



# TEGL 21-06: H-2B Temporary Labor Certification Process Stakeholder Briefing Sessions

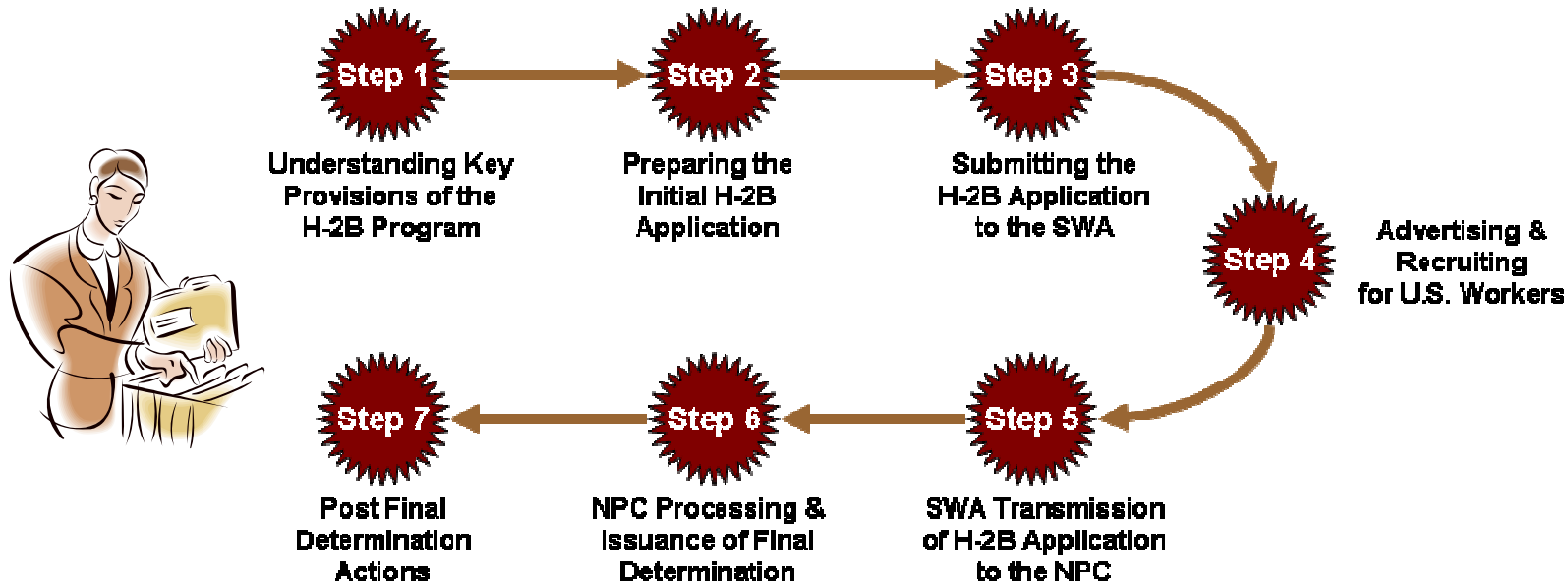
(Chicago, IL and Atlanta, GA)

May 2007

Office of Foreign Labor Certification  
Employment and Training Administration  
United States Department of Labor

# TEGL 21-06 Presentation Outline

- Implementation Schedule & Major Updates
- Helping Employers Navigate the H-2B Application Process



- Next Steps & OFLC Resources



# TEGL 21-06 Implementation Schedule

## April 2007

- April 4<sup>th</sup> TEGL 21-06 issued to SWAs and NPCs
- April 10<sup>th</sup> Public briefings announced in *Federal Register*
- April 18<sup>th</sup> First webinar training session for SWA staff
- April 20<sup>th</sup> Second webinar training session for SWA staff
- TEGL 21-06 published in *Federal Register*

## May 2007

- May 1<sup>st</sup> First public briefing for H-2B stakeholders (Chicago, IL)
- May 4<sup>th</sup> Second public briefing for H-2B stakeholders (Atlanta, GA)
- Late May OFLC begins posting FAQs on public website

## June 1<sup>st</sup>, 2007



**SWAs and NPCs begin implementing TEGL 21-06 for H-2B applications received on or after June 1, 2007**



# Major Updates to H-2B Procedures

- Rescinds and replaces prior operating guidance under GAL 01-95, GAL 01-95 Change 1, and FM 25-98
- Updates process to reflect centralized filing at the ETA National Processing Centers (NPCs)
- Clarifies the types of supportive evidence and documentation needed by employers to justify temporary need
- Maintains existing SWA processing steps, but provides special handling for applications with multiple worksites that cross SWA/NPC jurisdictions



