

**Employment and Training Administration**

# Foreign Labor Certification

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## Announcements

### **January 20, 2021. U.S. Department of Labor Withdraws Forthcoming H-2A Temporary Agricultural Program Rule for Review**

On January 15, 2021, the U.S. Department of Labor (Department) announced and posted on the Office of Foreign Labor Certification's website a forthcoming final rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* (RIN 1205-AB89), pending publication in the *Federal Register* with a 30-day delayed effective date. On January 20, 2021, the Department withdrew this document from the Office of the Federal Register prior to its publication for the purpose of reviewing issues of law, fact, and policy raised by the rule, and therefore it will not take effect. The Department will notify the public of any further actions

as appropriate once it completes its review.

## **January 20, 2021. U.S. Department of Labor Withdraws Program Bulletin Announcing Revised Interpretation and New Guidance under the H-1B Visa Program for Review**

On January 15, 2021, the U.S. Department of Labor (Department) issued an Office of Foreign Labor Certification H-1B Program Bulletin and a Wage and Hour Division Field Assistance Bulletin (FAB) revising its interpretation of its regulations concerning which employers of H-1B workers must file Labor Condition Applications. The Department simultaneously submitted a Notice for publication in the *Federal Register* announcing and requesting public comments on this interpretation. On January 20, 2021, the Department withdrew its Notice from the Office of the Federal Register prior to its publication, and is now withdrawing the Bulletin and FAB for the purpose of considering the process for issuing this interpretation as well as reviewing related issues of law, fact, and policy. Accordingly, the requirements of the Bulletin and FAB are no longer in effect. The Department will notify the public of any further actions as appropriate once it completes its review.

## **January 15, 2021. OFLC Announces Updates to Implementation of the H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations Final Rule; Compliance with District Court Order**

On December 23, 2020, the U.S. District Court for the Eastern District of California issued an order in *United Farm Workers, et al. v. DOL, et al.*, No. 20-cv-01690, enjoining the Department of Labor (Department) from implementing its Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 85 FR 70445 (Nov. 5, 2020), and ordering the Department to operate under the 2010 rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010).

On January 12, 2021, the court issued a supplemental order requiring the Department to publish the adverse effect wage rates (AEWR) for 2021 in the *Federal Register* on or before February 25, 2021, using the methodology set forth in the 2010 rule, and to make those AEWRs effective upon their publication. Additionally, the court ordered the Department to notify all state workforce agencies (SWAs), employers, and the general public that the AEWRs in effect on December 20, 2020, will remain in effect during the interim period until the Department publishes 2021 AEWRs in the *Federal Register*.

Accordingly, all H-2A job orders filed on or after December 21, 2020, with SWAs serving the area of intended employment, as set forth in [20 CFR 655.121](#), including job orders filed concurrently with an *Application for Temporary Employment Certification* with the OFLC National Processing Center for emergency situations under [20 CFR 655.134](#), must continue to use the AEWRs in effect on December 20, 2020, until the publication of new AEWRs in the *Federal Register*.

Additionally, the court reserved decision on whether an award of backpay is warranted based on the difference, if any, between the 2020 AEWRs and the final 2021 AEWRs. Accordingly, the court ordered the Department to provide notice to all employers who submit job orders and applications under the H-2A program between December 21, 2020, and the publication of 2021 AEWRs in the *Federal Register*, that affected H-2A workers may have a potential claim for backpay. Accordingly, and as part of their regulatory obligations to maintain accurate and adequate earnings records (see [20 CFR 655.122\(j\)](#)), the Department reminds employers to record the names and permanent home addresses of all H-2A workers who may later be entitled to backpay, and make reasonable efforts to ensure that such information for each worker remains current. The Department will provide here a further notice if and when the court issues a ruling regarding potential backpay.

## **January 14, 2021. U.S. Department of Labor Published a Final Rule Updating Regulations for Wages Paid to Certain Immigrant and Nonimmigrant Foreign Workers and Better Protect the Wages and Job Opportunities of United States Workers**

The U.S. Department of Labor [published](#) a Final Rule in the *Federal Register* that will help America's workers remain competitive by reforming the prevailing wage methodology for several foreign worker programs. This Final Rule will be effective on March 15, 2021. However, filers will not be required to use the prevailing wage methodology under this Final Rule until July 1, 2021.

## **January 7, 2021. OFLC Publishes List of Randomized H-2B Applications Submitted January 1-3 for Employers Seeking H-2B Workers Starting April 1, 2021**

To keep the public informed regarding the submission and assignment of H-2B applications for review, the Office of Foreign Labor Certification (OFLC) published the assignment group(s) for 5,377 H-2B applications covering 96,641 worker positions with the start date of work of April 1, 2021.

Following the [randomization procedures](#) published in the *Federal Register* on March 4, 2019, OFLC completed the randomization process on January 5 and assigned to National Processing Center analysts all H-2B applications placed in Assignment Group A for issuance of Notices of Deficiency or Acceptance. Group A includes enough worker positions to reach the H-2B semi-annual visa allotment of 33,000. Four additional Assignment Groups (Groups B-E) were created for the remaining applications, each of which includes no more than 20,000 worker positions.