COLORADO
Department of
Labor and Employment

Workforce Development Programs
633 17th Street, Suite 700
Denver, CO 80202

Category/Subject:	H-2A Foreign Labor Certification Guidelines
Colorado Policy Guidance Letter#:	WP-2011-01, change 1 (prior #11-04-WP)
Revise/Replace PGL#:	11-04-WP
Date:	May 13, 2014
Distribution:	CDLE Management/Finance, State/Local Workforce Directors & Staff, Partners

I. REFERENCE(S):

Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers): Federal Register for MSFW Programs, Final Rules as stated in 20 CFR Part 655 subpart B; Agricultural Clearance Order Activities as stated in 20 CFR 653 subpart F; Occupational Safety and Health Administration Temporary Labor Camps as stated in 29 CFR 1910.142; ETA Housing Standards as stated in 20 CFR 654.404 through 654.417; and Wagner-Peyser Act (29 U.S.C. 49 et seq.).

II. PURPOSE:

To provide updated information and guidelines for the labor certification process for the federal H-2A visa program conducted by the Foreign Labor Certification Unit and Workforce Regions. The intent of this PGL is to establish a basic standard of service statewide. .

III. BACKGROUND:

Employers who anticipate a shortage of agricultural workers are eligible to apply for the H-2A visa program administered by three federal agencies: the U.S. Department of Labor, the US Department of Homeland Security, and the US Department of State. The H-2A program was designed to allow foreign nationals entry into the U.S. to work in the agricultural industry, to meet needs that are temporary and seasonal in nature, without displacing U.S. workers. The state workforce agency is required to be instrumental in assisting in the process and is funded by the Wagner-Peyser Act (29 U.S.C. 49 et seq.). Services provided to assist the employers' application process include:

a. Review of ETA 790 application form to ensure the employer meets the content requirements for agricultural clearance orders in 20 CFR 653 subpart F and job order content for job offers in 20 CFR 655.122
b. Placement of job orders in statewide database to recruit local workers.
c. Inspection of mandatory employer-provided housing to ensure compliance with OSHA (as set forth in 29 CFR 1910.142) or ETA standards (as set forth in 20 CFR 654.404 through 654.417), depending on the date of construction.

d. Continued referral during the mandatory recruitment period ofU.S. workers for which the employer is seeking to import non-immigrant foreign workers. According to 20 CFR 655.155 "SWAs (State Workforce Agencies) may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that he or she is qualified, able, willing and available for employment."
e. Provide the U.S. Department of Labor's Chicago National Processing center the job order number, housing inspection and recruitment report associated with a labor certification request to enable a determination whether the request for foreign workers is justified.
f. Send job order for interstate clearance to states deemed as labor supply states for the occupations of requested foreign workers.

IV: POLICY/ACTION:

A. RESPONSIBILITIES OF THE STATE LABOR CERTIFICATION UNIT

1. The Labor Certification Unit at the Colorado Department of Labor and Employment (CDLE) provides guidance and assistance to local workforce regions to assure consistency in statewide operation and the rendering of basic H-2A labor certification services. The Unit is the initial point of contact for employers wishing to file a labor certification request. Employers, or their agents, must submit a form ETA 790 **(attachment 1)** and associated attachments to Labor Certification Unit, 633 17th street 7th floor, Denver CO, 80202 or via email at cdle_flc@state.co.us. The request must be received no more than 75 calendar days and no fewer than 60 calendar days before the employer needs workers at the worksite, which is also known as "the date of need". Employers must state that the ETA 790 is associated with a future H-2A labor certification request.

2. The Labor Certification Unit reviews the ETA 790 and attachments to ensure compliance with applicable regulations. As stated in 20 CFR 655.121(b), the Unit has 7 days to respond to the employer with either, a letter of acceptance and a job order number, or a letter stating deficiencies and citing appropriate regulations. The employer, or its agent, has 5 days to respond to the deficiencies and make appropriate changes counting from 3 days after the Labor Certification Unit sends the letter.

3. After review of the ETA 790 and attachments, the Labor Certification Unit fills out items 4, 6, 7 and 8 on the form to designate an industry code, occupational title, date received application and the job order expiration date. The job order expiration date will be up to the 50% point of the period for which the employer is requesting workers unless the employer, or its agent, requests an exemption. If an exemption is requested, the job order closing date will be 3 days before the date of need. Under 20 CFR 655.135(d), an exemption can be granted to an employer that certifies that it:

1) did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in sec. 203(u) of Title 29,

2) is not a member of an association which has petitioned for certification for its member; and

3) has not otherwise associated with other employers who are petitioning for temporary foreign workers under the H-2A program.

4. After review, the Labor Certification Unit will send a copy of the ETA 790 to the appropriate contact person in the workforce region corresponding to the geographic area of the labor certification application. The Workforce Region will create a job order in ConnectingColorado with all of the information provided.