# Pay Attention to Important “Icons”



Emphasizes important documentation requirements needed to support H-2B application



Indicates USDOL policy or procedural step contains a definite timeframe for response



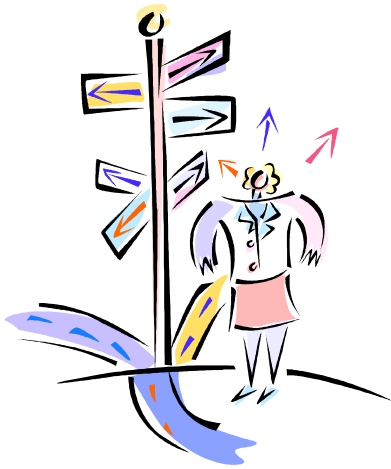
Means employer signature is required



“Post-it” notes highlight important reminders for employers



# Navigating the H-2B Application Process



## **Step 1** Understanding Key Provisions of the H-2B Program



# Authority/General Provisions

- The H-2B program is authorized under the Immigration and Nationality Act (INA) at section 214(c)(1)
- Regulations issued by USCIS at 8 CFR Part 214.2(h)(6) and USDOL at 20 CFR Part 655, Subpart A, govern the H-2B labor certification process
- USDOL has the authority to establish procedures for administering the temporary labor certification program (i.e., TEGL 21-06)
- Employers must obtain a temporary labor certification determination from the USDOL before filing a visa petition with USCIS



# Authority/General Provisions (cont'd)

- USDOL determinations under the H-2B visa classification are only **advisory** to USCIS
- There is no provision for reconsideration or appeal of the USDOL denial decision through the NPC Certifying Officer or the National Office
- Employers may appeal directly to the USCIS **or** file a new application in accordance with instructions provided by the NPC





# Standards for Determining Temporary Need

- A job opportunity is temporary if the nature of the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary
- Part-time employment does not qualify for H-2B certification; only full-time employment can be certified
- A labor shortage, however severe, does not establish a temporary need under the H-2B classification



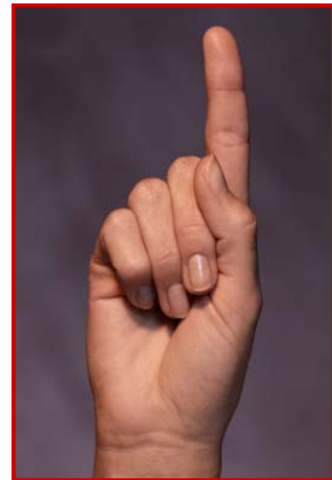
# Standards for Determining Temporary Need

- USCIS regulations state the employer's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year
- However, an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature, must be supported by compelling evidence (*Vito Volpe Court Decision*)
- Employer's need for temporary labor or services must be justified under one of the following regulatory standards:
  - One-time occurrence
  - Intermittent
  - Seasonal
  - Peakload



# One-Time Occurrence

- Employer must establish the following:
  - It has not employed workers to perform the services or labor in the past and it will not need the workers to perform the services or labor in the future
  - or
  - It has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s)




# Intermittent

- Employer must establish the following:
    - It has not employed permanent or full-time workers to perform the services or labor
- but**
- Occasionally or intermittently needs temporary workers to perform the services or labor for short periods



# Seasonal

- Employer must establish the following:
  - The services or labor to be performed is traditionally tied to a season of the year by an event or pattern and is of a recurring nature **and**
  - The period(s) of time during each year in which the employer does not need the services or labor



*Employment is not seasonal if the period of need is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees*



# Peakload

- Employer must establish the following:
  - It regularly employs permanent workers to perform the services or labor at the place of employment
  - and**
  - It needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand
  - and**
  - The temporary additions to staff will not become a part of the employer's regular operation



