

<b>EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D. C. 20210</b>	<b>CLASSIFICATION</b>
	H-2B Non-Agricultural Program
	<b>CORRESPONDENCE SYMBOL</b>
	OFLC
	<b>ISSUE DATE</b>
	June 12, 2007

**ADVISORY: FOREIGN LABOR CERTIFICATION  
TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 27-06**

**TO: OFLC-NATIONAL PROCESSING CENTER DIRECTORS  
STATE WORKFORCE AGENCY ADMINISTRATORS**

**FROM: EMILY STOVER DeROCCO**  
Assistant Secretary 

**SUBJECT: Special Guidelines for Processing H-2B Temporary Labor  
Certification in Tree Planting and Related Reforestation Occupations**

- Purpose.** To outline special guidelines as part of the H-2B labor certification process for employers who desire to employ tree planters and related reforestation occupations in the United States.
- References.** Immigration and Nationality Act (INA) sec. 101(a)(15)(H)(ii)(b); 20 Code of Federal Regulations (CFR) Parts 652 and 655; 8 CFR 214.2(h)(6); Federal Register Notice, Vol. 70, No. 137, pps. 41430-41438; Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801, et seq.; 29 CFR Part 500; and Training and Employment Guidance Letter (TEGL) 21-06, Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations.
- Background.** The H-2B nonimmigrant program permits employers to hire foreign workers to come temporarily to the United States (U.S.) and perform temporary non-agricultural services or labor on a one-time, seasonal, peakload, or intermittent basis. The H-2B visa classification requires the Secretary of Homeland Security to consult with appropriate agencies before admitting H-2B nonimmigrants. Homeland Security regulations require the intending employer first to apply for a temporary labor certification from the Secretary of Labor advising the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) as to whether qualified U.S. workers are available, and whether the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers, or a notice that such certification cannot be made prior to filing an H-2B visa petition with USCIS. Historically, H-2B applications for non-agricultural occupations were processed through the Employment and Training Administration's (ETA) Regional Offices.

<b>RESCISSIONS</b>	<b>EXPIRATION DATE</b>
None	Continuing

However, in December 2004, the Department opened two new National Processing Centers (NPCs), one each located in Atlanta and Chicago. These Centers have been designated to process applications to employ foreign workers for temporary positions under the H-2B program. The Department published a notice in the Federal Register (Vol. 70, No. 137, pages 41430-41438) on July 19, 2005, clarifying that employers must file two (2) originals of the ETA Form 750, Part A, directly with the State Workforce Agency (SWA) serving the area of intended employment and, once reviewed, the SWA will send the complete application to the appropriate NPC. That process does not apply to employer applications for emergency boilermakers, entertainers, logging, and professional team sports, which were given special filing instructions in the notice.

The guidelines outlined in this document work in conjunction with this centralized filing process, and ensure greater consistency in the processing of these H-2B applications through the Centers.

4. **Procedures for Tree Planting and Related Reforestation Activities.** Due to a number of complexities, special guidelines for processing H-2B applications for tree planting and related reforestation occupations are required. For example, although the occupations of Tree Planter, Forest Worker and Laborer, and Brush Clearer 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 occupations. However, two court decisions (*Bresgal v. Brock*, 833 F. 2d 763 (9th Cir. 1987), and *Bracamantes v. Weyerhauser Co.*, 840 F.2d 271 (5th Cir. 1988)) directed the Department to cover migrant and seasonal forestry workers under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). In addition, because forestry occupations may have elements of both agricultural and non-agricultural occupations or involve multi-state itineraries, these applications cannot be solely processed according to the general procedures for H-2B in TEGl 21-06.

Attachment A outlines special guidelines for processing labor certification applications submitted by employers for occupations involved in tree planting and related reforestation activities under the H-2B program, subject to these special provisions. Unless otherwise specified in Attachment A, applications submitted for these occupations must comply with the requirements for H-2B applications contained in TEGl 21-06 issued on April 4, 2007.

