

**Linda Waites**

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**From:** Kathie Luedeke [KLuedeke@horsecouncil.org]  
**Sent:** Friday, December 19, 2008 2:41 PM  
**To:** Kathie Luedeke  
**Subject:** American Horse Council - Final Changes to H-2A Visa Process



## MEMORANDUM

**To:** AHC Organizations  
**From:** American Horse Council  
**Re:** Final Changes to H-2A Visa Process  
**Date:** December 19, 2008

### **Introduction**

On December 18, 2008 the U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) each published final rules in the federal reregister governing the administration of the H-2A program. The changes have been characterized by the DOL and USCIS as an effort to modernize H-2A program so that it can serve its intended purpose of providing farm employers with a legal means to hire agricultural workers when no U.S. workers can be found.”

The new regulations will take effect January 17, 2009.

### **Key points-USCIS final rule**

Unnamed beneficiaries. The USCIS rule relaxes current limitations on an employer’s ability to petition for unnamed H-2A workers. The new rules allow employers to specify only the number of positions sought and no longer require that individual aliens be named, except in cases where the alien is already in the U.S.

Post visa waiting periods. The USCIS rule reduces from six months to three months the time period H-2A workers who have spent three years in the United States must leave the country before they are eligible to file for a new H-2A visa. The rule also extends from 10 to 30 days the time an H-2A worker may remain in the country following the expiration of his or her approved stay.

Temporary labor certification. The USCIS will now require an approved temporary labor certification in connection with all H-2A petitions and prohibits H-2A employers and recruiters from imposing certain fees on prospective H-2A workers as a condition of employment.

Notification requirements. The final rule also requires employers to notify USCIS when an H-2A worker fails to show up for work, is terminated, or leaves the job.

## **Key points-DOL final Rule**

Applications. Under the DOL final rule, employers would file their H-2A applications solely with the DOL, rather than both the DOL and the State Workforce Agencies (SWAs). The application would be filed directly with the National Processing Center (NPC) having jurisdiction over the employer's place of employment.

Attestation-based process. The DOL rule amends the current application procedure by implementing an "attestation-based" labor process in place of the current "labor certification" process, which requires DOL to certify that there are no qualified Americans available for the job involved. Under the new process an employer would be required to attest, under threat of penalties, including fines, revocation of certification, and program debarment, that it has fully complied with all program requirements for recruiting, that wage requirements are met, housing inspections performed, and, in short, that it has complied with all of the obligations on employers to satisfy the H-2A program requirements.

Audits. Employers are required to keep documents supporting their attestation for five years for possible audit. Additionally, the rule institutes a new auditing program to ensure employers have complied with program requirements and met their responsibilities under the new attestation process.

Housing inspections. The DOL has increased the amount of time states have to conduct required housing inspections in response to delays often caused by SWAs overwhelmed by employer requests for pre-certification housing inspections.

Required pre-filing activity and advertising. Under the new rule H-2A employers are required to fulfill a recruitment process to ensure that there are no qualified American workers able and available for the temporary job involved before filing an Application for Temporary Employment Certification. The recruitment must include: submitting a job order with the SWA serving the area of intended employment and placing at least two print advertisements one of which must be on a Sunday. Additionally, employers must contact former U.S. employees who were employed within the last year and recruit in all States currently designated as a State of traditional or expected labor supply for the intended job. This process must begin well in advance of filing for a Temporary Employment Certification and employers must keep records of their efforts to find American workers for three years.

Wage rates. The DOL rule requires employers to offer a wage rate based on the Adverse Effect Wage Rate (AEWR), the prevailing hourly wage or piece rate, or the Federal or State minimum wage which ever is higher as determined by the national processing center. The method by which the AEWR is calculated has also been modified. It will be based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey.

Worker costs. Like the USCIS final rule employers would be prohibited from passing along to workers any of the costs incurred as a result of participating in the H-2A program, including the cost of preparing and filing an application, attorney fees, and recruiting costs. In addition, employers that utilize foreign recruiters must also contractually prohibit them from passing on such costs.

Surety bonds. Additionally, Under the DOL rule, H-2A labor contractors would be required to maintain a surety bond (in an amount based on the number of workers employed) throughout the effective period of the labor certification.

Penalties. Fines for willful failure to meet a condition of the work contract, or discrimination against a U.S. or H-2A worker, or interference with an investigation will not exceed \$5,000. Fines for willful failure to meet a condition of the work contract that results in displacement of a U.S. worker would not exceed \$10,000. Fines for housing violations or transportation safety and health standards causing serious injury or death would be

established at \$25,000 per worker and \$50,000 for willful or repeat violations and \$100,000 in case where the employer failed after notification, to fix the specific violation.

These rules are quite technical. If you have any questions, please contact the AHC.

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