

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION

COVID-19

Frequently Asked Questions

ROUND 2

April 1, 2020

- 1. Due to the impact of the COVID-19 pandemic, can I permit workers to perform other agricultural labor or services that were not initially disclosed in the H-2A job order as a temporary measure to promote social distancing and slow the spread of the virus within my community?**

The Department understands that, while responding to the disruptive impacts of the COVID-19 pandemic, agricultural employers are making every effort to maintain the nation's food supply and meet their contractual obligations to foreign and domestic workers. Based on these unique circumstances, and pursuant to the provisions below, an employer may permit H-2A workers and domestic workers employed in corresponding employment to perform limited duties that are not specifically listed in the job order, but only as necessary due to the COVID-19 pandemic and related measures, and provided that the additional duties:

- (1) constitute agricultural labor or services, as defined at 20 CFR 655.103(c); and
- (2) are performed at worksite locations covering the same area of intended employment certified by the Department.

Consistent with the employer's recordkeeping requirements at 20 CFR 655.122(j), the employer must retain records showing the nature and amount of the work performed, including any other agricultural work performed in response to the impacts of the COVID-19 pandemic. The employer must continue to pay H-2A workers and workers in corresponding employment the highest applicable wage rate in effect at the time the work is performed and must offer U.S. workers no less than the same benefits, wages, and working conditions the employer will offer or provide to H-2A workers.

2. My workers may need to be quarantined and not able to perform work for several continuous weeks in order to slow the spread of the COVID-19 virus. Do I need to invoke contract impossibility?

Given the unforeseen and disruptive impacts of the COVID-19 pandemic, the employers may be afforded some degree of flexibility before requesting a determination of contract impossibility from the Department under 20 CFR 655.122(o) (i.e., “for reasons beyond the control of the employer ... that makes the fulfillment of the contract impossible”).

Accordingly, employers who must temporarily suspend agricultural operations due to the COVID-19 pandemic, whether in whole or part, may do so for a period of up to 21 calendar days without advance CO approval.

Consistent with the recordkeeping requirements at 20 CFR 655.122(j), the employer retains records for each worker of the number of hours of work offered each day, the number of hours actually worked, and, if applicable, the reason(s) why the number of hours worked is less than the number of hours offered. In order for the Department to take into account the disruptive impacts of the COVID-19 pandemic on the employer’s business while still ensuring the three-fourths guarantee protection for workers, employers may note for each worker the specific time period in which fewer hours or no work was offered and the reason(s) why (e.g., business closure or worker quarantine due to COVID-19 pandemic).

3. Due to the impact of the COVID-19 pandemic, my workers may not be permitted to perform work at some worksites listed on my certified *Application for Temporary Employment Certification* and job order. However, there are other worksites within the certified area of intended employment where work can be performed. Can I place workers at other worksites not specifically listed in the certified *Application for Temporary Employment Certification* but are still within the same area of intended employment?

The Department understands that, while responding to the disruptive impacts of the COVID-19 pandemic, agricultural employers are making every effort to maintain the nation’s food supply and meet their contractual obligations to foreign and domestic workers. Based on these unique circumstances, and pursuant to the provisions below, an employer may place H-2A workers and domestic workers employed in corresponding employment at other worksite(s) that are not specifically listed in the certified H-2A application and job order, but only as necessary due to the COVID-19 pandemic and related measures, and provided that: the worksite(s) are located in the certified area(s) of intended employment and workers will perform only agricultural labor or services listed on their H-2A job orders at those worksite(s) (or as provided in the separate FAQ addressing the performance of other agricultural labor or services that were not initially disclosed in the H-2A job order as a temporary measure to promote social distancing and slow the spread of COVID-19). The employer should provide an amended work contract to any workers who will be performing work at another worksite.

The Department must be assured that essential worker protections (e.g., safe and compliant housing and daily transportation, as well as meals) will be provided to all workers performing duties at the worksites not covered by the certified H-2A application and job order. For worksites that are outside of the area of intended employment on the certified application, and where the COVID-19 pandemic may constitute good and substantial cause, the employer must file a new H-2A application and job order, but should request emergency processing under 20 CFR 655.134.

