

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2022 H-2A Final Rule FAQs

Round 4: H-2A Application Filing and Processing
December 30, 2022

Electronic Filing

1. How do I submit an H-2A application?

Employers and their authorized attorneys or agents must submit H-2A applications (*i.e.*, *H-2A Application for Temporary Employment Certification* (Form ETA-9142A)) using the electronic method(s) designated by the OFLC Administrator, unless a specific exemption applies. Currently, the Department’s [Foreign Labor Application Gateway \(FLAG\) System](https://flag.dol.gov), available at <https://flag.dol.gov>, is the OFLC Administrator’s designated electronic filing method. Only employers the OFLC Administrator authorizes to file by mail due to lack of internet access or to file using a reasonable accommodation due to a disability would be permitted to file using those other means. *See* 20 CFR 655. 655.130(c). The National Processing Center (NPC) will return without review any H-2A application submitted using a method other than the designated electronic method(s), unless the employer obtains the OFLC Administrator’s approval in advance to use an alternative means of submission. *See* 20 CFR 655.130(c)(1).

How-to content, including videos posted on YouTube, is available in the “Support” area of the FLAG homepage to guide users through the major features of the system, such as creating an account and logging in, and creating and joining a network.

The FLAG system enables employers to submit H-2A application forms (*e.g.*, Form ETA-9142A) electronically and includes an upload feature to facilitate submission of supporting documentation (*e.g.*, workers’ compensation) and requests (*e.g.*, request for amendment of the number of workers requested).

Joint-Employers Note: In joint-employer situations, only one H-2A application is submitted for the job opportunity. Each joint-employer must be identified in the job order (*i.e.*, Form ETA-790/790A, *H-2A Agricultural Clearance Order*) filed in connection with the H-2A application.

2. Is the employer’s original signature required on the H-2A application submission?

Yes. The Form ETA-9142A, *H-2A Application for Temporary Employment Certification*, Appendix A, must contain the employer’s original signature. For electronic submission, the original signature requirement may be satisfied with an electronic (scanned) copy of the

employer's original signature or a valid, verifiable electronic signature method, as directed by the OFLC Administrator.

The OFLC Administrator will accept electronic signatures affixed to required documents using any available technology that meets the five signing requirements in guidelines published by the Office of Management and Budget through the Federal Chief Information Council, *Use of Electronic Signatures in Federal Organization Transactions*, Version 1.0 (Jan. 25, 2013): (1) the signer must use an acceptable electronic form of signature; (2) the electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record; (3) the electronic form of signature must be attached to or associated with the electronic record being signed; (4) there must be a means to identify and authenticate a particular person as the signer; and (5) there must be a means to preserve the integrity of the signed record.

Joint-Employers Note: Apart from “master applications,” each employer in joint-employer filings must sign the Form ETA-9142A, Appendix A. The additional signed Forms ETA-9142A, Appendix A, for the joint-employers may be uploaded at the time of filing using FLAG’s document upload feature. For an agricultural association filing a “master application” as a joint-employer with its employer-members, only the agricultural association’s signatory must sign Form ETA-9142A, Appendix A.

Reminder: If applicable, the employer’s attorney or agent’s original signature is also required.

Timing Considerations

3. Is there a timeframe requirement that governs when an employer submits its H-2A application?

Yes. Employers and their authorized attorneys or agents must submit completed *H-2A Applications for Temporary Employment Certification* (Forms ETA-9142A) to the NPC no fewer than 45 calendar days before the employer’s first date of need, except in emergency situations that satisfy the criteria of 20 CFR 655.134.

Reminder: Generally, the employer must have submitted an H-2A job order (*i.e.*, *H-2A Agricultural Clearance Order* (Form ETA-790/790A)) 60 and 75 calendar days before the employer’s date of need and received the SWA’s approval of that H-2A job order, prior to submitting a Form ETA-9142A. Only where emergency situations or herding and production of livestock on the range processing applies may the employer submit a Form ETA-9142A, including a Form ETA-790/790A that the SWA has not yet reviewed and approved.

