

H-2A PROGRAM
EMPLOYER
INFORMATION,
FORMS &
OPERATING
INSTRUCTIONS

This guide is intended to provide Colorado's agricultural employers a complete, comprehensive informational guide regarding temporary and seasonal agricultural operating instructions from the start through to housing inspections information. An "agricultural" employer who anticipates a shortage of U.S. workers and needs temporary or seasonal nature nonimmigrant agricultural foreign workers (H-2A) on a temporary basis to tend or harvest crops, or do other agricultural labor or services may file an application. The duration may be a limited time period of less than one year when an employer can show that the need for the foreign worker(s) is truly temporary or usually in relation to the production and/or harvesting of a crop. It's the employer's need, and not the nature of the job, which determines whether a position is, in fact, temporary. In considering whether the job is temporary, USDOL will evaluate the employer's need for the workers. The unavailability of U. S. workers is not material to the USDOL's determination of whether the position is temporary.

The employer may be an individual proprietorship, a partnership or a corporation. An association of agricultural producers may file as a sole employer, a joint employer (occurs when two or more employers file an application together and each agrees to be fully responsible for the application's wages and working conditions) with its employer-member employers, or as an agent of its members. The association must submit documentation sufficient to enable the U.S. Department of Labor to verify the employer or agency status of the association; and must identify by name and address each member which will be an employer of H-2A workers.

An agent on behalf of an employer may sign and file H-2A applications providing the application is accompanied by a signed employer's statement which authorizes such action. The employer may authorize the agent to interview applicants from the job order and make hiring commitments. However, this statement must specify that the employer assumes full responsibility for the accuracy of the application, and representations made by the agent

Pursuant to Section 203(f) of Title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938, as codified), quoted as follows, defines "agriculture" to include: (f) *** farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as a incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

This guide also provides a broad overview of the process of applying for certification for the importation of temporary foreign agricultural workers. The filing requirements and employer obligations are presented in general terms. The U.S. Department of Labor regulations at 20 CFR (Code of Federal Regulations) Part 655, Subpart B provide a comprehensive statement of such requirements and obligations.

This guide will also provide the employer housing standards of Employment and Training Administration (ETA) and Occupational Safety and Health Administration (OSHA) – 1910.142, which will inform the employer of applicable housing standards. Each housing standards will provide the regulations and housing inspection checklist for easier guidance in understanding the standards. Also, each standard have the necessary Employer Furnished Housing and Facilities, ETA 338 and Certificate of Housing, Form WH –520.

The Colorado Department of Labor (CDL) does NOT inspect the following:

- Employer owned and/or rental which is already occupied
- Commercial hotels/motels
- HUD housing units

H-2A Conditions To Be Satisfied Mandated (**Bolded**)

An employer who files a H-2A application for temporary foreign worker certification pursuant to regulations must meet the following specific conditions:

RECRUITMENT: The active recruitment of U.S. workers is an integral part of the labor certification process. This requires positive action of the employer and the coordination and cooperation throughout the State Workforce Agency (SWA) system. As the statute provides, labor certification may not be issued if “the Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply” upon being advised by the Secretary of a significant number of qualified U.S. workers. The law further states that this effort is in addition to the recruitment through “the interstate employment service system.” In making a finding of U.S. worker availability, the Regional Administrator (RA), must have accurate documentation from SWA offices and from the employer of the efforts their recruitment results.

Pursuant to 655.105(b) An United States (U.S.) worker means any worker who whether a U.S. national, a U.S. citizen, or an alien is legally permitted to work in the job opportunity within the United States.

The application of an agricultural employer for temporary labor certification must include a job offer. The job offer must include the terms and conditions of employment that will be used in the recruitment of both U.S. and foreign workers. As a minimum, the job offer must comply with minimum requirements established in the general agricultural clearance order regulations at 20 CFR Part 653, Subpart F, and must include certain benefits, wages and working conditions which are needed in order to assure no adverse effect on U.S. workers similarly employed. The job offer (ETA 750) or the Form ETA 790 must also include an agreement to abide by the assurances specified in the regulations at 20 CFR 655.103.

