



**DEPARTMENT OF HOMELAND SECURITY  
U.S. Citizenship and Immigration Services**

**[CIS No. 2646-20; DHS Docket No. USCIS-2020-0002]**

**Notice of DHS's Requirement of the Temporary Labor Certification Final Determination under the H-2A Temporary Worker Program**

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** The Department of Homeland Security, U.S. Citizenship and Immigration Services is announcing, through this notice, that a printed copy of the electronic final determination form granting temporary labor certification under the H-2A program through the U.S. Department of Labor's new Foreign Labor Application Gateway system must be submitted with an H-2A petition as evidence of an original and valid temporary labor certification.

**DATES:** This notice is applicable [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]

**FOR FURTHER INFORMATION CONTACT:** Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529-2120, Telephone Number (202)-272-8377 (not a toll-free call).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:**

The Immigration and Nationality Act (INA), as amended, establishes the H-2A nonimmigrant classification for a temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.” INA section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). Employers must petition the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS), for classification of prospective temporary workers as H-2A nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). DHS must approve this petition before the beneficiary can be considered eligible for an H-2A visa. Finally, the INA requires that “[t]he question of importing any alien as [an H-2A] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],<sup>1</sup> after consultation with appropriate agencies of the Government . . . mean[ing] the U.S. Department of Labor and includ[ing] the U.S. Department of Agriculture.” INA section 214(c)(1), 8 U.S.C. 1184(c)(1).

DHS regulations provide that an H-2A petition for temporary employment in the United States must be accompanied by a single valid temporary labor certification (TLC) from the U.S. Department of Labor (DOL) issued in accordance with INA section 218, 8 U.S.C. § 1188, and DOL regulations established at 20 CFR part 655. 8 CFR 214.2(h)(5)(i)(A), (D), (h)(5)(iv); *see also* INA sections 214(c)(1) and 218, 8 U.S.C. 1184(c)(1) and 1188.<sup>2</sup> The TLC serves as DHS's consultation with DOL regarding whether: (i) an able, willing, and qualified U.S. worker is

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<sup>1</sup> As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

<sup>2</sup> Under certain emergent circumstances, petitions requesting a continuation of employment with the same employer for 2 weeks or less are exempt from the TLC requirement. *See* 8 CFR 214.2(h)(5)(x).

available to fill the petitioning H-2A employer's job opportunity, and (ii) whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* INA sections 214(c)(1) and 218, 8 U.S.C. 1184(c)(1) and 1188; *see also* 8 CFR 214.2(h)(5)(ii); 20 CFR 655.100.

Historically, when a TLC was granted, DOL sent an original certified Form ETA-9142A, Application for Temporary Employment Certification, and a Final Determination letter on paper to the employer and a copy, if appropriate, to the employer's agent or attorney. 20 CFR 655.162. The original paper TLC was sent by means normally ensuring next day delivery, and the employer retained a signed copy of the certified Form ETA-9142A and the original signed Appendix A, as required by 20 CFR 655.167. *Id.* The employer or, if applicable, its agent or attorney, then attached the original paper TLC, along with all other supporting documentation and appropriate fees, to the Form I-129, Petition for a Nonimmigrant Worker, and filed the Form I-129 with USCIS. On December 10, 2012, DOL implemented electronic filing in the H-2A labor certification program, but continued to issue original certified ETA-9142A TLCs on paper.<sup>3</sup>

On August 22, 2019, and in accordance with the Paperwork Reduction Act (PRA), the Office of Management and Budget (OMB) approved revisions to DOL's H-2A Foreign Labor Certification Program information collection.<sup>4</sup> OMB also approved Form ETA-9142A, Final Determination: H-2A Temporary Labor Certification Approval, which allows DOL to issue electronic TLCs to employers or, if applicable, the authorized attorneys or agents. On August 27, 2019, DOL then announced on the Office of Foreign Labor Certification (OFLC) website a

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<sup>3</sup> *Electronic Filing of H-2A and H-2B Labor Certification Applications Through the iCERT Visa Portal System*, 77 FR 59670, 69672 (September 28, 2012).

<sup>4</sup> *See* OMB's Notice of Action issued on August 22, 2019, on DOL's information collection control number 1205-0466 at <https://www.reginfo.gov>.

transition schedule for employers to submit the new H-2A application forms through its new Foreign Labor Application Gateway (FLAG) system beginning October 1, 2019.<sup>5</sup> Employers who file the Form ETA-9142A, including all applicable appendices and the new Form ETA-790/790A, H-2A Agricultural Clearance Order, through the FLAG system and are granted a TLC will receive the Form ETA-9142A, Final Determination: H-2A Temporary Labor Certification Approval, and Final Determination letter electronically.<sup>6</sup> In circumstances where the employer or, if applicable, its authorized attorney or agent, is not able to receive the approved TLC documents electronically, DOL will send the Form ETA-9142A, Form ETA-790/790A, and Final Determination letter on paper and in a manner that ensures next day delivery.