# Seasonal vs. Peakload

## Key Distinctions

### Seasonal

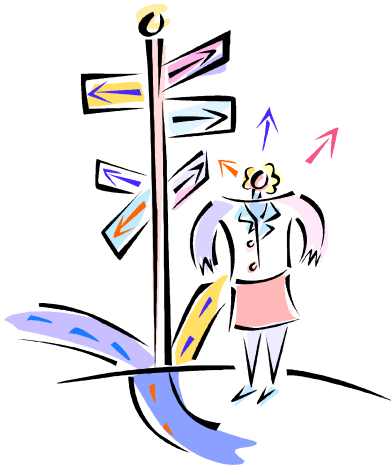
- Employer's need is clearly tied to a season and has a predictable pattern each year
- Quite often business operations "shut down" or do not employ workers at all in that occupation for part of the year
- It is possible for the business to operate year round, but the need for workers in the occupation is seasonal

### Peakload

- Need for workers can be tied to one or more seasons or other short-term demand
- Business operations are year-round and employ workers in that occupation on a permanent basis
- Employer's need is "above and beyond" the existing workers employed in that occupation



# Navigating the H-2B Application Process



## Step 2 Preparing the Initial H-2B Application





# Initial H-2B Application Checklist



Two (2) originals of ETA Form 750, Part A, signed and dated by the employer (Part B is not required)

- ✓ Documentation of any efforts to advertise and recruit U.S. workers prior to filing the application



A detailed statement of temporary need on the employer's letterhead with signature

- ✓ Supporting evidence and documentation that justifies the chosen standard of temporary need (i.e., one-time occurrence, intermittent, seasonal, or peakload need)



*Modifications to the ETA Form 750 by employers, agents, and attorneys will be accepted for processing as long as each modification is initialed and dated*



# Helpful Filing Tips

## ETA Form 750, Part A

- Must be legible (hand written applications are often difficult to read)
- Must be originally signed and dated; no fax copies
- Must be double-sided
- Include all physical locations for applications involving multiple work-sites
- Provide a clear description of the job opportunity
- Job duties must be normal to the occupation and not written in a manner that inhibits the effective recruitment of U.S. workers
- Work hours must be normal to the occupation
- Wage offer must be at least the prevailing wage
- State actual minimum requirements for the job and avoid excessive experience or education requirements



# Helpful Filing Tips

## ETA Form 750, Part A (cont'd)

- More than one worker may be requested as long as all workers are performing the same duties, are in the same occupation, receiving the same pay, and working for the same period of time
- Total number of workers requested and period of need in Item 18 must be specified in the advertisement and SWA job order
- Business necessity documentation must be submitted (e.g., support foreign language requirement or combination of duties)
- If employer's representative files, the "Authorization of Agent of Employer" portion of the ETA Form 750 must be signed
- An attorney must file a Notice of Appearance (Form G-28)

*Information on ETA Form 750, Part A, must be consistent with temporary need statement, ads, job order, and supporting documents*

→ DON'T FORGET!



# Helpful Filing Tips

## Temporary Need Statement

- Must be submitted on employer's letterhead with signature
- Clearly describes the nature of the employer's business activity and schedule of operations each year
- Explains why the job opportunity and number of workers being requested reflect a temporary need
- Explains how the employer's request for the services or labor meets one of the standards of a one-time occurrence, intermittent, seasonal, or peakload need
- Although not required, information on the local labor market and a narrative summary of previous efforts to recruit U.S. workers would also be helpful
- Information must be consistent with what is disclosed on the ETA Form 750, Part A



# Supporting Evidence and Documentation

- Each application must contain supporting evidence and documentation that justifies the chosen standard of temporary need
- Requirement strikes an appropriate balance between the competing interests of employers and the domestic workforce
- Information is necessary in making the statutory determination of whether the employment being requested for certification is temporary or permanent
- Employers can submit any combination of evidence or documentation in order to substantiate their temporary need



# Examples of Acceptable Documentation

- Justifying a seasonal or peakload need
  - Signed work contracts correlating to the period of need on the ETA 750, Part A, Item 18b for the coming season
  - Letters of intent from clients correlating to the period of need on the ETA 750, Part A, Item 18b for the coming season
  - Monthly invoices from previous calendar year(s) correlating to the period of need on the ETA 750, Part A, Item 18b
  - Annualized or multi-year work contracts/agreements supplemented with signed work contracts specifying the actual dates when work will commence and end during each year of service



*Documentation identified above submitted from previous calendar year(s) must clearly show work performed for each month during the period of need on the ETA Form 750*