4. How does the NPC determine whether an H-2A application has been filed at least 45 calendar days before the employer’s date of need?

When determining whether an application has been filed “no less than 45 calendar before employer's date of need,” as required by 20 CFR 655.130(b), the NPC does not include the

day the H-2A application was received in its calculation. Instead, the next day is counted as day 1. For example, if an H-2A application is electronically filed on Wednesday, March 1, 2023, that date is not counted. Instead, Thursday, March 2nd, is counted as day 1 of the timeframe and Friday, March 3rd, as day 2, etc., up until Saturday, April 15th, which is day 45. In this instance, provided the employer lists its date of need on its submitted application as April 15, 2023, or after, the employer has complied with 20 CFR 655.130(b).

5. What should an employer do if it is not ready to file its H-2A application at least 45 days from the first date of need?

An employer cannot submit an *H-2A Application for Temporary Employment Certification* (Form ETA-9142A) that lists a first date of need fewer than 45 calendar days from the date of submission, except in emergency situations that satisfy the criteria of 20 CFR 655.134 or in situations involving job order processing disputes or delays that satisfy the criteria of 20 CFR 655.121(e)(3). In situations where the employer does not satisfy the criteria of one of these filing timeframe waiver situations, the employer may submit its H-2A application but must adjust its requested first date of need for certification so that filing time period requirements are met. The first date of need for temporary workers must be at least 45 calendar days from the date the employer will submit the H-2A application, and at least 60 calendar days from the job order submission date.

6. What should an employer do if it becomes aware of a need for labor with fewer than 45 days before the first date of need?

An employer should assess whether its circumstances support a request for emergency filing procedures. As provided in 20 CFR 655.134, the Certifying Officer (CO) may waive the time period for filing an *H-2A Application for Temporary Employment Certification* (Form ETA-9142A) (*i.e.*, no fewer than 45 days before the first date of need) for employers who did not make use of temporary foreign agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause, provided the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100. To request processing under the emergency situations filing provision, the employer must simultaneously submit to the NPC: a complete job order, Form ETA-790/790A, *H-2A Agricultural Clearance Order*; a complete Form ETA-9142A, *H-2A Application for Temporary Employment Certification*; all supporting documentation required at the time of filing; and a statement justifying the employer's request for a waiver of the time period requirement.

The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior year's agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (*e.g.*, a hazardous materials emergency

or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control.

As provided in 20 CFR 655.121(e)(3), an employer may request H-2A application processing under the emergency situations filing provision due to a dispute or processing delay during H-2A job order processing. To make such a request, the employer must simultaneously submit to the NPC: a complete Form ETA-9142A, *H-2A Application for Temporary Employment Certification*; all supporting documentation required at the time of filing; and a statement describing the nature of the dispute or delay and demonstrating the employer's compliance with program requirements.

Reminder: Unless the CO approves the employer's request for waiver of the filing timeframes, the CO will require the employer to adjust its requested first date of need for certification so that the first date of need for temporary workers is at least 60 days from the date the employer submitted the job order related to the H-2A application and at least 45 days from the date the employer submitted the H-2A application.

Multiple Worksites

7. Can an employer file one H-2A application for work in multiple places of employment?

Yes. An H-2A application may encompass multiple places of employment within a single area of intended employment (AIE). As defined in H-2A program regulations at 20 CFR 655.103(b), AIE means:

The geographic area within normal commuting distance of the place of employment for which temporary agricultural labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.*, average commuting times, barriers to reaching the place of employment, or quality of the regional transportation network). If a place of employment is within an MSA, including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (*e.g.*, near the border of) the MSA.

All the places of employment listed in the H-2A application must be located within a single AIE, unless an explicit variance applies. *See* 20 CFR 655.130(e)(1).

