

To: Indiana’s Workforce System

From: Indiana Department of Workforce Development (DWD)

Date: February 29, 2024

Subject: DWD Policy 2023-09
Foreign Labor Certification Programs Overview and Recruitment Processes

Purpose

The purpose of this policy is to provide a summary of the H-2A, H-2B, and PERM programs, introduce the responsibilities of the DWD Foreign Labor Certification Unit (DWDFLC), and notify the Local Workforce Development Areas (local areas) of the required WorkOne/American Job Center (WorkOne/AJC) staff activities associated with Foreign Labor Certification job orders and employment services provision.

References

- WIOA Section 188
- 20 CFR Parts 655 and 656
- 29 CFR Part 38
- 29 CFR Part 501
- Immigration and Nationality Act¹
- U.S. Department of Labor Sheet #78 *General Requirements for Employers Participating in the H-2B Program*²
- TEN 15-22 *American Job Center Role in Connecting U.S. Job Seekers to Job Opportunities Available with Employers Seeking to Employ H-2B Nonimmigrant Foreign Workers Certified for Work Starting in Fiscal Year (FY) 2023*
- U.S. Citizenship and Immigration Services Policy Manual, Chapter 6³
- DWD Policy 2022-20 *Procedures and Required Forms for WorkOne Centers Pertaining to the Employment Service and Employment-Related Law Complaint System*
- DWD Policy 2016-09 *Equal Opportunity and Nondiscrimination Guidance Letter*
- DWD TA 2021-07 *Complaint Procedures for WIOA Nondiscrimination and Equal Opportunity Provisions*

Content

Foreign Labor Certification Programs⁴

The main objectives of the Foreign Labor Certification programs are:

¹ <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act>.

² [Fact Sheet #78: General Requirements for Employers Participating in the H-2B Program | U.S. Department of Labor \(dol.gov\)](#).

³ [Volume 6 - Immigrants | USCIS](#).

⁴ Employers interested in the H-2A, and H-2B Temporary Agricultural Programs should visit [DWD: Foreign Labor Certification \(in.gov\)](#) for more information.

- To enable agricultural and other employers to obtain foreign workers for temporary or seasonal jobs when domestic (U.S.) workers are not available;
- To assure adequate working and living conditions for domestic and foreign workers employed in corresponding employment;
- To provide greater protection for U.S. and foreign workers alike; and
- To assist applicants in securing employment and workforce information through the network of local WorkOne/AJCs by providing a variety of services to both job seekers and employers free of charge.

H-2A

The H-2A temporary **agricultural** program allows agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature.⁵

20 CFR Part 655, Subpart B provides worker protections and employer requirements concerning wages and working conditions. The U.S. Department of Labor (USDOL) Employment and Training Administration's (ETA) Office of Foreign Labor Certification (OFLC) has responsibility for administering the H-2A program, including reviewing applications and issuing temporary labor certifications. The USDOL Wage and Hour Division (WHD) has responsibility for investigating and enforcing obligations applicable to the employment of H-2A workers including obligations to offer employment to eligible U.S. workers.⁶

To issue an H-2A certification, OFLC must determine that:

- There are not sufficient able, willing, and qualified U.S. workers available to perform the agricultural labor or services of a temporary or seasonal nature for which an employer desires to hire foreign workers; and
- The employment of the H-2A worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.

H-2B

The H-2B temporary **non-agricultural** program permits employers who meet the program requirements to hire nonimmigrant workers to temporarily come to the U.S. and perform non-agricultural services or labor based on the employer's temporary need.⁷

The Immigration and Nationality Act and regulations issued jointly by USDOL, and the U.S. Department of Homeland Security (DHS) establish employer requirements and worker protections with respect to wages and working conditions for the H-2B program. The WHD has responsibility for enforcing provisions of worker contracts and applicable employment laws.

To issue an H-2B certification, USDOL must determine that:

- There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers; and
- The employment of H-2B worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.

⁵ Immigration and Nationality Act 218, 8 U.S.C. 1188.

⁶ Please refer to 29 CFR Part 501 for additional information.

⁷ USDOL Fact Sheet #78: General Requirements for Employers Participating in the H-2B Program.

PERM

A **permanent** labor certification allows an employer to hire a foreign worker to work permanently in the United States.⁸

The permanent labor certification program (or PERM) is run by USDOL ETA. To issue a PERM certification, ETA must:

- Certify to the U.S. Citizenship and Immigration Services (USCIS) that there are not sufficient U.S. workers able, willing, qualified, and available to accept the job opportunity in the area of intended employment; and
- Determine that the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

DWD Foreign Labor Certification Unit

The DWDFLC is federally funded to support Foreign Labor Certification programs, including the review and posting of H-2A, H-2B, and PERM related job orders, inspection of employer-provided housing facilities, the administration of prevailing wage and prevailing practices surveys, and the referral and follow-up services to job applicants.

The DWDFLC also provides support and guidance to WorkOne/AJCs to ensure consistency in the management of all Foreign Labor Certification job orders.

The table below identifies the responsible entity for entering Foreign Labor Certification job orders into Indiana's labor exchange system, Indiana Career Connect (ICC), for the recruitment of U.S. workers for each program.