# Acceptable Documentation Work Contracts

- Written on employer letterhead and signed/dated by the employer and client(s)
- Regardless of when the contract is executed, the dates of services to be provided clearly correlate to the period of need on the ETA Form 750, Part A, Item 18b
- Contract establishes a monthly schedule and outlines the services or labor to be performed for each month during the period of need
- All job duties and work requirements are normal to the occupation for which foreign workers are being requested
- Contains a clear start and termination date



# Acceptable Documentation

## Letter of Intent/Monthly Invoices

### Letters of Intent

- Written on client's letterhead with signature and dated
- Includes the employer named on the ETA Form 750, Part A, Item 4
- Clearly identifies the intent to use the employer's services or labor during a specific period of time
- The dates of services to be provided clearly correlate to the period of need on the ETA Form 750, Part A, Item 18b

### Monthly Invoices

- Written on employer's letterhead (signature not required)
- Identifies the client and the billing period
- Clearly describes the services or labor provided in each bill with particularity
- Invoice is provided for each month during the period of need on the ETA Form 750, Part A, Item 18b





# Acceptable Documentation Summarized Payroll Reports

- Justifying a seasonal or peakload need
  - Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each occupation and separately for full-time permanent and temporary employment, the following:
    - Total number of workers or staff employed
    - Total hours worked
    - Total earnings received



*Payroll reports must be signed by the employer attesting that the information was compiled from the employer's actual accounting records or system*



# Acceptable Documentation Summarized Payroll Reports

- Sample format
- Employers may use alternative formats, but report must convey same information
- Payroll information that is less frequent than monthly may not be sufficient

## ABC EMPLOYER, INC.

**Designated Occupation:** Housekeeper  
**Payroll Reporting Period:** Calendar Year 2006

| Month     | Permanent Employment |                    |                         | Temporary Employment |                    |                         |
|-----------|----------------------|--------------------|-------------------------|----------------------|--------------------|-------------------------|
|           | Total Workers        | Total Hours Worked | Total Earnings Received | Total Workers        | Total Hours Worked | Total Earnings Received |
| January   | 2                    | 320                | \$3,200.00              | 0                    | 0                  | 0                       |
| February  | 2                    | 320                | \$3,200.00              | 0                    | 0                  | 0                       |
| March     | 2                    | 320                | \$3,200.00              | 6                    | 960                | \$9,600.00              |
| April     | 2                    | 320                | \$3,200.00              | 6                    | 960                | \$9,600.00              |
| May       | 2                    | 320                | \$3,200.00              | 6                    | 960                | \$9,600.00              |
| June      | 2                    | 320                | \$3,200.00              | 6                    | 960                | \$9,600.00              |
| July      | 2                    | 320                | \$3,200.00              | 6                    | 960                | \$9,600.00              |
| August    | 2                    | 320                | \$3,200.00              | 6                    | 960                | \$9,600.00              |
| September | 2                    | 320                | \$3,200.00              | 0                    | 0                  | 0                       |
| October   | 2                    | 320                | \$3,200.00              | 0                    | 0                  | 0                       |
| November  | 2                    | 320                | \$3,200.00              | 0                    | 0                  | 0                       |
| December  | 2                    | 320                | \$3,200.00              | 0                    | 0                  | 0                       |

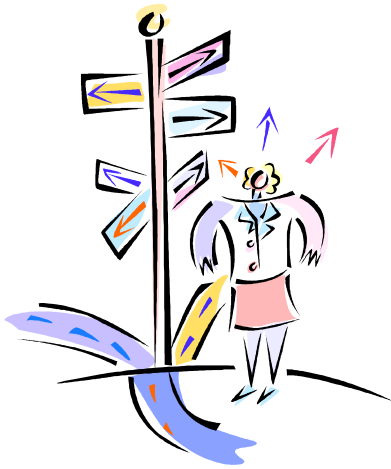


# Insufficient Documentation

- Work contracts with no clear start or termination date
- Work contracts specifying job duties that are not consistent with those listed on the ETA Form 750
- Applications supported solely by weather charts, event calendars, hotel occupancy rates, or annual/quarterly tax reports (e.g., IRS Form 941)
- Applications supported solely by staffing charts, graphs, or other documentation, which do not correspond with the requested period of need
- News articles regarding labor shortages, however severe
- Unsigned proposals of services to be provided (i.e., unexecuted work contracts or agreements)