A basic premise of any labor certification determination is that the employer must offer U.S. workers at least the same opportunities, wages, benefits, and working conditions as those, which the employer offers or intends to offer to nonimmigrant foreign workers. At the same time, the employer may not require more of U.S. workers than is being required of the foreign workers. For example, if the employer allows foreign workers a certain period of training time to achieve a required production standard, U.S. workers must be offered at least the same opportunity for reaching the standard without being discouraged.

Employers must provide employment to any qualified and eligible U.S. worker who applies until 50 percent of the period of the work contract has elapsed up to the number of workers that the employer has stated they anticipated employing. The employer must keep an active job order on file until the “50 percent rule” has been met. The expiration date of the local and agricultural clearance order should also be adjusted to reflect the ending date of this requirement.

Exceptions to the 50 percent rule: It does not apply to a small employer who certifies to the Regional Administrator in the application that they did not use more than 500 man-days of agricultural labor during any quarter of the preceding calendar year and is not a member of an association. Please note the definition of man-days is **“any day during which an employee performs agricultural labor for not less than one hour.”** **500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter.** However, an employer who hires temporary or part-time employees during part of the year, such as harvesting season, may exceed the man-day test even though they may have only two or three full-time employees.

The employer must agree to engage in independent positive recruitment of U.S. workers. This means an active effort, including newspaper and radio advertising in area of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers in the same or similar crops and area to secure U.S. workers. This must be an effort independent of and in addition to the efforts of the Colorado Department of Labor. (The Colorado Department of Labor shall create a job order number based upon your acceptable H-2A application and clearance order. We will screen and refer qualified workers for a period of ten days and comply with the referral instructions). In establishing worker qualifications and/or job specifications, the employer must designate only those qualifications and specifications which are essential to carrying out the job and which are normally required by other employers who do not hire foreign workers. The employer must not reject or terminate U.S. workers for other than job related reasons.

Positive recruitment by employer is defined in the regulations as “the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply area in the area where the employer’s establishment is located in an effort to fill specific job openings”. **At the time of application, the employer must also submit an independent positive recruitment plan to recruit U.S. workers**, such as contacting former employees or negotiating with specific farm labor contractors.

The wording on the ETA 790, Agricultural and Food Processing Clearance Order, Item 15, referral instructions cannot indicate that referrals will be accepted from local Workforce Centers only. The correct wording must indicate – Referrals will be accepted from Workforce Center, in addition to, employer’s recruitment through other means such as word-of-mouth and gate hires will be offered.

U.S. workers cannot be rejected for or terminated from employment for other than lawful –job related reasons. Lawful job-related reasons include failure to achieve approved productivity levels, malingering or serious misconduct. The employer must report each situation when U.S. workers are refused employment or are terminated, for any reason, in writing to the SWA. (SWAs must maintain a record of such actions for at least two years).

CFR655.103 requires employers to notify the designated SWA office within two (2) business days of termination of any H-2A worker or, in the case of abandonment, within two (2) business days of discovering abandonment. If this action has been completed, the employer will not be responsible for providing or paying for the worker’s subsequent transportation and subsistence expense, and is also not entitled to the three-fourths guarantee.

- **WAGES:** The wage or rate of pay must be the same for U.S. workers and H-2A workers. The hourly must also be at least as high as the applicable Adverse Effect Wage Rate (AEWR), federal or state minimum wage or the applicable prevailing hourly wage rate, whichever is higher. Currently, Colorado’s AEWR is \$9.42 per hour. (This rate will change yearly around March in the Federal Register).

