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**ADVISORY: FOREIGN LABOR CERTIFICATION
TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 31-05**

**TO: FLC-NATIONAL PROCESSING CENTER DIRECTORS
FLC-BACKLOG ELIMINATION CENTER DIRECTORS**

**FROM: EMILY STOVER DeROCCO
Assistant Secretary**



**SUBJECT: Procedures for Temporary Labor Certification in the Entertainment Industry
under the H-2B Visa Program**

- Purpose.** This guidance letter and its attachments replace and supersede prior operating procedures and policy guidance within the Employment and Training Administration (ETA) for H-2B certifications in the entertainment industry, including attachments I - IV of ETA Training and Employment Guidance Letter No. 4-03 (TEGL 4-03). This letter describes the special procedures in ETA governing the H-2B nonimmigrant labor certification process for temporary positions in the entertainment industry. This TEGL, as revised, identifies the Chicago National Processing Center as the Center designated to issue ETA determinations on applications for certification to employ temporary workers in the entertainment industry which are initially filed by employers with designated Offices Specializing in Entertainment (OSEs) within the State Workforce Agencies (SWAs). This is the only substantive change from previous procedures, under which ETA's New York City, Dallas, and San Francisco Regional Certifying Officers were designated to issue determinations on these applications.
- References.** 20 CFR §§655.1 through 655.4, and §656.40.
- Background.** The H-2B visa classification applies to foreign workers coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature. The Code of Federal Regulations at Title 20, Part 655, Subpart A requires that, before petitioning the Department of Homeland Security's (DHS) United States Citizenship and Immigration Services (USCIS) for authorization to hire H-2B workers – which requires the filing of a nonimmigrant worker visa petition with USCIS – employers obtain: (1) a temporary labor certification from the Secretary of Labor advising USCIS that the employer has established, to the satisfaction of the Department of Labor (DOL), that no United States workers capable of performing the temporary services or labor are available and that the foreign worker's

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employment will not adversely affect the wages and working conditions of similarly employed United States workers, or, alternatively, (2) a notice from DOL that such a certification cannot be made.

For purposes of temporary employment of foreign workers under the H-2B program, DOL's certification addresses the occupational classification named in the employer's application and the (un)availability of qualified United States workers, not the qualifications of individual foreign worker(s) who might fill the employer's opening(s) in that occupational classification.

Due to the unique characteristics of the entertainment industry, the Employment and Training Administration has established the following procedures for the processing of employer applications for certification of temporary positions in that industry. These procedures clarify processing requirements and continue to provide that applications are filed with one of three state Offices Specializing in Entertainment and then centralize processing authority for temporary labor certifications related to the entertainment industry in the Chicago National Processing Center.

4. Discussion.

Operating Guidelines

- A. The Certifying Officer at the Chicago National Processing Center is designated as the appropriate ETA official to issue determinations on applications for **temporary** employment of foreign workers in the entertainment industry.
- B. Offices of the SWAs in New York, New York; Austin, Texas; and Sacramento, California; are designated as OSEs. These offices exclusively shall receive and process applications for certification of **temporary** positions in the entertainment industry. Each OSE shall accept applications directly from employers in its jurisdiction. The states served by each OSE are listed in Attachments 1 and 2 to this guidance. OSEs shall forward approved applications to the Chicago National Processing Center.
- C. Canadian musicians who enter the United States to perform within a 50-mile area adjacent to the Canadian border for a period of 30 days or less are pre-certified and not subject to these procedures. In these cases, employers file nonimmigrant worker petitions directly with USCIS in accordance with USCIS guidelines.
- D. 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.
- E. Occupations in the entertainment industry shall include performers and all technical and support personnel involved with a performance.
- F. When a job offer contains requirements or conditions which preclude effective recruitment of United States workers, e.g., there is no employer in the United States, the OSE shall disregard the recruitment procedures below and immediately send the application to the Chicago National Processing Center for determination.

Procedures

- A. Temporary labor certification applications for foreign workers in the entertainment industry shall be filed by employers with the OSE serving the area of intended employment (see map of OSE jurisdictions). Note: When the job opportunity requires the work to be performed in more than one OSE jurisdiction, the application should be filed with the OSE having jurisdiction over the area where the employment will begin.
- B. To allow for sufficient recruitment of United States workers, and to give the OSE and the Chicago National Processing Center enough time to process the application and issue a timely determination, employers should be advised to file their applications at least 60 calendar days but no more than 120 days prior to the employment start date (date of need). The Department of Labor cannot assure a timely determination if the employer files an application for labor certification less than 60 days prior to its date of need. The OSE must return to the employer applications that are filed more than 120 days prior to the date of need.
- C. When filed, the temporary application must include:
 1. A completed Form ETA-750, Part A, the "Offer of Employment" portion of the Alien Employment Certification form signed by the employer.
 2. An itinerary of locations and duration of work in each location, when there is more than one worksite.
 3. Documentation of the employer's efforts, if any, to recruit United States workers, and the results of those efforts.
- D. The OSE shall review the application for completeness and determine the prevailing wage, guided by standards in regulations at 20 CFR §656.40 for each location listed in the itinerary.
- E. The employer must specify a wage which meets or exceeds the prevailing hourly, daily, or weekly rate and covers each day of the workweek that the foreign worker is in the United States for the duration of the employment regardless of hours worked. The employer must be willing to pay the applicable wage for each location listed on the itinerary for work performed in that location.
- F. The employer may advertise the job opportunity, before or after filing the application, in a national publication that is likely to bring responses from United States workers. The advertisement shall:
 1. Identify the employer's name, address, and the location of the employment, if other than the employer's location;
 2. Describe the job opportunity in detail;
 3. State the rate of pay, which shall not be below the prevailing wage for the occupation;
 4. Offer prevailing working conditions;