# Navigating the H-2B Application Process



## **Step 3** Submitting the H-2B Application to the SWA



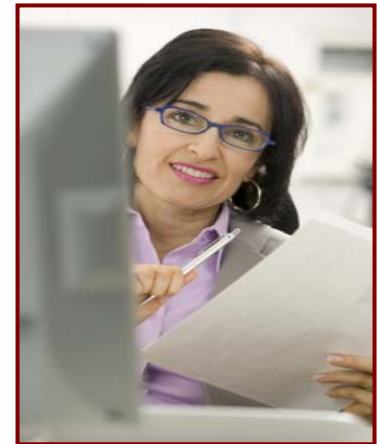
# Application Filing Requirements

- Filed by a U.S. employer with the State Workforce Agency (SWA) serving the area of intended employment in the U.S.
- If multiple worksites are listed within a Metropolitan Statistical Area (MSA) covering multiple SWAs, the employer may file a single application with the SWA where work will begin
- Application must include the names and physical addresses of all worksite locations
- If employment crosses NPC jurisdictions, within an MSA, the NPC with jurisdiction over the SWA where employment will begin shall process the application



# Application Filing Requirements (cont'd)

- Master applications filed by an association or other organization of employers, on behalf of its members, will not be permitted
- Job contractors, who typically supply labor to one or more employers under contract, may file applications
- However, the temporary or permanent nature of the work will be determined by examining the job contractor's need for such workers, rather than the needs of its employer customers



# Application Filing Requirements (cont'd)



Employer's should file at least 60 calendar days, but not more than 120 calendar days, prior to the date of need

- The SWAs and NPCs need at least 60 calendar days to enable them to complete recruitment and processing of the employer's application.
- This filing timeframe is necessary for conducting an adequate test of the domestic labor market and allowing the SWA and NPC sufficient time for processing

SWAs will return employer applications filed more than 120 calendar days before the worker(s) is needed and advise the employer to re-file within the appropriate timeframe

*Important  
DATE!*



# SWA Application Review

- SWA is responsible for ensuring the application is complete and accurate
- SWA will issue a correction letter to the employer under any one or more of the following conditions:
  - Job offer is less than full-time
  - Wage offer is below the prevailing wage
  - Job contains unduly restrictive requirements or a combination of duties not normal to the occupation
  - Terms and conditions of employment which inhibit the effective recruitment and consideration of U.S. workers
  - Application is incomplete





# Responding to SWA Correction Letters



If deficiencies are found, SWA will send the employer a 7-day correction letter

- All deficiencies **must** be corrected before commencing supervised recruitment
- **PLEASE** respond to the SWA deficiency letters as soon as possible

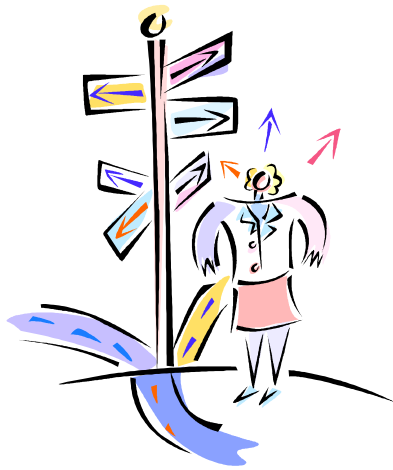
**NEW**

*SWAs have the authority to close out cases in circumstances where the employer fails to respond to the 7-day correction letter*

*SWAs will no longer send **INCOMPLETE** applications to the NPC !*



# Navigating the H-2B Application Process




## **Step 4** Advertising and Recruiting for U.S. Workers



# Advertising and Recruiting – SWA Job Order

- SWA will prepare a job order, using information on the application, and place it into the job bank for 10 calendar days
- SWA will accept for referral to the employer all qualified applicants
- Employer should initiate contact with unions or other recruitment sources, appropriate to the occupation and customary to the industry, for qualified U.S. workers
- Employer **must** contact and evaluate all qualified applicants who are referred



If the job opportunity contains multiple worksites within a MSA outside the jurisdiction of the SWA, the job order will be cleared for 10 calendar days with other SWAs where work will be performed



# Advertising and Recruiting – Employer Ad



During the 10-day posting of the SWA job order, employer will run a newspaper ad for 3 consecutive calendar days

- The SWA will provide instructions to advertise in a newspaper with the widest circulation in the local area
- If job is located in a rural area with no daily edition, employer shall use a daily edition published in the nearest urban area or other publication as determined by the SWA
- SWAs will not accept advertisements run on Internet sites !