Important Reminders:

- An employer that obtained temporary labor certification as a fixed-site employer may place workers only at other worksite(s) the employer owns or operates.
- An employer must provide workers with a copy of any approved extensions or modifications to the work contract, as soon as practicable.

4. I'm concerned that some or all of my workers will not arrive on my certified start date of work due to the COVID-19 pandemic and related measures. Should I request an amendment to my certified start date or file a new *H-2A Application for Temporary Labor Certification* with a later start date for those workers whose arrival will be delayed? If not, what do I need to do?

The Department recognizes that employers are making every effort to ensure that all workers arrive in time to commence work on the start date listed on the *H-2A Application for Temporary Employment Certification* or as soon as possible thereafter, consistent with the health and safety parameters related to the COVID-19 pandemic response. The Department also understands that, while responding to the disruptive impacts of the COVID-19 pandemic, agricultural employers are making every effort to maintain the nation's food supply and meet their contractual obligations to foreign and domestic workers. Based on these unique circumstances, and pursuant to the provisions below, employers will not be required to file a new *H-2A Application for Temporary Employment Certification* with a later start date for workers whose arrival is delayed due to the COVID-19 pandemic, or to request amendment of the start date on their certified application provided they comply with the following conditions:

An employer experiencing temporary delays in the arrival of H-2A workers must notify the State Workforce Agency (SWA) to which it submitted the job order and the Chicago National Processing Center (NPC) that, due to the delayed arrival of H-2A workers based on the COVID-19 pandemic and related measures, the employer's positive recruitment period is extended. *See* 20 CFR 655.158. Under these circumstances, the SWA and Chicago NPC will continue to recruit for U.S. workers and satisfy as much of the employer's need as close to the employer's actual start date of need as possible.

In some cases, however, the impact of the COVID-19 pandemic and any delayed worker arrival(s) may change the employer's need for labor to such an extent that a new *H-2A Application for Temporary Employment Certification* is required for the resulting job opportunity. For example, a new *H-2A Application for Temporary Employment Certification* may be necessary if: the duties the employer needs workers to perform have substantially changed as a result of the unforeseen circumstances; the timing of the need for labor has shifted such that a new labor market test is necessary; or if the employer is unable to reasonably anticipate when labor will be needed.

5. My *H-2A Application for Temporary Labor Certification* is pending with the Chicago NPC. I'm concerned that some or all of my workers will not arrive on the start date I listed on my application due to the impact of the COVID-19 pandemic and related measures. Should I request an amendment to my start date before certification?

The Department recognizes that employers are making every effort to ensure that all workers arrive in time to commence work on the start date listed on the *H-2A Application for Temporary Employment Certification* or as soon as possible thereafter, consistent with the health and safety parameters related to the COVID-19 pandemic response. The Department also understands that, while responding to the disruptive impacts of the COVID-19 pandemic, agricultural employers are making every effort to maintain the nation's food supply and meet their contractual obligations to foreign and domestic workers. Based on these unique circumstances, and pursuant to the provisions below, an employer may request a minor amendment to the start date listed on its *H-2A Application for Temporary Employment Certification*, consistent with 20 CFR 655.145(b). For example, an employer's request to amend the period of need should include 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 could not have been foreseen, and a description of how the crops or commodities will be in jeopardy if approval is not granted.

Although the general impact of the COVID-19 pandemic and related measures may be more focused on the health and movement of people and not crop conditions, the employer's *H-2A Application for Temporary Employment Certification* identified the first date of need on which it required workers to begin performing agricultural labor or services. In most cases, an employer's need for the agricultural labor or services work to begin on the date specified in its *H-2A Application for Temporary Employment Certification* will remain unchanged and the employer will need as many of the workers to begin work on the listed start date. In such cases, a start date amendment would not be appropriate.

In some cases, however, an employer anticipating widespread delays in workers arriving due to the COVID-19 pandemic, and related measure, may sufficiently demonstrate to the Chicago NPC that a minor delay will increase the likelihood of more workers arriving to begin work together (e.g., as a crew,) and perform large-scale planting. Where a minor amendment to the start date could increase the likelihood of more workers arriving together on the later start date (e.g., as the result of changes to travel restrictions or availability of other domestic workers based on an extended labor market recruitment), a start date amendment may be appropriate.