Piece rate - If a worker is paid on a piece rate (price per identifiable and measurable unit of production), the job offer must state the piece rate. The unit of production must be clearly described, i.e., a field box of oranges (1 ½ bushels) bushel of potatoes, an apple box (1 ½ metric bushels) a flat of strawberries (12 quarts), etc. It is important to understand the actual measurement of the container. Therefore, the employer must provide the cubic measurement of all boxes and bins utilized.

The job offer must also state that, if the average hourly earnings for a pay period does not equal the amount the worker would have earned if paid by the hour, then the worker will be paid supplemental pay to bring earnings up to such level for each pay period.

The regulations state that the worker’s pay must be supplemented to increase the worker’s earnings to a level “...if the worker has been paid at the appropriate hourly wage rate for each hour worked.” The appropriate hourly wage rate will be the published AEWR.

Employers are required to pay their workers at least twice monthly, or more frequently if it’s the prevailing practice in the area of intended employment.

The employer shall make those deductions from the worker’s paycheck, which is required by law. All deductions shall be reasonable. The employer may deduct the cost of worker’s transportation and daily subsistence expenses to the place of

employment, which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage.

The wages paid to H-2A workers are exempt from FICA, federal and/or state income tax withholding, and including FUTA taxes.

IRS tax law prohibits FICA, Social Security, and Medicare deductions for H-2A/visa foreign workers. Although ETA Form 790 and its attachments ask for these deductions, DO NOT select these options for H-2A/visa foreign workers. Please review IRS code 3121 shown below:

Foreign agricultural workers temporarily admitted into the United States on H-2A visas are always exempt from U.S. social security and medicare taxes, whether they are resident aliens or nonresident aliens[1]. In addition, payments made to H-2A alien agricultural workers are not considered to be "wages" for the purposes of income tax withholding and reporting on forms 943 and W-2.[2] The employee is required to report his Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN) to his agricultural employer. Please see IRS Publication 51 Circular A (www.irs.gov/publications/p51/index.html) Agricultural Employer's Tax Guide for the withholding tables and deposit requirements on agricultural employees.

The job offer must state that the employer will keep and maintain adequate and accurate payrolls and supporting records. The employer must keep the following records:

- With respect to the worker's earning, including field tally records, supporting summary payroll records and records showing the nature and amount of the work performed;
- The number of work offered each day by the employer (broken out by hours offered both in accordance with and over the above the three-fourths guarantee;
- The hours actually worked each day by the worker;
- The time the worker began and ended each workday;
- The rate of pay (both piece rate and hourly, if applicable);
- The worker's earnings per pay period;
- The worker's home address; and
- The amount of and reasons for any and all deductions made from the worker's wages.

- **HOUSING:** The employer must provide free housing to all workers who are not reasonably able to return to their residences the same day. Colorado Department of Labor's Workforce Center staff must inspect such housing. **The Colorado Department of Labor encourages employers who expect to obtain their labor certification 30 days before the date of need to have their housing ready for inspection at the time of filing their application, or earlier.** Workforce Centers may be prepared to conduct housing inspections prior to the employer's filing of their application, as appropriate, and may plan to schedule housing inspections prior to filing for those employers who use regularly use the H-2A program.

ETA housing standards are used for housing constructed prior to April 3, 1980 or housing which a contract for construction was signed before March 4, 1980. However, if this housing was re-modeled along with a change in foundation, OSHA standards are applicable.

Employers may make other arrangements for housing, such as rental or public accommodations, which meet standards for housing. **If rental property is to be used to house temporary agricultural workers, a copy of a lease or rental agreement from the actual property owner must be provided.** If there are no local or state standards, then such housing must meet OSHA standards.

Workers must not be held responsible for paying the rental cost of the accommodation. Also, it's not permissible for workers to be required to make deposits for bedding, other items furnished in the accommodations, or for possible damage to accommodations. If workers are subsequently found to have been responsible for damages, the employer may require reimbursement for such damages as prescribed in the regulations. Such reimbursements may not result in a worker's wage going below the Federal minimum wage.