Employer **must** notify the SWA as to “WHEN” (i.e., calendar dates) the advertisements will run

→ Don't FORGET!



# Employer Ad Checklist



- Newspaper advertisements must contain the following:
  - ✓ Employer's name and location of work
  - ✓ SWA contact information and job order number  
(directs U.S. workers to the SWA for referral to employer)
  - ✓ Description of job opportunity with particularity
  - ✓ Rate of pay including overtime, if applicable
  - ✓ Prevailing working conditions such as housing, lifting, excessive heat, etc.
  - ✓ Actual minimum job requirements  
(must match the application)
  - ✓ Total job openings to be filled  
(must match the application)
  - ✓ Indication the job is “temporary”



# Preparing Recruitment Report



- Employer **must** allow applicants ample time to respond to the contact
- Recruitment report must contain the following information:
  - ✓ Identification of each recruitment source by name
  - ✓ The name, address, telephone number, and resume (if provided) of each U.S. worker who applied for the job
  - ✓ Explanation of the lawful job-related reason(s) for not hiring each U.S. worker



**Pay Attention!** Employer **must** respond to the SWA 7-day recruitment letter requesting the advertisement and recruitment documentation.



# Final Recruitment Documentation Checklist



- The following documentation must be submitted back to the SWA:



The detailed recruitment report showing the disposition of each qualified applicant referred for employment consideration and may include applicant resumes



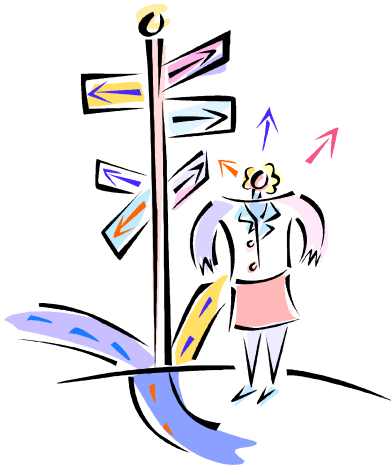
Copies of newspaper pages (“tear sheets”) or other proof of publication (affidavit of publication, invoices) furnished by the newspaper for each of the 3 days. Documentation **must** clearly show the dates of publication



If applicable, documentation that union and other recruitment sources were contacted and either unable to refer qualified applicants or non-responsive



# Navigating the H-2B Application Process



## Step 5 SWA Transmission of H-2B Application to the NPC





# Final H-2B Application Checklist



- SWA sends the **complete** H-2B application package to the appropriate NPC containing the following:
  - ✓ Two (2) originals of ETA Form 750, Part A
  - ✓ Temporary need statement and supporting evidence
  - ✓ Prevailing wage findings
  - ✓ Copy of SWA job posting(s)
  - ✓ Documentation of employer advertisements
  - ✓ Detailed recruitment report
  - ✓ All other supporting documentation

*If further recruitment is warranted, the NPC Certifying Officer has the authority to remand the application back to the SWA with specific instructions*



# For More Information . . .

## How Do I Check the Status of My Case?

- Please submit a request via electronic mail to one of the following addresses (depending on location of employment):

Atlanta NPC

[TLC.Atlanta@dol.gov](mailto:TLC.Atlanta@dol.gov)

Chicago NPC

[TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov)

## What Information Should I Provide to the NPC?

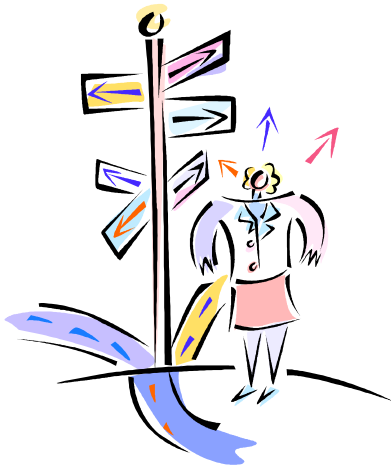
- In the subject line of the email, please include the program designation (H-2A, H-2B, H-1B) and the words “Case Status Request”
- In the body of the email, please include the following information:
  - ✓ Name of the SWA and date filed
  - ✓ Occupation Title
  - ✓ Employer Name (ETA Form 750, Part A, Item 4)
  - ✓ Agent/Attorney Name, if applicable

## When Can I Expect a Response from the NPC?

- Within 48 hours depending on workload volume at the NPC



# Navigating the H-2B Application Process



## Step 6 NPC Processing and Issuance of Final Determination



# NPC Processing and Determination

- H-2B applications are processed on a First-In-First-Out (FIFO) basis using the date on which the initial application was received by the SWA
- To be fair and equitable to all employers, the NPCs do not have the authority to expedite any H-2B application

F.Y.I.