5. **Effective Date.** This guidance applies to all temporary labor certification applications for occupations involved in tree planting and related reforestation activities received by the SWAs on or after July 1, 2007.
6. **Action Required.** NPC Directors and SWA Administrators are requested to provide Center and SWA staff involved in the processing of H-2B applications with a copy of these procedures.
7. **Inquiries.** Questions from State Workforce Agency staff should be directed to the appropriate NPC Certifying Officer.
8. **Attachment.**

Attachment A: Special Guidelines for Occupations Involving Tree Planting and Related Reforestation Activities under the H-2B Program

**Attachment A**  
**Special Guidelines for Occupations Involving Tree Planting**  
**and Related Reforestation Activities under the H-2B Program**

This section outlines special guidelines for employer applications involving tree planting and related reforestation occupations under the H-2B program. Unless otherwise specified in this attachment, applications submitted for these occupations must comply with the requirements for H-2B applications contained in TEGL 21-06 issued on April 4, 2007.

**I. Application of Temporary Need Standards Involving Tree Planting and Related Reforestation Occupations**

- A. The employer's need for temporary non-agricultural services or labor in tree planting and related reforestation occupations must be justified to the NPC Certifying Officer under one of the following standards: (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need.
- B. Tree planting and reforestation are predominantly seasonal activities determined by climatic conditions occurring once, or in some locations, twice a year. Although some applications for relatively short itineraries can be justified under the peakload standard, the employer's need for the services or labor to be performed may be more appropriately justified under the seasonal standard.

Employers will typically bid on a sequence of work contracts linking each seasonal activity into an itinerary covering, in some instances, a major portion of the year. Since tree planting and related reforestation activities are covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the MSPA definition of "on a seasonal or other temporary basis" cited at 29 CFR 500.20 provides guidance for determining whether the job offer is for temporary employment. Under MSPA, "seasonal" basis means the following:

*"Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. 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."*

The term "other temporary basis" refers to employment where a worker is employed for a limited time only or where performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

- C. Whether the work to be performed, as described in a tree planting application, is temporary or permanent in nature will be determined by examining the employer's need for such workers for the duration of the itinerary. As with every request for H-2B labor certification, an employer's seasonal need of longer than 10 months, which is of a recurring nature, must be supported by compelling evidence to the NPC Certifying Officer that the employer's need for such work and the job opportunity itself are not ongoing or otherwise permanent. A peakload need longer than 10 months will not be certified.

## II. Special Application Filing Procedures

- A. An employer requesting temporary labor certification who meets the MSPA definition of a Farm Labor Contractor (FLC) (see item II(C)(1) below) must register as a FLC with the Department of Labor's Employment Standards Administration (ESA) before filing a H-2B application for workers who will be performing predominantly manual work, which includes, but is not limited to, tree planting, brush clearing, and precommercial tree thinning. The employer must also provide proof of current registration, including proof of the registration of any Farm Labor Contractor Employees (FLCE - see item II(C)(1) below) at the time of filing. The FLC and FLCE certificate(s) of registration must be valid for the entire period of need. If the expiration date of the FLC or FLCE certificate(s) falls at any point during the period of need, the employer must submit a signed written assurance that an application for renewing FLC and FLCE certificate(s) will be submitted timely to ESA in order to attempt to ensure that the certificate(s) are valid during the entire period of need.
- B. In situations where the employer is not properly registered as a FLC, the SWA must promptly return the application with a notification that the SWA cannot accept a job opportunity for a reforestation related occupation when the employer is not registered as a FLC.
- C. Important FLC Terms and Information
  1. A Farm Labor Contractor means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity. Farm labor contracting activities include recruiting, soliciting, hiring, employing, furnishing, and/or transporting workers. "Agricultural employer" includes any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery, or who produces or conditions seed. "Agricultural association" means any nonprofit or cooperative association of farmers, growers, or ranchers incorporated or qualified under applicable State law. A farm labor contractor employee is a person who performs a farm labor contracting activity solely on behalf of a farm labor contractor holding a valid Certificate of Registration and who is not an independent farm labor contractor who would be required to register under the Act in his own right.
  2. For information on how to apply as a FLC or FLCE or to obtain a listing of persons and companies currently registered, please contact the nearest office of the Employment Standards Administration (ESA), Wage and Hour Division. A current listing of the ESA District Offices can be obtained at the following website: <http://www.dol.gov/esa/contacts/whd/america2.htm>.
  3. For information on individuals or companies who are not eligible to register as a FLC and may not engage in any activity as a FLC or as a Farm Labor Contractor Employee (FLCE) as defined by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), please visit the ESA website at the following address: [http://www.dol.gov/esa/regs/statutes/whd/mspa\\_debar.htm](http://www.dol.gov/esa/regs/statutes/whd/mspa_debar.htm).
  4. Each facility or real property used to house and each vehicle used to transport workers must be described in the application. Housing and transport vehicles for MSPA-covered workers must be authorized for use on the FLC's certificate of

registration prior to use. Each driver of a vehicle transporting MSPA-covered workers must have an FLC or FLCE (Farm Labor Contractor Employee) certificate of registration that specifically authorizes driving (see II(A) above concerning expiration dates of FLC or FLCE certificates).