DHS regulations refer to a valid TLC by various terms including “Department of Labor determination” at 8 CFR 214.2(h)(2)(i)(E), “approved labor certification” at 8 CFR 214.2(h)(5)(x), and “temporary agricultural labor certification” at 8 CFR 214.2(h)(5)(i)(A), (h)(5)(iv)(B). Under the current instructions for Form I-129, H-2A petitioners must submit a single valid temporary labor certification from DOL with the H-2A petition.<sup>7</sup> Since DOL, generally, will now only provide the approved TLC to an employer electronically, USCIS announced on its website on October 1, 2019, that employers whose application for a TLC was processed in FLAG must include a printed copy of the electronic one-page Form ETA-9142A, Final Determination: H-2A Temporary Labor Certification Approval, with their Form I-129, and

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<sup>5</sup> DOL announced that it would continue to accept original Form ETA-9142A through its legacy iCERT system until October 16, 2019. DOL also announced that, beginning October 1, 2019, employers seeking to file an emergency application under 20 CFR 655.134 or an application for workers in herding or production of livestock on the range, as defined in 20 CFR 655.201, must file the new Form ETA-9142A, Form ETA-790/790A, and appendices in the FLAG system. In addition, employers with a start date of need on or after December 15, 2019 must file the new Form ETA-790/790A and any appendices in the FLAG system. *See* <https://www.foreignlaborcert.doleta.gov/>.

<sup>6</sup> Employers may obtain a copy of the final decisions from the Historical table in the My Cases tab of their FLAG account. *See* DOL’s Frequently Asked Questions, under the question, “How can I find a copy of my issued application?” at: <https://flag.dol.gov/support/FAQ#cases>.

<sup>7</sup> *See* <https://www.uscis.gov/i-129>. Under certain emergent circumstances, petitions requesting a continuation of employment with the same employer for 2 weeks or less are exempt from the TLC requirement. *See* 8 CFR 214.2(h)(5)(x).

that USCIS will consider this printed copy as an original and valid TLC.<sup>8</sup> USCIS is formally announcing through this notice that a printed copy of the Form ETA-9142A, Final Determination, completed and electronically signed by DOL, must be submitted as initial evidence with an H-2A petition, and that this printed copy of the one-page determination satisfies the requirement that petitioners provide evidence of a valid TLC that is required to accompany an H-2A petition<sup>9</sup>. As discussed above, this change in USCIS procedure aligns with DOL's change in its procedures, as DOL has transitioned to a new electronic filing and application processing environment through which, generally, DOL no longer provides the employer and, if applicable, the employer's authorized attorney or agent with an original paper TLC. This change in process is also appropriate since, in most circumstances, USCIS will no longer need to reference a paper copy of a certified Form ETA-9142A (including the Form ETA-790/790A and all appendices) because USCIS and DOL have in place an information sharing process that allows USCIS to validate substantive elements of the valid TLC based on case information supplied by DOL directly to USCIS.<sup>10</sup>

USCIS notes that there may be limited circumstances when an employer (or its authorized attorney or agent, if applicable) has a paper-based final determination from DOL because, among other reasons, the employer is unable to receive the final determination

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<sup>8</sup> See <https://www.uscis.gov/news/alerts/h-2a-petitioners-must-include-temporary-labor-certification-final-determination-form-i-129>.

<sup>9</sup> See 8 CFR 103.2(b)(7)(ii).

<sup>10</sup> DHS USCIS and DOL entered into a Memorandum of Agreement regarding employment-based petition, labor certification, and labor condition application data sharing in support of their respective missions, effective January 12, 2017. See [https://www.uscis.gov/sites/default/files/files/nativedocuments/Employment-Based\\_Petition\\_Labor\\_Certification\\_and\\_Labor\\_Condition\\_Application\\_Data.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Employment-Based_Petition_Labor_Certification_and_Labor_Condition_Application_Data.pdf). To view the Privacy Impact Assessment (PIA) for the Validation Instrument for Business Enterprises (VIBE), see <https://www.dhs.gov/publication/dhs-uscis-pia-044-validation-instrument-business-enterprises>. Note, though USCIS and DOL have in place an information sharing process, petitioners must provide a printed copy of the one-page determination with the submission of the H-2A petition.

electronically.<sup>11</sup> In these limited circumstances, USCIS may accept and consider the paper-based certification documents as an original approved TLC. Additionally, USCIS notes that the submission of a printed copy of the electronic Form ETA-9142A, Final Determination does not preclude USCIS from issuing a request for evidence or a notice of intent to deny in certain warranted circumstances, including but not limited to, when the electronic systems are unavailable for validation, or the final determination document is substantively inconsistent with the information provided by DOL regarding that labor certification determination. In those instances, USCIS will request that an employer (or its authorized attorney or agent, if applicable) submit, in response to a request for evidence or a notice of intent to deny, supporting documentation, including but not limited to a copy(ies) of the complete certified Form ETA-9142A, Form ETA-790/790A, and its appendices. DOL has agreed that such evidence will be made available to employers (or authorized attorneys agents) in certain circumstances, for example, in the event of a FLAG system outage or scheduled maintenance.

**Joseph Edlow,**  
*Deputy Director for Policy*  
*U.S. Citizenship and Immigration Services*

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<sup>11</sup> See 83 FR 53911, 53912 (October 25, 2018) (“In circumstances where the employer or, if applicable, its authorized attorney or agent, is not able to receive the temporary labor certification documents electronically, ETA will send the certification documents printed on standard paper in a manner that ensures overnight delivery.”).

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