Employment and Training Administration, Labor  § 655.11

provide a wage survey. If the Administrator, OFLC approves the employer’s written request, the Administrator, OFLC will send an approval letter to the employer. Approvals shall be valid for 1 year from the date of approval and only for the job opportunity and area of intended employment specified in the original written request. This approval does not constitute an acceptance of any particular wage survey.

(iii) If approval is granted, the employer may submit a request for a prevailing wage determination to the NPC along with a copy of the Administrator, OFLC’s approval letter and a complete copy of the private survey. The NPC will evaluate the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(iv) In each case where the employer submits a wage survey for which it seeks acceptance, the employer must provide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(v) The survey must be based upon recently collected data:

(A) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more than 24 months before the publication date.

(B) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(vi) The survey cannot as any part of its data wage information reflect the wages of H-2B workers or other nonimmigrant workers.

(vii) If the NPC does not approve the survey for use in the H-2B program, the NPC shall inform the employer in writing of the reasons the survey was not accepted. An employer may appeal the NPC’s decision in accordance with §655.11.

§ 655.11  Registration of H-2B employers.

All employers that desire to hire H-2B workers must establish their need for services or labor is temporary by filing an H-2B Registration with the Chicago NPC.

(a) Registration filing. An employer must file an H-2B Registration. The H-2B Registration must be accompanied by documentation evidencing:

(1) The number of positions that will be sought in the first year of registration;

(2) The time period of need for the workers requested;

(3) That the nature of the employer’s need for the services or labor to be performed is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined at 8 CFR 214.2(h)(6)(ii)(B) and §655.6 (or in the case of job contractors, a seasonal need or one-time occurrence); and

(4) For job contractors, the job contractor’s own seasonal need or one-time occurrence, such as through the provision of payroll records.

(b) Original signature. The H-2B Registration must bear the original signature of the employer (and that of the employer’s attorney or agent if applicable). If and when the H-2B Registration is permitted to be filed electronically, the employer will satisfy this requirement by signing the H-2B Registration as directed by the CO.

(c) Timeliness of registration filing. A completed request for an H-2B Registration must be received by no less than 120 calendar days and no more than 150 calendar days before the employer’s date of need, except where the employer submits the H-2B Registration in support of an emergency filing under §655.17.

(d) Temporary need. (1) The employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). A job contractor must also demonstrate through documentation its own seasonal need or one-time occurrence.

(2) The employer’s need will be assessed in accordance with the definitions provided by the Secretary of DHS and as further defined in §655.6.

(e) NPC review. The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based on the following factors:

(1) The job classification and duties qualify as non-agricultural;
(2) The employer’s need for the services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor’s own seasonal need or one-time occurrence;

(3) The number of worker positions and period of need are justified; and

(4) The request represents a bona fide job opportunity.

(f) Mailing and postmark requirements. Any notice or request pertaining to an H–2B Registration sent by the CO to an employer requiring a response will be mailed to the address provided on the H–2B Registration using methods to assure next day delivery, including electronic mail. The employer’s response to the notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date specified by the CO or by the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(g) Request for information (RFI). If the CO determines the H–2B Registration cannot be approved, the CO will issue an RFI. The RFI will be issued within 7 business days of the CO’s receipt of the H–2B Registration. The RFI will:

(1) State the reason(s) why the H–2B Registration cannot be approved and what supplemental information or documentation is needed to correct the deficiencies;

(2) Specify a date, no later than 7 business days from the date the RFI is issued, by which the supplemental information or documentation must be sent by the employer;

(3) State that, upon receipt of a response to the RFI, the CO will review the H–2B Registration as well as any supplemental information and documentation and issue a Notice of Decision on the H–2B Registration. The CO may, at his or her discretion, issue one or more additional RFIs before issuing a Notice of Decision on the H–2B Registration; and

(4) State that failure to comply with an RFI, including not responding in a timely manner or not providing all required documentation within the specified timeframe, will result in a denial of the H–2B Registration.

