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DIRECTIVE: [FIELD MEMORANDUM NO. 25-98](#)

TO: ALL REGIONAL ADMINISTRATORS

FROM: DAVID HENSON
 Director
 Office of Regional Management

SUBJECT: **H-2B Temporary Non-Agricultural Labor Certification Program Requirements**

1.Purpose. To provide answers to frequently asked questions about the H-2B Temporary Non-Agricultural Labor Certification program, especially with respect to the temporary nature of this program.

2.References. Immigration and Nationality Act (INA) Section 101 (a)(15)(H)(ii)(b) definition; 8 CFR 214.2(h) Temporary Employees; 20 CFR Part 655 Subpart A; GAL No. 1-95, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations; and FM 58-97, Guidelines for Employment Service (ES) Cost Reimbursable Grants for FY 1998.

3.Background. The H-2B program is authorized by the Immigration and Nationality Act which specifies that the program is limited to "temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." Technically speaking, the DOL certification is actually advice to the Immigration and Naturalization Service (INS) as to whether or not U.S. workers are available, and as to whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers.

Due to the sensitivity and recent growth of the H-2B non- agricultural temporary labor program, ETA met with the Immigration and Naturalization Service to ensure that ETA's advice to INS regarding H-2B certifications is consistent with the statute, consistent with INS' legal interpretation of its regulations, and consistent with ETA's own policy.

In general, the following interpretation represents DOL policy regarding the H-2B program:

- **H-2B is authorized by INS and DOL regulations only when the employer has demonstrated a temporary need (i.e., less than one year) for a worker and, in addition, has demonstrated**

that its need is either a "one-time occurrence," a "seasonal need," a "peakload need," or an "intermittent need."

- After ETA (or appropriate State staff) determines that the H-2B application is for a temporary need, the labor market is tested for U.S. workers.
- Foreign workers cannot be authorized under H-2B for a permanent and ongoing need.
- INS regulations and DOL instructions clearly state that the H-2B program is not to be used for long term labor needs.

4. Commonly Asked Questions About H-2B.

a. Is H-2B authorized only for temporary jobs?

The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary. In some situations, the employer's need may create a temporary job opportunity in an employment situation which may otherwise have been permanent in nature.

For example, a temporary job opportunity could be created because the incumbent (who holds the position of permanent factory foreman) was injured or is otherwise unavailable for a period of less than one year, or additional workers are needed during a busy period. The temporary period must have a clear beginning and end.

b. What is the responsibility of the employer in establishing temporary need?

The employer has the burden of establishing the facts necessary to support a finding that the need is temporary and is either a one time, seasonal, peak, or intermittent need in his/her application. Documentation might include contracts, lists of projects and timeframes, as well as narrative explanations.

Note: The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project. The employer must demonstrate its need is temporary, and is either a one time, seasonal, peakload, or intermittent need.

c. Can an H-2B application request workers for longer than one year?

The employer's need may generally be only for one year. However, the need, under the "extraordinary circumstances" provision, may ultimately be longer than one year if the extended need could not be anticipated at the time of application. An example might be the case of a hurricane that destroyed a large bridge. It will take 11 months to replace the bridge. After the application is approved for this "one time" occurrence, the employer demonstrates that the work cannot be completed in 11 months based on circumstances which did not exist at the time the employer first petitioned for the aliens. The work will now take 14 months. The employer would file another application for the three additional months.

d. Can H-2B labor certification applications filed by job contractors be certified as temporary jobs?

In the vast majority of cases, H-2B applications filed by job contractors cannot be approved since they are for permanent jobs. The temporary or permanent nature of the work involved in such applications is determined by examining the job contractor's need for the workers, rather than the needs of its customers. When examined from this perspective, the need for the workers involved in applications filed by job shops is almost always a permanent need. A job contractor, that is in the business of supplying the labor needs to one or more customers, has a permanent need for such workers outside the scope of the particular agreement, and should be informed that he/she may wish to consider filing a permanent application.

In order to meet its burden of proof, such a contractor would need to establish that it had not previously employed workers to perform this particular type of service and that there was no possibility that it would do so again after the performance of the particular contract. Under this scenario, a job contractor might be able to qualify for H-2B status based on the work being either a peakload or a one-time occurrence.

e. Is there a limit to the time of need?

GAL 1-95, consistent with INS regulations, limits the employer's need, except for extraordinary and unforeseen circumstances, to one year or less. However, the requirement that the employer also demonstrate that the need is one time, seasonal, peak load, or intermittent increases the difficulty of justifying a long term need as temporary.

Each situation should be examined on a case by case basis. However, as a general rule, an alleged need of longer than 10 months which is of a recurring nature should be adequately justified. For example, a key item for Certifying Officers considering a seasonal need is the relationship of the need to "a season of the year by an event or pattern that is of a recurring nature." The employment is not seasonal if the period during which the services or labor are not needed is unpredictable, is discretionary, or is considered a vacation period for the petitioner's permanent employees." (GAL 1-95)

"Layered" applications for seasonal workers, such as the case of a fishing industry requesting 25 workers for a six month season, and another 25 workers (same occupation) for five different months, usually indicate the existence of a permanent, ongoing need for eleven months. Normally, one month would not be considered sufficient time to differentiate between seasons.

f. Is a documented labor shortage justification for an H-2B application?

No. The first requirement is that the nature of the need is temporary. Then, the labor market is tested to determine whether qualified workers are available and interested in the position. Regardless of even the most extreme labor shortages, if the need is permanent, H-2B cannot be used. The employer could, of course, consider a permanent application.

5. Action Required. Regional Offices are requested to:

a. Consider the use of training sessions, or other means to assist all staff who respond to public inquiries, or process H-2B applications, fully understand the policies explained in

this FM, and with GAL 1-95.

b. Provide the information in this FM to all States.

c. Request that State staff who receive an H-2B application:

1) Consult with the Regional Office when there is doubt regarding whether the H-2B need is temporary;

2) Notify the Regional Office of unusual increases in H-2B applications and unusual new occupations, especially highly skilled occupations;

3) Screen H-2B applications for temporary need prior to commencement of recruitment activities involving advertising, and advise employers of deficiencies. (GAL 1-95, IV. B.); and

4) Process and forward to the Regional Certifying Officer H-2B application packages in adequate time for a certification to be made within 60 days of the date the application was received at the State. (It normally takes an employer 10-15 days to receive the requested visas after he/she receives the certification.)(GAL 1-95, III. C.)

d. Consult with the National Office before certifying any temporary labor certifications filed by job contractors.

6. Inquiries. Questions should be directed to Rick Kaufmann at (202) 219-8666 (X113) or Pat Stange (X102).