starting in Region VI are more than 14 days apart. Therefore, the employer must file three separate orders: One each for Itineraries 1 and 3 in Region VI (in Arkansas), and one for Itinerary 2 in Region X (in Idaho).

- What is the employer's tax account number?
- How will workers be assigned?
- What is the need for a particular number of workers?
- What is the planting season?

If a SESA or Region has a question or concern not under ETA's jurisdiction (e.g., housing), the SESA or Region should forward the question or concern to the appropriate agency.

Wage and Hour must receive a copy of all certifications from the Regional Office.

SESAs should also process the application according to Parts II, III, IV, V, VI, and VII in GAL-I-95 as appropriate.