

PUBLICATION

Immigration Update: Trying to Cut the Red Tape: Department of Labor Announces Emergency Procedures for Backlogged H-2B Applications

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The Department of Labor (DOL) has recently been experiencing considerable delays in its processing of applications for H-2B status for temporary nonimmigrant workers. The H-2B program allows U.S. employers to bring foreign nationals from certain countries to the U.S. to fill temporary nonagricultural jobs. Employers can apply for H-2B status for workers based on a seasonal or intermittent need, to supplement their permanent staff due to increased short-term demand, or because a one-time or short-term event has created the need for temporary workers. The H-2B application process involves several steps, including submitting a temporary labor certification for the position to the DOL. In the application to the DOL, the employer certifies that it will pay the worker at least the prevailing wage for that particular occupation for the area of intended employment. The employer must also certify that there are not sufficient U.S. workers who are capable of performing the temporary services/labor at the time of filing the H-2B petition, and that the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. After the DOL approves the labor certification, an additional application must be submitted to and approved by the U.S. Citizenship and Immigration Services, an agency within the Department of Homeland Security.

Due to the time constraints of seasonal and peak demand employment and the many steps involved in the H-2B process, it is important that H-2B processing run smoothly. Starting in December 2015, H-2B applications began to experience considerable delays at the DOL. Given the time sensitive nature of the seasonal and short-term labor involved, the delays in the H-2B certification process have adversely affected employers that depend on these types of workers. In an effort to speedup processing and decrease the current H-2B backlog, the Office of Foreign Labor Certification (OFLC) within the DOL announced on February 19, 2016, that it would be instituting emergency processing procedures for pending H-2B applications.

As part of these new procedures, employers with pending H-2B applications will have a limited opportunity to request emergency processing with the DOL. In order to request emergency processing, employers must have an H-2B application with an attached valid prevailing wage determination currently pending with the DOL. Additionally, the employer's application must meet one of two conditions: 1) It has been over seven business days since the DOL received the application and the employer has not received an initial Notification of Acceptance or Notice of Deficiency; or 2) The employer has received a Notice of Deficiency from the DOL after the seven-business-day timeframe and has not yet received a Notice of Acceptance.

The DOL began accepting requests for emergency procedures on Monday, February 22, 2016, and will continue to accept emergency requests until midnight on Friday April 1, 2016. Employers should be aware that they must submit their emergency requests within a set assigned timeframe that corresponds to their original filing date. The DOL has created the following filing schedule for emergency requests:

Original H-2B Application Filing Date	Timeframe for Submitting Requests for Emergency Procedures
January 3 – January 16	February 22 – February 28

January 17 – January 30	February 29 – March 6
January 31 – February 13	March 7 – March 13
February 14 – February 27	March 14 – March 20
February 28 – March 12	March 21 – March 27
March 13 – April 1	March 28 – April 1

These emergency requests must contain certain language as explained in the DOL announcement and be submitted to the Chicago National Processing Center (NPC) via email or letter. Assuming the eligibility criteria are met, the DOL states that the Chicago NPC will issue an approval notification upon receipt of the request for emergency handling. The employer's pending H-2B application will remain in the original queue based on the date the original application was received. Employers with pending H-2B applications should act quickly to take advantage of this new procedure before it expires. For more information about the H-2B program or to request assistance with emergency H-2B processing, please contact us.