



**POLICY NUMBER  
78**

## **Administrative Policy**

<b>Title:</b>	<b>H-2A Job Order Referral Procedures</b>
<b>Program:</b>	<b>Wagner-Peyser and Foreign Labor Certification</b>
<b>Adopted:</b>	<b>September 13, 2013</b>
<b>Effective:</b>	<b>September 13, 2013</b>

### **I. PURPOSE AND SCOPE**

The purpose of this issuance is to provide guidance to Regional Workforce Boards (RWBs), career center employees and other workforce system partners on processing job seeker referrals to H-2A job orders.

### **II. BACKGROUND (if applicable, include revision history)**

The Immigration and Nationality Act (INA) was created in 1952. Before the INA, a variety of statutes governed immigration law but were not organized in one location. The McCarran-Walter bill of 1952, Public Law No.82-414, collected and codified many existing provisions and reorganized the structure of immigration law.

The H-2A Program is authorized under the INA and allows a U.S. employer to hire foreign workers on a temporary basis to perform agricultural work when there are not sufficient U.S. workers available. Before the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) can approve a visa petition for H-2A workers, the employer must first receive a temporary labor certification from the U.S. Department of Labor (USDOL), Office of Foreign Labor Certification.

The USDOL Office of Foreign Labor Certification is responsible for receiving and processing employer-filed H-2A applications, and ensuring as a condition of certification that qualified U.S. workers are not available for the job and the employment of temporary foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. The USDOL Wage and Hour Division is responsible for enforcing the terms and conditions of the agricultural work contract and worker protections under the H-2A Program.

Federal regulations at 20 CFR 655 Subpart B and 29 CFR 501 provide complete and definitive information regarding program requirements.

The Department of Economic Opportunity (DEO) works in conjunction with the USDOL Office of Foreign Labor Certification, National Processing Center in Chicago, to assist with the processing of temporary labor certifications to Florida employers who participate in the H-2A Certification for Temporary Agricultural Workers.

The H-2A Program services provided by DEO to employers include:

- Receiving and reviewing the ETA Form 790 - Agricultural and Food Processing Clearance Order applications and supporting documentation for intrastate clearance.
- Posting job orders in Employ Florida Marketplace (EFM).
- Conducting agricultural surveys of prevailing wage and employer practices.
- Conducting pre-occupancy housing inspections of employer-owned housing.
- Providing technical assistance and training.

### III. AUTHORITY

[Immigration and Nationality Act](#)

[United States Department of Labor](#)

[Department of Economic Opportunity](#)

[20 CFR 655 Temporary Employment of Foreign Workers in the United States](#)

[20 CFR 653 Subpart F Agricultural Clearance Order Activity](#)

### IV. POLICIES AND PROCEDURES

#### **JOB ORDER MANAGEMENT RESTRICTIONS**

The Foreign Labor Certification Unit within DEO has been designated as the H-2A Program job order manager for Florida, and is the only entity authorized to enter or change an H-2A job order. Changes to job orders requested by employers, Regional Workforce Boards or career centers must be submitted to the DEO Foreign Labor Certification office. DEO will review the request and coordinate with the USDOL Chicago National Processing Center any changes requiring approval by them. Local staff shall not under any circumstances alter an H-2A job order.

#### **ACTIVE AND PASSIVE RECRUITMENT AND FIFTY PERCENT DATE**

Active recruitment of workers begins on the date the EFM job order is entered and ends three days before the job start date. During this time, career center staff may refer any U.S. domestic worker (citizen, permanent resident or individual authorized to work in the U.S.).

Passive recruitment of workers begins three days before the job start date and ends on the fifty percent date of the job order. The fifty percent date occurs when one-half of the contract period listed in the ETA 790 has expired, and is used as the job order close date. If an applicant requests a referral to a job order that is in passive recruitment, staff must offer the applicant job referrals

to other open job orders, and may refer the worker to the H-2A job order in passive recruitment only if the applicant rejects all other referrals. All recruitment ends on the fifty percent date, when passive recruitment ends.

#### **REFERRAL OF WORKERS**

H-2A job orders are suppressed in EFM and therefore require staff assistance. Job seekers cannot self-refer to these job orders. Basic steps to refer job seekers to H-2A Program Job Orders are:

