

U.S. DEPARTMENT OF LABOR

DEPUTY SECRETARY OF LABOR

WASHINGTON, D.C.

20210

SEP - 7 2011

The Honorable Louise M. Slaughter
U.S. House of Representatives
Washington, D.C. 20515

Dear ~~Congresswoman Slaughter~~ *Louise*:

Thank you for your letter to Secretary of Labor Hilda L. Solis requesting our assistance on behalf of producers and growers from New York regarding timely processing of H-2A temporary agricultural applications. Thank you also for organizing a listening session on July 14, 2011 for staff representing the Office of the Secretary, the Employment and Training Administration (ETA) Office of Foreign Labor Certification (OFLC), the Wage and Hour Division and me, along with you and several of your colleagues, a number of New York and Vermont growers and agricultural employer trade associations. I appreciate your leadership on these issues.

We understand the important role the agriculture sector, especially apple production, plays in New York's economy. As you mention in your letter, obtaining a reliable farm workforce is critical to the planting and harvesting of crops. We share your concerns about this workforce issue and view the H-2A program as a means by which growers may obtain foreign labor, but only when they have recruited U.S. workers and given them a fair opportunity to secure these jobs.

We found your letter and listening session to be meaningful and informative. They raised issues that ranged from improving customer service to enhancing the Chicago National Processing Center's (NPC) processes for helping the employer community comply with the H-2A program's requirements. I have asked OFLC to develop a management plan consisting of a series of short-term and long-term actions to address the issues identified in your letter or discussed at our meeting on July 14, 2011. I hope you agree that the administrative actions we have undertaken, and those we plan to implement, will address your constituents' concerns. I look forward to hearing how our plans are received.

The following are actions we have taken or will be taking in order to address the concerns identified:

1. We have implemented a pilot electronic mail (e-mail) program for certain states in New England, as well as New York, which allows us to communicate more efficiently with growers when there are concerns about a specific application. Initial feedback from our pilot program has been positive, and our goal is to expand this effort in the near future.
2. We have a dedicated e-mail box at the NPC to receive questions from growers about the H-2A program. The address for the e-mail box is TLC.Chicago@dol.gov. We think increasing our use of technology will result in a much more efficient process for growers

and our staff.

3. We developed the enclosed set of “filing tips” based upon our actual program experience, which provides reminders of actions to help employers comply with the program’s requirements. These “filing tips” are already available on OFLC’s web site.
4. We heard from attendees at the meeting about their interest in OFLC using more technology to simplify and expedite filing and tracking the status of their H-2A applications. By the end of October 2011, we will award a contract that will initiate the design and development of a new web-based filing system for the H-2A program designed to improve access to our services and allow growers to check an application’s status electronically. We expect to have this new system ready for use by growers in late summer 2012.
5. By the end of September, OFLC will post State Workforce Agency-conducted survey results on key issues, such as the acceptability of experience requirements and other prevailing practices, so growers and other individuals interested in the H-2A program can review this information at any time.
6. OFLC will continue to post Frequently Asked Questions (FAQs) and answers on their web site on a regular basis.
7. OFLC expects to publish in late fall 2011 an H-2A Small Business Handbook, which will provide additional program guidance to growers.
8. OFLC will establish a “stakeholder” process with representatives of growers so they can let us know early on about an emerging issue and allow us to address it before it turns into a larger problem. We will keep you informed about this initiative and when we schedule an initial meeting.

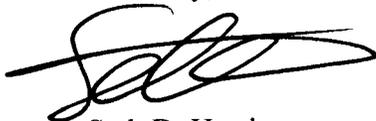
Employers also have expressed concern about required modifications to their H-2A applications and job orders. The H-2A Final Rule includes a process for employers to correct application or job order deficiencies, rather than be denied. Some of these required modifications are not the result of changes in the H-2A Final Rule, but rather the employer’s failure to comply with long-standing program requirements. For example, some modifications requested by New York employers were related to the requirement to pay the most current Adverse Effect Wage Rate which the Department published in the Federal Register and posted on its web site on March 1, 2011, as it does annually. Requiring that an employer offer and pay the appropriate wage rate is essential to meeting our statutory mandate to ensure that the employment of H-2A workers will not have an adverse effect on the wages and working conditions of similarly employed U.S. workers. In other instances, the requested modifications are necessary to ensure the employer meets the eligibility criteria for participating in the H-2A program only where there is a legitimate temporary need. Once an employer corrects the deficiencies, the application and job order are accepted for processing, and the employer is provided with instructions for completing the application process.