To the extent an employer anticipates more than a minor start date delay or is unsure whether or when work will begin, an amendment to the start date would not be appropriate. In those circumstances, once a new start date is certain, the employer may file a new *H-2A Application for Temporary Employment Certification*.

Important Reminder: If the employer requests a delay in the expected start date of work, please remember to include, in the written notification to the Chicago NPC, a statement indicating whether any U.S. 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.

6. I am an employer with a pending H-2A application and job order, and the housing I intend to provide to workers requires an inspection from the State Workforce Agency (SWA). What should I do in the event that the SWA temporarily closes its public offices or suspends operations due to the impact of the COVID-19 pandemic?

Employers should consult the appropriate state government website and/or office for the latest information concerning the SWA's operating status. Although some states may decide to temporarily close physical offices to the general public due to the impact of the COVID-19 pandemic, SWAs in those states may have the capability to continue to perform housing inspections on a case-by-case or emergency basis, to leverage technologies to conduct inspections remotely under specific conditions, or to implement other alternative methods for ensuring housing meets applicable standards. The Department encourages employers to proactively consult their SWAs to obtain information on available procedures to complete their housing inspections.

In the event that the SWA provides notification that it has or will fully suspend all operations due to the impact of the COVID-19 pandemic, employers should be aware that this may prevent or significantly delay the issuance of a final determination on their H-2A applications and job orders. A certification that housing meets applicable safety and health standards is a prerequisite for the Certifying Officer to grant temporary labor certification.

- 7. I am an employer operating as an H-2A Labor Contractor (H-2ALC). Due to the impact of the COVID-19 pandemic, I may not be able to provide the OFLC Chicago NPC an original surety bond associated with my H-2A application 30 days before the start date of work, as required by the Department's regulations. Can the Chicago NPC grant temporary labor certification based on its review of a scanned copy of the original surety bond in this unique circumstance?**

Yes. Under 20 CFR 655.132(b)(3), an H-2ALC must include, with its H-2A application, the original surety bond serving as proof of its ability to discharge financial obligations under the H-2A program. Under normal circumstances, an employer may scan and upload a copy of the surety bond in the Foreign Labor Application Gateway (FLAG) at the time of filing the H-2A application electronically, and send the original surety bond to the Chicago NPC for receipt at least 30 days before the employer's start date of work. Consistent with the Frequently Asked Questions, Round 1, issued on March 20, 2020, OFLC is making accommodations related to deadlines for employers and their authorized attorneys or agents to respond to the applicable OFLC NPC regarding the processing of applications for labor certification due to the COVID-19 pandemic.

For employers operating as H-2ALCs and impacted by the COVID-19 pandemic, if the deadline to submit an original surety bond falls within the period from March 13, 2020 through May 12, 2020 (i.e., 30 days before the start date of work), the Chicago NPC will review the scanned copy of the original surety bond uploaded in FLAG and, provided that the employer will submit the original surety bond by May 12, 2020, the Chicago NPC may grant temporary labor certification.

- 8. Due to the impact of the COVID-19 pandemic, I may not be able to pay the fees associated with my H-2A labor certification within 30 days after the date certification was granted. Will OFLC make accommodations for the delayed payment of H-2A labor certification fees?**

Yes. Consistent with the Frequently Asked Questions, Round 1, issued on March 20, 2020, OFLC is making accommodations related to deadlines for employers and their authorized attorneys or agents to respond to the applicable OFLC NPC regarding the processing of applications for labor certification due to the COVID-19 pandemic. Accordingly, for certifications issued from March 13, 2020 through May 12, 2020, the employer's H-2A labor certification fee will be considered timely if received by the Chicago NPC no later than June 11, 2020.

Important Reminder: An employer who is issued an H-2A labor certification, but requests post-certification withdrawal of that H-2A labor certification and/or decides not to proceed with the filing of a Petition for a Nonimmigrant Worker (Form I-129) with the United States Citizenship and Immigration Services, must still pay the required labor certification fee in a timely manner. Failure to do so can result in debarment from the H-2A program, in accordance with 20 CFR 655.182.