(h) Notice of Decision. The CO will notify the employer in writing of the final decision on the H–2B Registration.

(1) Approved H–2B Registration. If the H–2B Registration is approved, the CO will send a Notice of Decision to the employer, and a copy to the employer’s attorney or agent, if applicable. The Notice of Decision will notify the employer that it is eligible to seek H–2B workers in the occupational classification for the anticipated number of positions and period of need stated on the approved H–2B Registration. The CO may approve the H–2B Registration for a period of up to 3 consecutive years.

(2) Denied H–2B Registration. If the H–2B Registration is denied, the CO will send a Notice of Decision to the employer, and a copy to the employer’s attorney or agent, if applicable. The Notice of Decision will:

(i) State the reason(s) why the H–2B Registration is denied;

(ii) Offer the employer an opportunity to request administrative review under §655.61 within 10 business days from the date the Notice of Decision is issued and state that if the employer does not request administrative review within that period the denial is final.

(i) Retention of documents. All employers filing an H–2B Registration are required to retain any documents and records not otherwise submitted proving compliance with this subpart. Such records and documents must be retained for a period of 3 years from the date of certification of the last Application for Temporary Employment Certification supported by the H–2B Registration, if approved, or 3 years from the date the decision is issued if the H–2B Registration is denied or 3 years from the day the Department receives written notification from the employer withdrawing its pending H–2B Registration.

(j) Transition period. In order to allow OFLC to make the necessary changes to its program operations to accommodate the new registration process, OFLC will announce in the Federal Register a separate transition period for the registration process, and until that time, will continue to
adjudicate temporary need during the processing of applications.

§ 655.12 Use of registration of H–2B employers.
(a) Upon approval of the H–2B Registration, the employer is authorized for the specified period of up to 3 consecutive years from the date the H–2B Registration is approved to file an Application for Temporary Employment Certification, unless:

(1) The number of workers to be employed has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers) from the initial year;

(2) The dates of need for the job opportunity have changed by more than a total of 30 calendar days from the initial year for the entire period of need;

(3) The nature of the job classification and/or duties has materially changed; or

(4) The temporary nature of the employer’s need for services or labor to be performed has materially changed.

(b) If any of the changes in paragraphs (a)(1) through (4) of this section apply, the employer must file a new H–2B Registration in accordance with § 655.11.

§ 655.13 Review of PWDs.
(a) Request for review of PWDs. Any employer desiring review of a PWD must make a written request for such review to the NPWC Director within 7 business days from the date the PWD is issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) NPWC review. Upon the receipt of the written request for review, the NPWC Director will review the employer’s request and accompanying documentation, including any supplementary material submitted by the employer, and after review shall issue a Final Determination letter; that letter may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.
(c) Request for review by BALCA. Any employer desiring review of the NPWC Director’s decision on a PWD must make a written request for review of the determination by BALCA within 10 business days from the date the Final Determination letter is issued.

(1) The request for BALCA review must be in writing and addressed to the NPWC Director who made the final determinations. Upon receipt of a request for BALCA review, the NPWC will prepare an appeal file and submit it to BALCA.

(2) The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD was based.

(3) BALCA will handle appeals in accordance with § 655.61.

§ 655.14 [Reserved]

§ 655.15 Application filing requirements.

All registered employers that desire to hire H–2B workers must file an Application for Temporary Employment Certification with the NPC designated by the Administrator, OFLC. Except for employers that qualify for emergency procedures at § 655.17, employers that fail to register under the procedures in § 655.11 and/or that fail to submit a PWD obtained under § 655.10 will not be eligible to file an Application for Temporary Employment Certification and their applications will be returned without review.

(a) What to file. A registered employer seeking H–2B workers must file a completed Application for Temporary Employment Certification (ETA Form 9142 and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in § 655.16, and copies of all contracts and agreements.