5. State the employer's minimum job requirements; and
 6. Offer wages, terms, and conditions of employment which are no less favorable than those offered to the foreign worker.
- Note: Based on the judgment of the Chicago Certifying Officer, employers located in the U.S. Virgin Islands will be allowed to conduct local recruitment using local publications on the appropriate island, rather than conducting recruitment in national publications found in the continental United States that may or may not be available in the U.S. Virgin Islands.
- G. The employer must provide the OSE a copy of the advertisement showing the name of the publication, the dates published, and written results of all the recruitment which must:
 1. Identify each recruitment source by name;
 2. State the name, address, and telephone number of each United States worker who applied for the job; and
 3. Explain the lawful job-related reason for not hiring each United States worker.
 - H. The OSE shall write to the appropriate national union(s) (see Attachment 3) for U.S. worker availability information. The following procedures and conditions shall apply to union contacts:
 1. The letter to the union shall not identify the employer, but shall describe the type of establishment, the job duties, location, and dates of employment, hours of work, wages and working conditions.
 2. From the date the letter to the union is mailed, **five** working days should be allowed to receive a written response. If no response is received after **five** working days, the union should be contacted by telephone to verify if the request was received. If the union asserts that U.S. workers are available for the job, **five** additional workdays should be allowed for a written response before making a determination based on the information available in the application file.
 3. Acceptable availability information from unions shall include names, addresses, and telephone numbers of United States workers who meet the employer's requirements for the job opportunity.
 4. If the union(s) provide names of qualified United States workers, the OSE shall refer the list to the employer for direct contact with the workers.
 5. For each application, the name of the union, the union representative contacted, and the date of contact must be included on the transmittal form to the Chicago National Processing Center.
 - I. A recruitment or information source which asserts the availability of qualified United States workers must provide specific information on the United States workers, including their names, addresses, and telephone numbers, so that the employer may contact them.

- J. When recruitment through all sources is completed, the OSE shall send the application, together with all pertinent information, to the Certifying Officer at the Chicago National Processing Center.
- K. At the discretion of the Chicago Certifying Officer, the employer may be required to recruit through additional sources which are appropriate for the occupation and customary in the industry, such as talent agencies, agents, and casting directors.

Determinations

In making a final determination, the Chicago Certifying Officer shall consider circumstances unique to the entertainment industry.

- A. Decisions on applications by employers seeking temporary admission of nonimmigrant foreign workers for temporary employment in entertainment occupations require special consideration, such as:
 - 1. An assessment of requirements of the role or the act to be performed;
 - 2. The need to keep the unity of a group or company and support personnel;
 - 3. The role of labor unions in this highly unionized field and their impact on employment opportunities;
 - 4. The willingness of available United States workers to fulfill the employer's prescribed itinerary.
- B. The Chicago Certifying Officer, in determining whether to grant or deny a temporary labor certification, will base the decision on whether or not:
 - 1. United States workers are available for the temporary employment opportunity:
 - a. The Chicago Certifying Officer, in judging if a United States worker is available for the temporary employment opportunity, shall determine from documented results of the employer and the SWA recruitment efforts if there are other appropriate sources or options the employer could have used or may still use to recruit United States workers. If further recruitment is required, the application should be returned to the OSE with specific instructions for the additional recruitment.
 - b. To determine if a United States worker is available, the Chicago Certifying Officer shall consider United States workers living or working in the area of intended employment, and may also consider United States workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense, if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses.
 - c. The Chicago Certifying Officer shall consider a United States worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, can perform the duties involved in the occupation as customarily performed by other United States workers similarly employed and is willing to accept the specific job opportunity.

- d. For a determination that United States workers are available for job opportunities that will be performed in more than one location, workers must be available in each location on dates specified by the employer.
 2. The job opportunity contains requirements or conditions which preclude consideration of United States workers or which otherwise would prevent their effective recruitment, e.g., there is no employer in the United States. Such applications shall be denied on the basis that United States workers are generally available for employment in the entertainment industry and it was not shown that the employer made reasonable efforts to obtain United States workers for the job. Under these circumstances, the Department of Labor must assume that United States workers are available.
 - C. Dates on the temporary labor certification shall be the beginning and ending dates of the actual employment, not to exceed 12 months (a maximum of 364 days, for purposes of the H-2B program). The beginning date of certified employment may not be earlier than the date certification was granted.
 - D. A denial of certification or a notice that certification cannot be made (non-determination) is not reviewed by the Department of Labor, but may be appealed to DHS. The petitioner may attach the decision to the nonimmigrant visa petition and present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor were observed. DHS will consider all such evidence in adjudicating the petition. The denial of certification letter or notice of non-determination must set forth the specific reason(s) for denial. This statement of reasons will enable DHS to better understand the basis for the Department of Labor's decision to deny the request, in the event the denial is appealed.
5. **Action Required.** The National Processing Centers in Atlanta and Chicago, the Backlog Elimination Centers in Dallas and Philadelphia, and State Workforce Agencies (SWAs) are requested to:
 - A. Provide the attached procedures to appropriate staff; and
 - B. Instruct staff to provide application forms and advise employers of procedures for filing temporary labor certification applications in the entertainment industry to the Chicago National Processing Center.
6. **Inquiries.** Questions or inquiries should be addressed to ETA's Division of Foreign Labor Certification.
7. **Attachments.**
 1. Contact information for Chicago National Processing Center and Offices Specializing in Entertainment (OSEs).
 2. Map of OSEs and Areas Covered.
 3. List of Unions with Substantial Membership in the Arts, Entertainment, and Media Industry.