We also have heard concerns from the employer community, including during our listening session, about an increase in the number of initial application denials and subsequent appeals in the H-2A program over the previous year. The Department has determined that one of the most common reasons for denial is the employer's failure to provide the documentation required to issue the labor certification within 30 days of the employer's need: the statutory time period within which the Department must issue the determination. However, denials often force growers into the program's appellate process which creates additional delays. To ameliorate this problem, the Department implemented, within the limits of its statutory requirements, a more flexible process in January 2011 to provide employers with additional time to submit documents necessary to meet program requirements and receive certification rather than a denial. We expect that this change to OFLC's process will respond to many of the concerns expressed by you and your colleagues' constituents.

We know from experience that any new final regulation requires a period of adjustment for both the regulated community and our staff. OFLC continues to provide employer assistance and to implement improvements to ensure that the H-2A program is efficient and effective for employers that face a legitimate need for temporary foreign workers. We look forward to continuing our work with you, your colleagues and your constituents to identify further administrative improvements and efficiencies OFLC can implement in the coming months and years. Also, we understand that there are policy concerns you and your colleagues have raised about certain aspects of the H-2A program. We prioritized quickly addressing the administrative problems raised by your letter and our listening session, but we remain open to further discussions about policy issues, as well.

Thank you for writing and sharing your concerns and for meeting with me and my staff. Should you have any further questions, please contact Mr. Brian Kennedy, Assistant Secretary, Office of Congressional and Intergovernmental Affairs, at (202) 693-5927.

Sincerely,



Seth D. Harris
Deputy Secretary

Enclosure

Office of Foreign Labor Certification H-2A Employer Filing Tips

The following "filing tips" are based upon the Chicago National Processing Center's experience in processing H-2A applications over the past 16 months. These filing tips are intended to remind an employer of common mistakes which can delay the processing of an application. Additional detailed information on the H-2A program, including Frequently Asked Questions (FAQs), is available at:

<http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2a>

Pre-Filing

- Make sure to **first** submit a job order using the ETA Form 790 to the State Workforce Agency (SWA) which serves the area of intended employment between 60 and 75 days before your start date.
- Be specific when describing what agricultural work is to be performed and the crops to be planted, cultivated, and/or harvested.
- Include the most recent minimum amount to be provided to the workers for transportation and food as they travel from the place of recruitment to the worksite.
- Make sure you use the most current Adverse Effect Wage Rate (AEWR) on the job order where an hourly wage rate will be offered. The current AEWRs for all states can be found at:
<http://www.foreignlaborcert.doleta.gov/adverse.cfm>.
- Where information cannot legibly be written on the face of the forms, clearly label all applicable attachments.
- Make sure the application contains an original signature and is dated.
- Please include, if possible, an e-mail address to help with faster processing. If one is not available, ensure that the mailing address on the ETA 9142 is correct for receiving overnight delivery of parcels.

Forms

- Please use the fillable forms whenever possible. Hand written applications are often difficult to read and can create delays in processing. Avoid crossing out and making ink changes on the application.
- Make sure you use the correct forms when preparing your application. Forms that are fillable can be found at:
<http://www.foreignlaborcert.doleta.gov/form.cfm>
- When the application is submitted to the Chicago National Processing Center, ensure all required information on the ETA Form 9142 is present and is as close to identical as is possible to the information contained on the ETA Form 790.

Recruitment

- Make sure the employer signs the recruitment report, not the agent or attorney.

If you have additional questions, please contact the Chicago National Processing Center Help Desk at (312) 886-8000 or by email to tlc.chicago@dol.gov and include the words "H-2A Program Question" in the subject line of the email. Employers without internet access may also contact the Chicago NPC by fax at (312) 886-1688, ATTN: H-2A Certifying Officer.