Foreign Labor Certification Job Order Requirements and DWDFLC Processing Details

H-2A Job Orders	H-2B Job Orders	PERM Job Orders
The DWDFLC enters these job orders into ICC. Once approved and ready to be opened for referrals, the DWDFLC sends the job order and the employer's application form to the appropriate WorkOne/AJC.	The employer enters the job order into ICC and emails ⁹ it to the DWDFLC. Once the job order is approved by the DWDFLC, employers must contact a WorkOne/AJC for assistance in recruiting U.S. workers for job opportunities. ¹⁰	The employer enters the job order into ICC and emails ¹¹ it to the DWDFLC. Once the job order is approved by the DWDFLC, employers must contact a WorkOne/AJC for assistance in recruiting U.S. workers for job opportunities. ¹²

For each job order, the employer must include the following:

⁸ U.S. Citizenship and Immigration Services Policy Manual, Chapter 6

⁹ IndianaFLC@dwd.in.gov.

¹⁰ TEN 15-22.

¹¹ IndianaFLC@dwd.in.gov.

¹² TEN 15-22.

- Total number of job openings the employer intends to fill.
- Description of the job opportunity to include:
 - Job duties;
 - Work hours and days;
 - Anticipated start and end dates of the job opportunity;
 - Wage the employer is offering; and
 - Geographic area of intended employment.

For **H-2A** job orders, employers must also list the following:

- Employer provided housing;
- All worksites;
- Agreement to provide each worker with three (3) meals a day or furnish free and convenient cooking and kitchen facilities, and;
- Agreement to pay at least the Adverse Effect Wage Rate (AEWR) (H-2A only).

The DWDFLC reviews job opportunities and attachments to ensure compliance with applicable regulations.

- The DWDFLC has seven (7) business days to approve the job order.
- The DWDFLC reports H-2A job order deficiencies to the employer and makes a note to the certifying officer at the Chicago National Processing Center (CNPC) for corrections.
- Once approved and ready to be opened for referrals, the DWDFLC sends the job order and the employer's application form to the appropriate WorkOne/AJC.
- In the event a job order is denied after posting in ICC, the DWDFLC will close the job order in ICC and notify the WorkOne/AJC to pull the employer application form and job order to prevent further applicant referral.

H-2B employers must specify the wage they are offering. The wage offer must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage. The employer must specify if they will be providing the worker with the option of board, lodging, or other facilities. Additionally, the employer must state if they will provide daily transportation to and from the worksite.

- The DWDFLC reviews the job opportunities and attachments to ensure compliance with applicable regulations.
 - The DWDFLC communicates H-2B job order deficiencies to the employer.
 - Once the job order is approved, the DWDFLC will open the job order in ICC.
 - The DWDFLC will email open job orders to the appropriate WorkOne/AJC monthly.

For **PERM** job opportunities:

- The DWDFLC reviews the job opportunities and attachments to ensure compliance with applicable regulations.
- The DWDFLC communicates job order deficiencies to the employer.
- Once the job order is approved, the DWDFLC will open the job order in ICC.
- DWDFLC will email open job orders to the appropriate WorkOne/AJC monthly.

WorkOne/AJC Staff Foreign Labor Certification Job Order Activities

WorkOne/AJCs are responsible for servicing the job orders entered and/or approved by the DWDFLC in ICC. This includes reviewing terms and conditions of employment, referring applicants, providing employment services, and following up with applicants and employers.

NOTE: Applicants must have an active Wagner-Peyser enrollment.

Job Order Referrals and Employment Services Provision

- WorkOne/AJC staff must record all participant referrals in ICC.
 - Referrals to these job orders are classified as “staff assisted.”
 - Applicants can be referred to the job throughout the recruitment period.¹³
 - The full terms and conditions of the Agricultural Clearance Order Form ETA 790 must be disclosed in writing to all potential H-2A applicants.
 - Applicants must be offered training referrals, career counseling, supportive services, job listings, and similar employment-related services to applicants, as appropriate.
- WorkOne/AJC staff are responsible for informing the DWDFLC¹⁴ of any questionable refusals to interview/consider qualified applicants or hire qualified U.S. workers.¹⁵
 - Refusal to hire qualified applicants could affect the final determination or lead to revocation of the requested labor certification.
 - Employers must provide a valid employment-related reason for any rejection of otherwise qualified U.S. workers.
 - WorkOne/AJC staff must document refusals within the Customer Relationship Manager (CRM).
- WorkOne/AJC should contact referred applicants to provide any additional services as needed. Services could include supportive services and additional employment services as appropriate.
- Employers are to be provided appropriate employment services including labor market information and recruitment services.
 - Business Services staff shall contact employers to ensure their workforce needs have been met and to offer any additional appropriate employment services.
 - Business Services staff shall follow established processes for documenting employer engagements within the CRM.

All WorkOne/AJC staff must be familiar with and follow processes prescribed within DWD Policy 2022-20 for documenting and processing Migrant and Seasonal Farm Workers (MSFW) and employment-related law complaints and alleged violations.

NOTE: Alleged discrimination complaints should be referred to the local area Equal Opportunity Officer to follow the local discrimination complaint policy and procedures.¹⁶

¹³ Recruitment period (time the job will be open) can be located within the job order. **NOTE: Once this time has expired, the system will automatically “close” the job order.**

¹⁴ IndianaFLC@dwd.in.gov.

¹⁵ The DWDFLC must transmit questionable refusals to the USDOL Chicago National Processing Center.

¹⁶ WIOA Sec. 188, 29 CFR 38, DWD Policy 2016-09, and DWD TA 2021-07.

Action

Local areas must develop local procedures to ensure WorkOne/AJC staff are serving Foreign Labor Certification employers and applicants as prescribed within this guidance. The content of this policy may be subject to routine DWD monitoring.

Effective Date

Immediately.

Ending Date

Upon rescission.

Additional Information

Questions regarding the content of this publication should be directed to IndianaFLC@dwd.in.gov.