5. Prior to granting approval on a temporary labor certification application, the employer must submit a signed, written assurance that all registrations, permits, and/or other required licenses for vehicles, housing, or drivers will remain valid during the entire period of use.
- D. Employers have the option of filing a single master application covering multiple itineraries or separate applications for each itinerary where the tree planting or related reforestation work will begin. Alaska, Hawaii, and the U.S. territories may not be included in multi-state itineraries.
1. Employers are permitted to develop and file an itinerary under the following conditions:
    - a. If the itinerary includes worksite locations covering multiple SWAs, the employer may submit a single application to the SWA where the itinerant employment will begin. In those instances where the start dates for each worksite location in the itinerary are exactly the same, the employer may submit a single application to any one of the SWAs covered by the itinerary. If the employment crosses NPC jurisdictions as well, the NPC that has jurisdiction over the SWA where the employment will begin shall process the application.
    - b. In situations where the worksite locations cover multiple SWAs, the states listed in the itinerary **must be contiguous or located within close geographic proximity to one another**. Itineraries where the worksite locations cover multiple states over widely separated geographic areas (e.g., Texas, Arkansas, and Idaho, or Georgia, Alabama, and Maine) are not normal to reforestation occupations and will not be permitted. Such itineraries make it extremely difficult for the Department to satisfy its statutory mandate for determining the availability of domestic workers as a predicate to temporary labor certification. An employer who seeks H-2B workers for job opportunities in one or more remote “downstream” states must file separate applications and job orders for those locations.
    - c. The employer must submit a signed and dated itinerary to the SWA with its application and include the following information:
      - The names, physical addresses, telephone numbers, and wages offered in each worksite location. If no physical address and/or telephone number is available, the employer must provide as much geographic detail as possible (e.g., county/city/township/state corresponding to the itinerary time-frame) regarding the location of the crews performing the work;
      - The total number of crews’ and total number of workers in each crew; and
      - The estimated start and end dates of work in each worksite location. Since the work of tree planting and related reforestation occupations are dependent on climatic conditions, the precise ending dates and subsequent contracts may not be defined at the time of placing a job order.

2. Employers are permitted to file a single master application for multiple itineraries under the following conditions:
  - a. When examining the starting locations of each itinerary, the master application must be filed with the SWA where the largest number of job opportunities is being requested on the itineraries included in the master application. If the employment crosses NPC jurisdictions as well, the NPC that has jurisdiction over the SWA where the employment will begin shall process the application.
  - b. The application must consist only of crews working for a single employer.
  - c. The total range of the crews start dates cannot be more than 14 calendar days apart.

### III. Special SWA Processing Instructions

- A. SWAs should accept agent designations on the ETA Form 750, which is similar to filing procedures under the H-2A program. The employer's application to the SWA must include a copy of the "Agent Agreement" or similar document to substantiate that specific authority has been granted to the agent. (Note: As under the H-2A program, an "agent" who meets the definition of an FLC under MSPA (see II(A) and II(C)(1) above) must be registered as an FLC with ESA prior to engaging in any farm labor contracting activity. "Recruiting" and "soliciting" are farm labor contracting activities. If the employer is represented by an attorney, the attorney must file a Notice of Appearance (G-28) with the application package.
- B. SWAs must review all itineraries to ensure each is normal to tree planting and related reforestation occupations (i.e., it is prevailing practice to start in a particular area; what type of itineraries are normal for contracts and the H-2B program), and contact the appropriate NPC Certifying Officer when they receive an itinerary that may not reflect prevailing practice.
- C. Employers can require tree planter workers to perform **minor** related reforestation job activities such as tree seedling pulling, thinning, seed cone gathering, and pine straw gathering. These activities must be stipulated in the application and job order to apprise workers of the full scope of possible job duties.
- D. A job opportunity containing a wage offer below the prevailing wage will not be accepted. In accordance with TEGL 21-06, the SWA shall determine the prevailing wage, guided by the regulations at 20 CFR § 656.40 and in accordance with Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Non-Agricultural Immigration Programs, Revised May 9, 2005.
- E. A job opportunity specifying that workers are to be paid on a piece rate basis must also guarantee the required hourly wage rate per pay period. The required hourly wage rate will be the prevailing wage rate determined by the SWA. If the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the hourly rate, the worker's pay must be supplemented to increase the earnings to the equivalent hourly level. In situations where workers will be paid on a piece rate basis, the job offer must identify the piece rate, the length of the pay period and the ending day of the week of the payroll period and date, and the minimum productivity required for job retention.