5. The State Unit receives the job order number from the Workforce Region and fills out section 5 (job order number) of the ETA 790. The Unit will then send the ETA 790, a notice of acceptance, a letter encouraging preparation for a housing inspection, a housing checklist, and a copy of the job order to the employer or its agent. The Labor Certification Unit is required to respond no later than 7 calendar days from the time of the employer's submission of the ETA 790.

6. The State Unit will upload a copy of the ETA 790 and attach it to the job order in ConnectingColorado for potential applicants to receive during the referral process.

7. The Labor Certification Unit will send housing inspection reports from the Workforce Regions to the Chicago Processing Center when requested, which is normally 32 days before the date of need. It will also upload a copy of the inspection to the employer's record in ConnectingColorado so there is a continuous year-to-year record of inspections available to authorized personnel.

8. When requested, the Labor Certification Unit will print off recruitment reports from the "results of referrals" in ConnectingColorado job orders and send them to the Chicago Processing Center.

9. When instructed by the Chicago Processing Center, the Labor Certification Unit will send the ETA 790 and attachments for interstate clearance to states deemed to have a labor supply for the positions solicited. The Unit will inform the order-holding Workforce Center of the clearance process. The unit will then remove the "no referrals beyond commuting distance" from the job order.

10. The Labor Certification Unit will maintain an electronic –copy file of the application process and all associated correspondence for the required 3-year period.

B. RESPONSIBILITIES OF LOCAL WORKFORCE CENTERS

1. The local Workforce Center will designate a point of contact for Labor Certification activities and reporting. The Workforce Center must contact the Labor Certification Unit at cdle_flc@state.co.us whenever there is a change in the contact person, phone, address or email address.

2. The designee will be responsible for creating a job order from the ETA 790 and associated attachments that meets the requirements of 20 CFR part 653 subpart F and 20 CFR 655.122 in a timely manner to meet the Labor Certification Unit's requirement to submit the job order number to the employer within 7 days of receipt of the ETA 790. The job order in ConnectingColorado should be coded as class HA (for H-2A) and must contain the following five statements in the beginning of the job description:

a. “In view of the statutorily established basic function of the job service as a no-fee labor exchange, that is, as a forum for bringing together employers and jobseekers, neither the ETA nor the State agencies are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. Nor does any job order accepted or recruited upon by the JS constitute a contractual job offer to which the ETA or a State agency is in any way a party”.

b. “No referrals beyond commuting distance.” (This statement will be removed once the Labor Certification Unit is notified of the acceptance for interstate clearance.)

c. *****Jobseekers*****
If you are interested in this position, meet the experience requirements, and are willing to commit to the entire contract period, please go to your local workforce center to be apprised of all terms and conditions of employment and application instructions.

d. *****Workforce Center Staff*****
Please download the file attached to this job order for interested jobseekers and make sure the applicants understand the content of the contract before issuing a referral.

e. “FLSA Exempt; no overtime paid”

3. The designee must be trained by CDLE in housing inspections and OSHA or ETA requirements, which are used depending on the construction date of the employer-provided housing. The employer should be contacted as soon as possible to arrange a pre-occupancy housing inspection, which must be supplied to the Chicago Processing Center no later than 32 days before the date of the need. To provide a record of the inspection, Forms WH-520 and ETA 338 **(see attachment 2)** must be filled out and signed by the designee and must also have the employer’s signature. The designee must then submit the forms to the Labor Certification Unit for review. If housing fails to meet guidelines the employer must be notified of deficiencies, in which case, they have 5 days to correct and request another inspection. If housing fails inspection, or no efforts are made to correct the deficiencies, the job order should be closed, and any referred U.S. workers should be notified.

4. In order to comply with 20 CFR 655.155, all job orders classified as H2A are staff-assisted only referrals and potential applicants must be given a copy of the ETA 790 that is attached to the job order. Whenever possible, workforce center staff should place in any referred applicant’s file in ConnectingColorado, notes regarding the reason for the referral and if the applicant actually applied for the position.

5. The designee is responsible for informing the Labor Certification Unit at cdle_flc@state.co.us of any questionable refusals to hire U.S. workers so that the information can be forwarded to the Chicago National Processing Center. Such refusals could affect the determination and/or revocation of the requested labor certification should the employer not have valid reasons for not hiring U.S. workers. Workforce regions should continue to refer any able, willing and qualified U.S. workers to the job order until the end date of the order.

V. IMPLEMENTATION DATE: Upon receipt of the Policy Guidance Letter

VI. INQUIRIES:

Please direct all inquiries to Thomas B Gonzales at 303-318-8831 or cdle_flc@state.co.us

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Elise Lowe-Vaughn, Director
Workforce Programs, Policy, and Special Initiatives

ATTACHMENTS:

1. Agricultural and Food Processing Clearance Order ETA Form 790
2. Housing inspection Forms WH-520 and ETA 338