Shared housing – The Colorado Department of Labor's housing inspector will be asking if any time during your H-2A contract you will be sharing worker housing with any other H-2A employer? If so, the inspector must get the name(s) of the other employer(s) who will be using this housing, and this information must be reported immediately to the U.S. Department of Labor so this information can be matched with the applicable cases in a timely manner.

Conditional access to the intrastate or interstate clearance system – The pre-clearance inspection may be delayed if the employer has requested conditional access into the clearance system because the housing is not in compliance when the employer files their H-2A application. This completed form provides an assurance that their housing will be available for inspection and will meet applicable housing standards at least 30 days before the date of need. If this housing fails to pass inspection, the employer will be given an additional five calendar days to correct their housing deficiencies noted by the inspector. U.S.

Department of Labor will not grant certification to an employer whose housing has not passed inspection.

- **MEALS:** The employer must provide three meals a day to each worker or furnish free and convenient cooking and kitchen facilities of sufficient size and capacity (including utensils) which would enable workers to prepare their own meals as well as ensuring workers have access to necessary food and supplies. The job offer must clearly describe such facilities and state that the facilities and necessary utensils are provided at no cost to the workers.

If three meals daily are provided, the maximum allowable charge employers may impose upon workers is \$9.90 per day, unless the Regional Administrator has approved a higher charge. (The \$9.90 per day charge will change yearly around March when annual adjustments are published in the Federal Register).

- **TRANSPORTATION:** The amount of transportation payment must be no less (and must not be required to be more) than the most economical and reasonable common carrier transportation charges for the distance involved. The employer is responsible for the following different types of transportation of workers: (1) After a worker has completed fifty percent (50%) of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work if such cost were borne by the worker. Completion of the work contract, employer will pay reasonable costs of return transportation and subsistence (travel reimbursement subsistence will be the minimum amount of \$9.90 per 24-hour period of travel [without receipts] and the maximum amount will be \$39.00 per day [with receipts]) from the place of employment to the place of recruitment, except when the worker will not be returning to the place of recruitment due to subsequent employment with another employer who agrees to pay such costs, in which case the employer will only pay for the transportation and subsistence to the next job. (2) The employer must provide free transportation between the employer's housing and the worksite for any worker who is provided housing. (3) Upon completion of the work contract, the employer must pay economic costs of a worker's subsistence and return transportation to the place of recruitment. Special conditions apply when the worker will not be returning to the place of recruitment because of another job. If the employer must advance transportation cost to foreign workers or provide transportation, the employer must advance such cost or provide transportation to U.S. workers as well. In addition, if it's prevailing practice in the occupation to provide transportation, the employer must provide transportation to U.S. workers, as well.

CLARIFICATION: The following will inform you of regulatory provisions governing the H-2A employer's obligation to reimburse transportation expenses for foreign and domestic workers:

U. S workers, and in some cases H-2A foreign workers, may go from a current H-2A employer to a subsequent employer. When this occurs, questions are raised regarding which, if any, does the employer have an obligation to pay for (or provide) transportation back to the place from which the worker was recruited?

Workers have a right to make an informed decision regarding the economic benefits of a subsequent non-H-2A job and weigh these benefits against the loss of the transportation benefits.

The following pertinent regulatory provisions apply:

20 C.F.R. 655.102(b) (5) (i) "...the employer shall pay the worker for cost incurred by the worker for transportation and daily subsistence from the place of employment."

20 C.F.R. 655.102(b) (5) (ii) "Transportation from place of employment. If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, has come to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses; except that, if the worker has contracted for employment with a subsequent employer who, in this contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer is not required to provide or pay for such expenses."