A variance to the single AIE limitation permits an agricultural association to file a "master application" as a joint employer with its employer-members. A master application, which must cover the same occupation or comparable agricultural employment and offer start dates for all employer-members listed on the H-2A application that are separated by no more than

14 calendar days, may cover multiple AIEs within a single State but no more than two contiguous States. *See* 20 CFR 655.131(a)(2).

In addition, variances to the single AIE limitation permit employers who file H-2A applications for herding or production of livestock on the range, custom combining, animal shearing, or beekeeping to include places of employment in multiple AIEs, based on a planned itinerary, subject to the conditions specified in the Department's H-2A regulations. *See* 20 CFR 655.200 through 655.235; *see also* 20 CFR 655.300 through 655.304.

Separately, where a job opportunity involves work at multiple places of employment after the workday begins, *e.g.*, a farm employee delivering the farmer's crops to market, the H-2A application may include places of employment outside of a single AIE only as is necessary to perform the duties specified in the H-2A application, and provided that the worker can reasonably return to the worker's residence or the employer-provided housing within the same workday. *See* 20 CFR 655.130(e)(1).

8. Can an employer file one H-2A application for work in multiple places of employment that are located across State lines?

Yes. An H-2A application may encompass multiple places of employment—including places on both sides of a State border—provided that all of the places of employment are located within the same AIE. If the worksites are not located within the same AIE, the employer must be subject to a variance to the single-AIE limitation of 20 CFR 655.130(e)(1) to file (*e.g.*, a master application; a custom combine application).

9. Under what conditions can an agricultural association submit one H-2A application for its members located in two States?

In most cases, an H-2A application is limited to a single AIE. However, provided that certain conditions are met, an agricultural association may file a "master application" on behalf of its employer-members in multiple AIEs in up to two contiguous States:

- The association must file as a joint employer with its employer-members;
- All of the places of employment must be located in no more than two contiguous States;
- The application covers the same occupation or comparable work for all employer-members; and
- The first dates of need for each employer-member are separated by no more than 14 calendar days. *See* 20 CFR 655.131(a)(2).

NPC Processing

10. What supporting documentation must an employer submit with its H-2A application?

All employers are required to submit several documents to the NPC in addition to the Form ETA-790/790A, *H-2A Agricultural Clearance Order* and the Form ETA-9142A, *H-2A Application for Temporary Employment Certification*:

- Proof that the employer's housing is in compliance with applicable program requirements (*see* 20 CFR 655.122(d));
- Proof of workers' compensation insurance coverage (*see* 20 CFR 655.122(e)); and
- A written recruitment report, signed by the employer, submitted on the date specified by the CO in the Notice of Acceptance (NOA) (*see* 20 CFR 655.156).

An employer may also choose to submit justification for any qualifications required for the position that are listed on its job order and/or application at the time of filing. The CO has the authority, through a Notice of Deficiency (NOD), to request that the employer provide documentation evidencing the appropriateness of these job qualifications. *See* 20 CFR 655.122(b).

Additional requirements apply to agricultural associations, joint employers other than agricultural associations, H-2A labor contractors (H-2ALCs), and agents, as explained below:

Agricultural associations (*see* 20 CFR 655.131(a)): If filing a master application, an agricultural association must list on the ETA-790A, *H-2A Agricultural Clearance Order*, Addendum B, the names, addresses, total number of workers needed, and dates of need for each employer who will employ H-2A workers under the master application. If the association is filing as an agent (instead of as a joint employer), the association must submit a signed ETA-9142A, *H-2A Application for Temporary Employment Certification*, Appendix A, for each member who will employ workers under the H-2A application.

Joint employers (other than agricultural associations) (*see* 20 CFR 655.131(b)): If two or more employers seek to jointly employ workers under the H-2A application, they must list on the ETA-790A, *H-2A Agricultural Clearance Order*, Addendum B, the names, addresses, and agricultural work to be performed for each of the joint employers. In addition, each joint employer must submit a signed ETA-9142A, *H-2A Application for Temporary Employment Certification*, Appendix A.

