

TEGL 11-07, Change 1
Questions From SWA Training Webinars – Round 2

Gate Hires

Q1. What actions should a SWA take if it learns an employer is referring to the SWA all individuals who appear at the employer's place of business or otherwise contact the employer directly?

A1. If a SWA receives reliable information that an employer is referring to the SWA all individuals who contact the employer directly, the SWAs should (1) process the applicant in the same manner it processes other applicants who initially contact the SWA, and (2) promptly notify the appropriate NPC Certifying Officer of the employer's actions. The NPC Certifying Officer will then notify the employer that failure to respond to employment inquiries from applicants who apply directly with the employer (i.e., gate hires) may result in a reduction in the number of workers certified or a denial of the temporary labor certification application, as appropriate.

Positive Recruitment

Q2. How can a SWA ensure an employer's advertisement directs interested applicants to the SWA for referral?

A2. The SWA is not required to ensure that an employer's advertisement, submitted in connection with an H-2A job order, directs interested applicants to the SWA. The NPC Certifying Officer is best positioned to ensure compliance with the regulatory requirement that the employer's advertisements direct interested applicants to the nearest office of the SWA for referral. In accordance with the NPC acceptance letter, the employer is instructed to submit original newspaper pages or other proof of publication containing the text of the advertisement that was published. Such documentation will allow the NPC Certifying Officer to monitor compliance with the regulatory requirement.

Q3. If DOL will not require employers to recruit in areas where there are a significant number of local employers recruiting for US workers in the same type of occupation, why must SWAs circulate H-2A job orders in proximate states and traditional labor supply states, if employers in such states are recruiting for U.S. workers in the same type of occupation?

A3. Requirements for recruitment via agricultural clearance order are different from requirements for positive recruitment.

The INA requires employers applying for H-2A certification to engage interstate recruitment. 20 CFR 655.105(a) effectuates this requirement, stating that SWAs

must place job orders into intrastate and interstate clearance in the states which the OFLC determines are potential sources of US workers. OFLC has determined that job orders should be circulated in no fewer than three proximate states, at least one traditional labor supply state (Texas, California, Florida, or Puerto Rico, to be chosen by the SWA based upon previous practice), and any other states where a significant number of workers would be determined by the SWA to be available. The requirement to post job orders in intrastate and interstate clearance terminates on the day that is halfway through the contract period.

Also as required by the INA, the relevant regulation at 20 CFR 655.105(a) states that, in addition to recruitment through the interstate clearance system, employers may be required to engage in independent positive recruitment efforts within a multi-state region of traditional or expected labor supply where OFLC determines there are a significant number of available workers. In making this determination, OFLC will attempt to avoid requiring employers to recruit in areas where there are a significant number of local employers recruiting for U.S. workers in the same types of occupations. The NPC will issue to the employer an acceptance letter advising the employer of the specific positive recruitment required. The imposition of such out-of-state recruiting requirements shall be based on current information provided by a state agency or other sources “that there are a significant number of able and qualified U.S. workers” in each state designated for recruitment “who, if recruited, would likely be willing to make themselves available for work at the time and place needed.” The requirement to engage in positive recruitment terminates on the day the H-2A workers depart for the place of employment.

50% Rule

Q4. What will be the effect on the 50% rule if SWAs encourage applicants to apply for non-H-2A job orders or unfilled H-2A job orders after the date the foreign workers depart from their homes?

A4. 20 CFR 655.106(e)(2) states, “The employer shall keep an active job order on file until the “50-percent rule” assurance at § 655.103(e) of this part is met, except as provided by paragraph (f) of this section.” The SWA must still keep the job order in the agricultural clearance system; the employer must still abide by the “50 percent rule” and hire any qualified U.S. worker who applies between the date the H-2A workers depart for the place of employment and the date that is halfway through the contract period. However, SWAs are directed to minimize disruption that may occur to established work forces during the contract period by giving higher referral priority to other job opportunities, if possible.

SWAs should therefore first attempt to refer an interested worker to either (1) a non-H-2A job order in the area of intended employment, or (2) an unfilled H-2A job order in the area of intended employment in which the H-2A workers have not yet departed for the place of employment. If the SWA is unable to refer the worker to a non-H-2A job order or an unfilled H-2A job order, then the SWA may refer the worker to a filled H-2A job order in which the H-2A workers are in place or have already departed for the place of employment.

Housing

Q5. Must SWAs inspect rental, public accommodation, or other substantially similar classes of housing?

A5. No. Pursuant to 20 CFR 655.102(b)(1), employer-provided housing must meet Federal standards for temporary labor camps or the standards for H-2A housing, whichever are applicable.. In circumstances where rental, public accommodation, or substantially similar housing is used, it must meet applicable local standards for such housing. In the absence of local standards, such rental or public accommodation housing must meet state standards. In the absence of both local and state standards, the housing must meet OSHA standards for temporary labor camps. Under 655.102(b)(1)(iii) the employer must document “to the satisfaction of the OFLC Administrator [by delegation, the NPC] that the housing complies with the local, State, or federal housing standards applicable” to the housing. The employer may document this compliance with a certificate from the local or State Department of Health office or a statement from the manager or owner of the housing. However, the NPCs will examine such situations carefully to ensure that employers are in full compliance with the applicable standards. SWAs are encouraged to bring any such situations about which they have information to the attention of the NPC.

Q6. If an employer’s certified housing becomes unavailable, why must the employer notify the SWA and not the NPC?

A6. If previously certified housing becomes unavailable for reasons outside the employer’s control, the employer may substitute other rental or public accommodation housing that possesses a valid certificate of occupancy. As noted in the TEGL, the employer “must notify the SWA, in writing, of the change in accommodations and the reason(s) for such change.” The employer must notify the SWA in order for the SWA to inspect the substitute accommodations, if required. Such inspection may occur prior to or during occupation, at the discretion of the SWA. SWAs should make every effort to notify the NPC CO of the unavailability of the housing and the substitution of other rental or public accommodation housing once the SWA is notified by the employer.