20 C.F.R. 655.102(b)(5)(i), 55 Fed. Reg. 20500 (June 1, 1987) Supplemental Information) "...The employer must offer to pay for (or provide) the worker's transportation home, or wherever the worker began the series of jobs culminating at the current place of employment...H-2A workers may be authorized to go from "criteria" (H-2A) employment...to other criteria employment...**This effectively places the requirement on the H-2A worker's final criteria employer to pay for (or provide) the H-2A worker's transportation home.**

"U.S. workers, however, may go from "criteria" employment (i.e., where they have H-2A coworkers in the same agricultural activity) to either criteria or non-criteria employment... **The transportation home requirement is assumed by the next criteria employer...**"

If the U.S. worker's subsequent employer is a non-criteria employer,...and unless that subsequent employer offers to pay for...transportation home, or to further employment, it's the worker's responsibility to obtain transportation...

The transportation home requirement...is not assumed by the non-criteria employer...”

“If the U.S. worker has no subsequent employer, the current employer must offer to pay for (or provide) the worker’s transportation home, or wherever the worker began the series of jobs culminating at the current place of employment.”

Completed contract examples which provides employer’s obligations:

- U.S. worker is recruited in Texas by a Colorado H-2A employer, and the worker goes on to a Wyoming H-2A employer. The Wyoming employer is responsible for transportation back to Texas.
- U.S. worker is recruited in Texas by a Colorado H-2A employer, and the worker goes on to a Utah non H-2A harvest job. If the subsequent, Utah non-H-2A employer does not offer to pay for (or provide) the U.S. worker’s transportation from the current place of employment to the subsequent place of employment, the Colorado H-2A employer is required to pay for (or provide) such transportation. **The transportation home requirement is NOT assumed by either employer and it’s the worker’ responsibility to obtain such transportation from some other source.**
- H-2A worker is recruited in Jamaica by a Colorado H-2A employer. The H-2A worker then moves (after an approved visa status change petition) to another certified H-2A employer in Wyoming. After completion of the contract, the Wyoming employer is responsible for transportation home to Jamaica.
- H-2A worker is recruited in Mexico by a Colorado H-2A employer. The H-2A worker then moves (after an approved visa status change petition) to Utah H-2B forestry employer. If the subsequent, Utah H-2B employer does not offer to pay for (or provide) the worker’s transportation from the current place of employment to the subsequent place of employment, the Colorado H-2A employer is required to pay for (or provide) such transportation. U.S. Department of Labor regulations do not require either employer to pay for transportation back to Mexico. It’s the worker’s responsibility to obtain such transportation form some other source.
- H-2A worker is recruited in Mexico by a Colorado H-2A employer. The H-2A worker then moves (after an approved visa status change petition) to H-2B employment with the same employer or an entity owned by the same employer. The H-2A employer is required to pay for (or provide) transportation home for the worker.

NOTE: This guidance addresses employer responsibilities under the H-2A program only. However, the Immigration and Nationality Act, provides that the subsequent H-2B employer may be responsible for reasonable costs of return transportation. Specifically, Section 214 ©(5)(a) provides that: “In the case of an alien who is provided

nonimmigrant status under Sections 101(a)(15)(H)(i)(b) or 101(a)(15)(H)(ii)(b) and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.”

- **WORKER’S COMPENSATION INSURANCE:** The job offer must include a statement that workers’ compensation will be provided at no cost to all workers in the occupation for which workers are being sought. The coverage and benefits provided will be at least equal to that provided under the state’s compensation law of comparable employment. If coverage is in effect at the time of application, the employer will set forth in the application the insurance carrier and the policy number, or, if appropriate, proof of a state law coverage. Proof of policy must be documented prior to labor certification determination date.
- **TOOLS, EQUIPMENT AND SUPPLIES:** The job offer must describe all equipment that will be used by workers in performing the job. All such tools, equipment and supplies must be provided by the employer without charge (i.e., any deposit) **except** where the employer asserts that it’s the common practice in the crop activity, the geographic area, and occupation for workers to provide such tools and equipment. This would apply regardless of whether the employer subsequently reimbursed workers for such const. In any event, the employer must clearly document that it is the common practice and obtain written approval in advance from U.S. Department of Labor before this exception can be granted.
- **THREE-FOURTHS GUARANTEE:** As part of the job offer, the employer must guarantee to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect.