*The NPCs will process all H-2B applications that are received even when the USCIS notifies the public that a visa cap has been reached*



# NPC Processing and Determination (cont'd)

- NPC Certifying Officer will determine whether to grant, deny, or issue a notification that certification cannot be made on whether or not:
  1. Nature of the employer's need is temporary and justified based on a one-time occurrence, seasonal, peakload, or intermittent need
  2. Qualified U.S. workers are available for the temporary job opportunity
  3. Employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers
  4. Job opportunity contains requirements or conditions which preclude consideration of U.S. workers or which otherwise prevent their effective recruitment



# Issuance of Final Determination Full Certifications

- A labor certification is valid only for the number of aliens, occupation requested, area of intended employment, specific duties, period of need, and employer specified on the ETA Form 750
- Beginning date of certified employment cannot be earlier than the date certification was granted
- If certification is granted, the NPC will perform the following actions:
  - Stamp and send the certified application to the employer or, if applicable, the employer's agent or attorney
  - Send a Final Determination letter directing employer to visit the USCIS website and locate the appropriate office to submit all documentation with the petition (I-129)



# Issuance of Final Determination Partial Certifications

- Based on the recruitment results, the NPC is authorized to award a “partial” certification to the employer
- If one or more U.S. workers were hired or unlawfully rejected by the employer, the NPC will grant certification for only those job opportunities that remain unfilled by qualified U.S. workers
- If certification is granted, the NPC will perform the following actions:
  - Stamp and send the certified application to the employer or, if applicable, the employer’s agent or attorney
  - Send a Final Determination letter directing employer to visit the USCIS website and locate the appropriate office to submit all documentation with the petition (I-129)



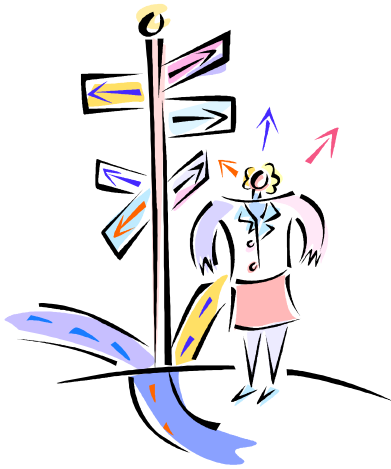
# Issuance of Final Determination Denials

- A denial or notice that certification cannot be made is the final decision of the Secretary and is advisory to USCIS
- If denial is recommended, the NPC will perform the following actions:
  - Return one original of the ETA Form 750, Part A, and all supporting documentation to the employer or, if applicable, the employer's agent or attorney
  - Send a Final Determination letter indicating the reason(s) why certification cannot be made and advising the employer of their right to pursue one of the two following actions:
    1. Employer may appeal the denial decision by submitting countervailing evidence directly to USCIS; or
    2. File a new application package in accordance with specific instructions issued by the NPC





# Navigating the H-2B Application Process



## Step 7 Post Final Determination Actions



# Post Final Determination Actions

## Employer Receives Full or Partial Certification

- Submit stamped ETA Form 750, Part A, and all other supporting documentation to the appropriate USCIS office
- **Pay Attention!** Starting on April 2, 2007, new filing instructions are in effect for USCIS Form I-129
- For more information, please visit the USCIS website at <http://www.uscis.gov/>



## Employer Receives Denial Decision

- Appeal denial decision directly to USCIS by submitting countervailing evidence; or
- File a new application in accordance with instructions provided by the NPC

USDOL decision is only advisory and there is no provision for reconsideration or appeal



# Next Steps & OFLC Information Resources

- Please stay tuned to the OFLC website for updates

<http://www.foreignlaborcert.doleta.gov>

- Information resources to be posted on OFLC website
  - TEGL 21-06 stakeholder briefing powerpoint presentation
  - Additional materials available at the stakeholder briefings
  - FAQs from stakeholder sessions (Late May)



# For More Questions on TEGL 21-06 . . .

Please send an electronic mail to [TEGL2106.OFLC@dol.gov](mailto:TEGL2106.OFLC@dol.gov)  
and indicate “*TEGL 21-06 Question*” in the subject line