H-2ALCs (*see* 20 CFR 655.132): Labor contractors filing H-2A applications must list on the ETA-790A, *H-2A Agricultural Clearance Order*, Addendum B, the name and location of each fixed site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected dates at each fixed site, and a description of the crops and activities the workers are expected to perform at each fixed site. In addition, the H-2ALC must submit copies of the following documents:

- Signed contracts with each of the listed fixed site agricultural businesses;
- If any of the fixed site businesses are providing housing and/or transportation to the H-2ALC's workers, proof that the housing and/or transportation are in compliance with program regulations;
- A copy of the H-2ALC's valid Farm Labor Contractor (FLC) Certificate of Registration, if required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that identifies the farm labor contracting activities the H-

2ALC will be required to perform as an FLC if the H-2A application is certified; and

- A surety bond (*i.e.*, Form ETA-9142A, Appendix B, *H-2A Labor Contractor Surety Bond*) that meets the requirements of 20 CFR 655.132(c).

Agents (*see* 20 CFR 655.133): An agent must provide a copy of the agent agreement or other document that demonstrates the agent's authority to represent the employer. In addition, if required under MSPA, an agent must submit a copy of a valid FLC Certificate of Registration, that identifies the farm labor contracting activities the agent is performing for the employer.

Important Note: Required documents should be submitted at the time of filing the H-2A application, if available, using the electronic filing system's document upload feature. If the employer does not have the documentation ready at the time it submits the H-2A application, the CO will direct the employer to submit each of these documents before certification may be granted. The CO may issue a NOA when an H-2A application is complete and compliant for recruitment purposes, even though requirements for certification that are unrelated to recruitment (*e.g.*, final housing approval) may not have been completed yet.

11. What happens after an employer submits an H-2A application?

Upon receipt in the electronic filing system, the CO has 7 calendar days to accept the H-2A application or to notify the employer that the application is deficient.

If the CO determines that the H-2A application, including the job order, does not meet program requirements, the CO will issue a NOD listing the deficiencies that must be corrected before the H-2A application can be accepted. The employer will have 5 business days to respond to the CO and correct the noted deficiencies. If the employer timely corrects the deficiencies, the CO will send the employer a NOA. However, if the employer does not adequately correct the deficiencies or if the response raises new concerns, the CO may issue additional NODs. Alternatively, the CO may conclude that a final determination denying the H-2A application is appropriate.

When the CO issues a NOA, which authorizes recruitment to begin, the NPC will promptly transmit the approved job order to SWAs for interstate clearance, consistent with the procedures in 20 CFR 655.150, and post the employer's job opportunity in the Department's electronic job registry, <https://seasonaljobs.dol.gov/>, as provided in 20 CFR 655.144.

Note: If the NPC does not receive an employer's response to a NOD within 12 calendar days after the notification was issued, the NPC will notify the employer in writing that the job order is deemed abandoned and is denied.

12. How can an employer ensure that its H-2A application is processed as quickly as possible?

An employer can minimize processing time by ensuring that its H-2A application is complete and accurate, and by responding promptly and completely to any request(s) from the NPC during H-2A application processing.

After reviewing the *Application for Temporary Employment Certification* and job order, the NPC will issue either a NOA or a NOD. An employer receiving a NOA should follow the recruitment instructions provided by the NPC and may submit the recruitment report and any other required documentation identified in the NOA to the NPC as soon as the employer has that documentation but must submit this documentation no later than the date specified by the CO. An employer receiving a NOD minimizes delay when it responds to the NOD quickly and completely.

As soon as all certification requirements are met, the NPC can issue a certification.

13. May an employer appeal a NOD?

No. If the employer disagrees with the CO's assessment of the H-2A application and job order as detailed in the NOD, the employer may explain its position and refusal to correct the deficiency or deficiencies noted in the NOD in its response. If, after review of the response, the CO concludes that the NOD was properly issued, the H-2A application will be denied for failure to correct the deficiency(ies) noted in the NOD. The employer may then appeal the denial of its application by following the appeal procedures at 20 CFR 655.171.