- F. When commencing recruitment, the SWA shall prepare a job order, using the information on the application, and place it into the SWA job bank system for 10 calendar days. During this period, the SWA should refer qualified applicants who contact the local offices and those in its active job files. If the application indicates that work will be performed in other states in the itinerary, the SWA shall clear the job order for 10 calendar days with the appropriate state(s) where the work is to be performed and accept for referral to the employer qualified applicants from the state(s).
- G. During the 10-day posting of the job order, the employer shall advertise the job opportunity in a newspaper of general circulation for 3 consecutive calendar days or in a readily available professional, trade or ethnic publication, whichever the SWA determines is most appropriate for the occupation and most likely to bring responses from U.S. workers. If the job opportunity is located in a rural area that does not have a newspaper with a daily edition, the employer shall use a daily edition with the widest circulation in the nearest urban area or such other publication as determined by the SWA.
- H. The SWA intrastate and interstate job postings and employer advertisements must include the following information:
  - 1. Identify the employer's name and direct applicants to report or send resumes to the SWA for referral to the employer.
  - 2. Address of the SWA local office and job order number.
  - 3. Description of the job opportunity with particularity, including a summary of the itinerary, duties to be performed, work hours and days, and, if applicable, benefits (e.g., housing and free transportation) and incentive wages (e.g., piece rates).
  - 4. Starting locations and wages at each crew's starting location.
  - 5. Notice if employees must purchase or rent tools.
  - 6. Offer wages, terms, and conditions of employment which are not less favorable than those offered to the alien and are prevailing for the occupation, activity, and industry.
  - 7. State the total number of job openings the employer intends to fill.
  - 8. Notice that the job opportunity is temporary.
- I. SWAs should examine all deductions (including housing, transportation, meals, tools, safety equipment, etc.) to determine if they are allowable in accordance with the Fair Labor Standards Act. To obtain more information on the propriety of the deduction(s), SWAs should contact the appropriate office of the ESA Wage and Hour Division. Consultation with the Wage and Hour Division is extremely important for those deductions which are for tools of the trade and other materials and services incidental to carrying on the employer's business. SWAs should contact the appropriate NPC if deductions are not in accordance with the prevailing practice for the area. SWA and ETA decisions regarding allowable deductions are not binding on the ESA Wage and Hour Division.

#### **IV. Special Instructions for Completing the ETA Form 750, Part A**

- A. To ensure consistency in completing applications, employers and SWAs should use the following annotations:
  - a. Item #7 – Employers should write “See Attached Itinerary” and follow the instructions for itineraries under section II.D.
  - b. Item #10b – Employer should note the maximum number of hours required for overtime.
  - c. Item #12b – Employer should note “rate of pay” which shall be time and a half.
  - d. Item #13 - Production standards must be disclosed, and the employer must provide documentation to the SWA substantiating any standard higher than the prevailing practice in the industry. Most reforestation employers have been in the reforestation business for a sufficient number of years so as to have records/documents on file. Such records/documents can include, but are not limited to, past production records, improved equipment, statement of how terrain will impact production rate. SWAs should use their best judgment, based on prevailing practice, to accept or deny the employer’s justification.
  - e. Item #15 – Specific requirements such as requiring employees to purchase tools or housing accommodations should be noted. In accordance with the MSPA, transportation, housing, and any other employee benefits to be provided and any costs to be charged for each of them must be disclosed to the workers. Further, if there is a relationship between the employer and the store to which employees are directed to purchase or rent tools, it must be disclosed to the employee. This information should also be stated in the job order.
- B. In accordance with procedures established under TEGl 21-06, the SWA shall advise the employer to correct any deficiencies in the application before commencing recruitment. SWAs are authorized to close cases in circumstances where the employer fails to address all deficiencies in the application (correction letter) or respond in a timely manner to a recruitment letter.