New Rules Proposed in the H-2B Temporary Labor Certification Program

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On May 22, 2008, the Department of Labor announced its efforts to revise the application process under the H-2B temporary labor certification program.

The H-2B temporary labor certification program permits employers to hire foreign workers to come to the United States and perform temporary nonagricultural work, which may be (1) one-time, (2) seasonal, (3) peak load or (4) intermittent. The applicant must be a U.S. employer with a job opportunity located within the United States, and the job opportunity must be temporary. A job opportunity is considered temporary under the
H-2B classification if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary.

In addition to the criteria mentioned above, an applicant is required to adequately test the U.S. labor market to demonstrate that there is no qualified and willing U.S. worker available for the job. In order to ensure an adequate test of the labor market, the employer must offer, and subsequently pay, the foreign worker at a wage equal to or higher than the prevailing wage for the occupation at the skill level in the area of employment.

Under the current application process for the H-2B program, employers initially apply with the appropriate state workforce agencies (SWA) that, among other tasks, fills in the applicable prevailing wage for the job opportunity. This process has been criticized as lengthy and duplicative. In addition, because the process is initially coordinated by the states, critics have stated that there is no consistency in the application process. Recognizing a need to streamline the application process, the Department has proposed new rules that it states will modernize the application process.

Under the newly proposed rules, employers would submit their applications directly to the Department of Labor's Employment Training Administration. This differs from the current process of submitting applications first with the applicant's SWA. In addition, the employers will be responsible for obtaining information about the prevailing wage for the job opportunity, another task currently performed by SWAs. The prevailing wages currently used by SWAs in H-2B applications have been for several years available to the public through the Department of Labor. As part of the proposed new process, employers will now be responsible for obtaining information about the prevailing wage directly from the Office of Foreign Labor Certification within the Department of Labor. According to Secretary of Labor, Elaine Chao, these proposed improvements will give the department additional tools to protect and remove duplicative bureaucracy.

The proposal also would change the application process so that employers would be required to attest that they have complied with the program's requirements or they would be subject to fines and other penalties. Although attestations are required of current applicants, several more attestations will be added to the proposed application form than the current form. Among the new attestations that the applicant would have to declare is that the employer is not displacing any similarly employed permanent U.S. worker in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the worker. Additionally, an employer must attest that it has not and will not shift the cost of preparing or filing the H-2B application to the temporary worker including the costs of domestic recruitment or

attorney's fees. Consistent with the Fair Labor Standards Act (FLSA) and current procedures, the Department of Labor will continue to permit employers to make reasonable housing and transportation deductions from a worker's pay for the reasonable cost of furnishing housing and transportation.

In regard to recruitment efforts, employers would be required to conduct recruitment efforts for U.S. workers prior to filing an application. This would include the placement of a job order with the SWA serving the areas of the intended employment, the placement of three advertisements, one of which must be on a Sunday, in the newspaper most appropriate for the occupation and most likely to reach the U.S. workers who would apply and qualify for the job opportunity, and the preparation of a recruitment report outlining the results of the recruitment. These steps are similar to those currently in place. The Department has stated that, by having employers engage in these steps under their own direction rather than the SWA's, the application processing is expected to improve and be consistent.

Under the federal statute, 8 U.S.C. 1184 (g)(1)(B), there is an annual limit of 66,000 foreign workers who may receive H-2B status. However, the H-2B foreign labor certification program continues to increase in popularity among employers. According to the Department of Labor, the number of H-2B certification applications has increased 129 percent from 2000. As a result of the increase, the Department has noted the growing challenge to efficiently and timely process applications.

If you have any questions about the application process under the H-2B temporary labor certification program please contact Tina Maiolo.