Amendment Requests

14. Can an employer request an amendment to the period of employment and/or number of workers on its H-2A application?

Yes, the Department's H-2A regulations at 20 CFR 655.145 permit an employer to request amendments to the number of workers and/or period of employment while the Form ETA-9142A, *Application for Temporary Employment Certification* is pending with the NPC. Such amendment requests must be submitted in writing to the NPC, as discussed further in a separate Frequently Asked Question.

An employer may request an amendment to increase or decrease the number of workers requested on the Form ETA-790A, *H-2A Agricultural Clearance Order*. The CO may approve a request to increase the number of workers requested without additional recruitment as long as the increase is no more than 20 percent of the original number requested, or no more than 50 percent in the case of an employer requesting less than 10 workers. For requests for increases above the percentages prescribed, without additional recruitment, the employer must demonstrate that the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. *See* 20 CFR 655.145(a).

An employer may request a minor amendment of the total period of employment identified on the Form ETA-790A. The employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. If the employer's request is for a delay in the first date of need and is made after workers have departed for the employer's place of employment, the CO may only approve the change if the employer includes with the request a written assurance signed and dated by the employer that all workers who are already traveling to the place of employment will be provided housing and subsistence, without cost to the workers, until work commences.

Important Note: Amendments are not effective until submitted in writing and approved by the CO. If the CO approves an amendment request, the CO will notify the SWA(s) of any necessary modification to the H-2A job order.

15. How late in the H-2A application process can an employer request an amendment?

An employer may request to amend its H-2A application at any time before the NPC issues a final determination.

16. What is the process for requesting an amendment to an H-2A application?

To amend a pending H-2A application, an employer must submit a written amendment request to the NPC. The employer may upload the request using the FLAG system's document upload feature or email the request directly to the NPC using the address: TLC.Chicago@dol.gov, with the words "H-2A Amendment Request" contained in the subject line of the email. Only employers the OFLC Administrator authorizes to file by mail due to lack of internet access or to file using a reasonable accommodation due to a disability would be permitted to submit a written request for amendment using an alternative means.

If the employer is requesting a change in the period of employment or an increase in the number of workers by more than 20 percent (more than 50 percent if you originally requested less than 10 workers), attach to the amendment request a statement and any other documentation (*e.g.*, state/local weather reports, crop yield data) demonstrating how the need for the change in the period of employment or number of workers requested could not have been foreseen, and a description of how the crops or commodities will be in jeopardy if approval is not granted immediately.

If the employer is requesting a delay in the expected start date of work, include in the written request a statement indicating whether any workers have already departed for the place of work *and*, if so, an assurance that all workers who are already traveling will be provided housing and meals, without cost to the workers, until work begins.

Important Note: The NPC may require the employer to conduct additional recruitment for U.S. workers as a condition of approving the amendment request, particularly in circumstances where the request will result in an increase in the number of workers by more than 20 percent *or* more than 50 percent if the employer originally requested less than 10 workers.

Withdrawal Requests

17. May I withdraw an H-2A application and job order before the CO makes a final determination?

Yes. An employer may withdraw an H-2A application and the related job order at any time before the CO makes a final determination. However, the employer is still obligated to comply with the terms and conditions of employment contained in the H-2A application and job order with respect to all workers recruited in connection with that H-2A application and job order.

To request withdrawal, the employer must submit a request in writing to the NPC identifying the H-2A application and stating the reason(s) for the withdrawal. To request withdrawal through an electronic filing user account, the employer must identify the Form ETA-9142A to be withdrawn, select the “withdrawal” option, and upload the employer’s written statement regarding the reason(s) for the withdrawal. Alternatively, the employer may submit a written request for withdrawal to the NPC at TLC.Chicago@dol.gov, with the words “H-2A Withdrawal Request” and the full H-2A case number contained in the subject line of the email.