- Interview the applicant and determine if the individual is a migrant or seasonal farmworker (MSFW). Complete the registration steps using the MSFW Desk Aid if it is determined that the applicant is an MSFW.
- Discuss the job description and requirements with the worker to determine if the person is able, available, willing and qualified for the job. For the most part, H-2A jobs require minimal or no prerequisites. However, agricultural labor is physically demanding and the applicant must fully understand the physical demands of the job. The applicant must also be available to work the entire contract period as stated on the ETA 790 form.
- Contact the DEO Foreign Labor Certification office and request the approved ETA 790 Agricultural and Food Processing Clearance Order, if not previously provided by DEO. The ETA 790 is provided to each MSFW significant career center and to the Center located closest to the work site.
- If a job seeker requests a referral to an H-2A job in another state and the job order is not listed in EFM, contact the DEO Foreign Labor Certification office for further information. Do not deny the job seeker the referral. DEO will obtain the approved ETA 790 from the order-holding state and will enter the job order in EFM for the referral to be made.
- Have the interested applicant read the ETA 790, or read it to them if they are unable to read on their own, to insure the applicant is fully aware of the terms and conditions of employment.
- Follow the referral instructions in the job order if the applicant meets the requirements of the job and desires a referral. Most referrals require arranging a telephone interview with the employer. Record the referral in EFM at the time contact was made or attempted with the employer. Document the referral with appropriate case notes.
- Provide each referred applicant a copy of the ETA 790 if offered employment, and a referral results confirmation document so the employer may report the result to the career center. Discuss employee rights and employer assurances with the applicant. Provide the applicant with the toll-free Florida Farmworker Helpline number (800-633-3572) and information on the Employment Service Complaint System. Inform the applicant to contact the career center one to two weeks prior to the start date of employment to confirm the start date, as weather and crop conditions may impact the actual start of employment.

**REFERRAL METHODS**

The majority of H-2A employers request that the career centers facilitate applicant referrals by arranging telephone interviews with the employer on behalf of the applicant. Prior to termination of the telephone interview, the career center staff should confirm with the employer the decision to hire or not to hire and document with an appropriate case note.

Referral instructions in the ETA 790 and EFM job order may call for:

- Submission of an application provided in the ETA 790.
- Submission of a career center or EFM application or resume by mail, facsimile or e-mail. Some employers will accept e-mail submissions but many do not. Refer to the referral instructions in the job order before using the EFM e-mail option.
- Direct referral of applicants to the employer location for interviews. Career centers must attempt a telephone interview prior to referral if the applicant lives outside a reasonable daily commuting distance of the employer location. H-2A Program regulations require applicant travel at little or no cost to the applicant, unless the employer agrees to reimburse travel, subsistence and lodging expenses of the applicant.

**CONSIDERATIONS**

If the employer does not answer the telephone when arranging the interview, attempt two or three calls and leave a callback message including the name and telephone number of the career center staff person. Contact the DEO Foreign Labor Certification staff if the employer does not return the call within two work days or if there is no option for voicemail. Document all actions in a case note in EFM.

If authorized in the job order, use an alternate method such as mail, facsimile or e-mail to inform the employer of the applicant and record the referral in EFM and document with a case note.

If the employer does not hire a qualified applicant who meets the minimum qualifications, contact the employer to determine if the failure to hire the applicant was for a legal reason. If the failure to hire was not for a legal reason, attempt informal resolution with the employer to hire the applicant. If the employer continues to refuse to hire, offer the applicant the option to file a complaint under the Employment Service Complaint System and forward the complaint to DEO's Senior Monitor Advocate. If the applicant chooses not to file a complaint, submit an apparent violation report to DEO's Senior Monitor Advocate.

If the employer indicates he/she does not need more workers, local staff should contact the DEO Foreign Labor Certification office for further guidance. The H-2A employer is obligated to hire qualified U.S. domestic workers during active and passive recruitment and is not allowed to close the H-2A job order. The arrival of H-2A Visa workers does not qualify as filling the labor need. If qualified U.S. domestic workers are available for referral to the job order after the arrival of the H-2A Visa Workers then the employer is still obligated to hire the U.S. domestic worker and arrangements need to be made to either transfer the H-2A workers to another H-2A employer with unmet labor needs or returned to their foreign country. Local office staff should report any

refusal to interview or hire referred U.S. domestic worker applicants to the DEO Foreign Labor Certification office and/or the Senior Monitor Advocate.

Alternative options when no suitable H-2A job order is available in the system or if the job seeker requests a job referral to an H-2A job order that has expired:

- Do not re-open an H-2A job order that has expired or has been closed.
- Consider job development activities with H-2A employers, but the employer will have no obligation to hire the applicant.
- Refer the job seeker to other Florida job orders for which they are able, available, willing and qualified.
- Search EFM using the O\*NET Code for the type of work desired. Follow the referral instructions carefully, especially if the instructions require contacting the State Workforce Agency in another state prior to making the referral.
- Finally, call the DEO Foreign Labor Certification office if the job seeker is seeking employment in another state and no listing appears in EFM. Provide the type of work, preferred crops, state and city or town, and any other preferences. DEO staff will coordinate with the H-2A office in the other state and attempt to obtain appropriate H-2A job information.

#### **RECORDING JOB PLACEMENTS**

Career center staff must verify the placement results within ten business days of the start date of employment or the date of referral, whichever is later. H-2A job placement verification is crucial in ensuring employer compliance with H-2A Program regulations. The lack of accurate placement records in EFM may lead to non-compliance issues with the employer when audited by USDOL. This may cause an assumption that the employer failed to hire qualified U.S. domestic workers. DEO is required to notify USDOL when employers participating in the H-2A Program fail to hire qualified U.S. workers. Also, DEO field checks at H-2A places of employment are based on job orders where at least one U.S. domestic worker was placed. Failing to record placements for an H-2A job order may exclude this employer from being liable to a field check.