The number of hours in the workday is that stated in the job offer. The period of the contract is from the first workday after arrival of the worker at the place of employment until the expiration date of the work contract. If the U.S. or H-2A worker is not offered the opportunity to work for three-fourths of such hours during this period, then the employer must supplement the pay of such worker as though the worker had actually worked such guaranteed employment.

The three-fourths guarantee of employment is established by computing 75% of the established total hours of work time in the contract period. The number of hours available work per day is simply the sum of the number of hours actually worked plus any hours offered, but not worked (up to the maximum number of daily hours specified in the clearance order). In meeting the three-fourths guarantee, the worker cannot be required to work for than the number of hours specified for a day on the job offer. Also, the worker cannot be required to work on the worker’s Sabbath or a Federal holiday.

The employer must maintain payroll records, which indicates the number of hours offered each day and the number of hours actually worked each day. This daily record must also clearly account for the reason(s) a worker did not work the full number of hours offered.

Examples to clarify this provision:

A Colorado agricultural employer request workers during the period from July 1 through September 30. The job hours per day specifies eight (8) hours of work for five days each week, Monday through Friday. The workers arrive on June 30. Therefore, the period of the work contract is for 92 calendar days. There are 28 non-workdays during the period of 64 workdays: 13 Saturdays, 13 Sundays, and two Federal holidays. Therefore, the three-fourths guarantee's total of 384 hours (75 percent of 8 hours/workday x 64 workdays).

The H-2A worker's daily record reflects the following data for this period: a total of 320 hours actually worked, and a total of 32 hours which the worker refused within normal, specified workdays. All 352 hours (320 + 32) may be credited towards the three-fourths guarantee.

In this case, the Colorado employer would still have to pay the worker 32 hours (384 – 352 = 32) of supplemental wages. The supplemental pay would be 32 times the hourly rate of pay specified on the job offer.

Please remember the enforcement of the three-fourths guarantee is the responsibility of Employment Standards Administration (ESA), Wage and Hour Division, U.S. Department of Labor.

- **CONTRACT IMPOSSIBILITY:** The provision of the regulations at 20 CFR 655.102 (b) (12) allows the employer to terminate the work contract before the contract expiration date of any worker(s) whose services are no longer required for reasons beyond the control of the employer due to fire, hurricane, extensive hail damage, crop loss, or other Act of God which makes the fulfillment of the contract impossible. In the event of such termination, the employer will be bound by the three-fourths guarantee from the first workday after arrival to the date of termination.

If the employer is unable to work out a transfer of the worker(s) to other comparable employment, the employer will be required to offer to return the worker at the employer's expense to the place from which the worker(s) came to work for the employer.

If the worker, who is terminated under this provision, has not been reimbursed for transportation to the job site in accordance with 20 CFR 655.102 (b) (5) (i), the worker will be reimbursed for any transportation and subsistence due. If transportation was advanced and subsequently deductions were made from the

worker's pay to cover cost, these deductions must be reimbursed to the worker and if necessary, supplemented up to the inbound transportation level.

- **COPY OF WORK CONTRACT:** If an employer develops a written contract between the employer and the worker, the contract must include the terms and conditions of the employment specified in the regulations. **A copy of such contract will be provided to the worker no later than the day on which the worker begins employment. If there is no written contract, the job offer may include a statement such as: "In the absence of a written contract, the terms and conditions of the clearance job order and application are to be the work contract between the employer and worker so employed."**

WHAT & HOW TO SUBMIT APPLICATION

The Colorado employer filing a H-2A application must use Employment and Training Administration forms (ETA) 750 and ETA 790 (Agricultural and Food Processing Clearance Order.) This filing includes:

- Two ETA 750, Offer of Employment forms, which are double sided (front-to-back) bearing original signatures.
- One ETA 790 & Attachments bearing original signature
- Request for conditional access into the intrastate or interstate clearance system
- Employer's positive recruitment plan
- G-28 (Notice of Entry of Appearance as Attorney or Representative) or a signed employer's authorization of agent, whereby, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer's behalf, which may include interviewing referred applicants and making hiring commitments. This signed authorization must specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for compliance with all regulatory and other legal requirements.
- Proof of Workers' Compensation Insurance, if coverage is in effect at the time of application, the employer must set forth in the application the insurance carrier and the policy number – copy of proof. **If coverage is not in effect at the time the application is filed, this insurance proof must be provided prior to the labor certification determination date.**

The H-2A application request may be for one worker or multiple (5) unknowns and workers are to perform the same occupation and work the same area of employment. However, separate applications must be submitted for each distinct occupation for which labor certification is being sought. **The requested number of multiple workers must meet employer's housing occupancy capacity.**

The **Colorado H-2A employer** who is seeking labor certification **to work in Colorado** must file the above forms to United States Department of Labor (USDOL) no less than **forty five (45) calendar days** before the date of need, and indicate on the envelope H-2A Application:

**USDOL – ETA
Chicago National Processing Center
844 North Rush Street, 12th Floor
Chicago, Illinois 60611
Telephone Number: 312/886-8000
FAX: 312/886-1688**

Concurrently, the employer must file copies of the application to:

**Jim Shimada
Colorado Department of Labor
Labor Certification Unit
633 17th Street, Suite 700
Denver, CO 80202-3660
Telephone Number: 303/318-8831
FAX: 303/318-8930**

Employers are encouraged, but not required to file their applications in advance of the 45 calendar-day before the date of need to ensure USDOL's timely determination date of thirty days before the date of need.

The Colorado Department of Labor will fax this filing to the nearest Workforce Center (WFC) who will create a job order number based upon the job offer and schedule a housing inspection. The WFC may determine that the application is acceptable for local recruitment within the area of intended employment, but not acceptable for intrastate and interstate recruitment. The Colorado Department of Labor will communicate with USDOL regarding application's regulatory deficiencies.

Upon receipt of original application, USDOL will review application pursuant to regulatory provisions and notify the employer either a written acceptance or cite deficiencies **within seven calendar days (including holidays and weekends) of the filing date of application.** The employer has five calendar days to submit corrections and/or amendments to the cited regulatory deficiencies. If the fifth day falls on a weekend, or on a holiday, the date for submittal of medications will be the next normal business day. Corrections or amendments submitted and received by USDOL beyond five calendar days will result in a day-for-day postponement of the certification determination.

The USDOL's acceptance letter of application must advise the employer of specific recruitment obligation, including the job order number, and provides the employer the labor certification determination date. The employer must communicate with their job order recruitment results at least 24 hours prior to their certification determination date. CDL must also communicate with USDOL regarding housing inspection and job order referral report.

Amendments of number or workers along with date of need must be communicated with USDOL with a copy to the CDL, pending USDOL's approval and made prior to the labor certification date. A twenty percent (50 percent for employers of less than ten workers) limit in the number of workers may be requested. The employer must

also explain why the need for additional workers was not unforeseen along with the nature of the crop or activity.

No change in the date of need is effective until approved by USDOL. If a request for a change is made after U.S. workers have departed for the employer's place of employment, USDOL may approve the change only upon receiving the employer's written assurance that all such U.S workers will be provided free housing and subsistence until work becomes available.

USDOL's determination either to certify or deny the application must be made thirty days before the date of need. USDOL must provide certification determinations to employers ensuring next day delivery and copies are provided to CDL.

The regulations require that employers will be billed for receiving H-2A labor certification at the time certification is granted. Employers will be charged a fee of \$100 for each H-2A certification granted (in whole or in part), plus an additional \$10 for each H-2A position certified, up to a maximum fee of \$1,000 per certification.