

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR WASHINGTON, D.C. 20210	CLASSIFICATION Foreign Labor Certification
	CORRESPONDENCE SYMBOL OFLC
	DATE April 23, 2009

ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 18-08

TO: STATE WORKFORCE AGENCIES

FROM: DOUGLAS F. SMALL *Douglas F. Small*
 Deputy Assistant Secretary

SUBJECT: FISCAL YEAR (FY) 2009 FOREIGN LABOR CERTIFICATION
 PLANNING GUIDANCE

1. **Purpose.** To provide guidance for the funding and management of FY 2009 annual grant allocations for the Foreign Labor Certification (FLC) programs.
2. **References.**
 - Immigration and Nationality Act (INA), Sections 101(a), 212(n), 212(t), 214(c), 214(i), and 218
 - 8 CFR Part 214
 - 8 CFR Part 274a
 - 2 CFR Part 225
 - 20 CFR Parts 655 and 656
 - Wagner-Peyser Act, Section 7(d)
 - OMB Circular A-87
 - Other ETA instructions as noted
3. **Background.** The purpose of this Training and Employment Guidance Letter (TEGL) memorandum is to provide State Workforce Agencies (SWAs) with final planning figures for funding that will be allocated to support FLC activities, and the necessary actions to request the funds.

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4. **Transition Year.** FY 2009 has been a year with a large amount of regulatory change to the H-2A and H-2B programs. For example, a re-engineered H-2A Final Regulation took effect on January 17, 2009, and an H-2B Final Regulation took effect on January 18, 2009. A *Federal Register* Notice proposing to suspend the January 17, 2009, H-2A Final Regulation was published March 17, 2009, and public comments are currently being reviewed. Both Final Regulations are currently in litigation.

Until actions surrounding both the H-2A and H-2B regulations are fully resolved, SWAs should follow the appropriate regulation in effect at the time applications are submitted.

Each SWA's FY 2008 Annual Plan will be extended through the remainder of FY 2009. However, in order to receive the remainder of their FY 2009 funds, SWAs must submit the required information and documents set forth in the attachments to this TEGL, which shall constitute the updated FY 2008 Annual Plan, and must agree to be bound by and comply with the terms and agreements set forth by the Office of Foreign Labor Certification (OFLC) in its FY 2008 Foreign Labor Certification Grant Guidance, TEGL 21-07, subject to any changes in the H-2A or H-2B Final Regulations taking effect since the issuance of such guidance. It is anticipated that new planning guidance will be issued for FY 2010.

5. **Actions.** SWAs are required to complete the actions listed below.
- Respond to these guidelines within **thirty (30) days** of receipt to ensure allocation of remaining grant funds.
 - Identify how program funds would best be utilized and by splitting the grant allocation between agricultural and nonagricultural activities.
 - Inform the National Office OFLC via written communication of the proposed program split that will be used to allocate funds between agricultural and nonagricultural activities.
6. **Mailing Address.** Mail (fed ex or other means preferred) completed work plans to Mr. William Rabung, Program Manager, Office of Foreign Labor Certification, U.S. Department of Labor, Room C-4312, 200 Constitution Avenue, NW, Washington, D.C. 20210.
7. **Inquiries.** Please direct questions to Mr. Rabung at (202) 693-3010.
8. **Attachments.**
1. Program Planning Guidance and Information Package
 2. FLC Annual Plan Workload Supplement
 3. Annual Plan Procedures

Attachment No.: 1

Program Planning Guidance and Information Package

Introduction

This document provides the necessary guidelines to be used by SWAs to update annual plans and request funds in order to administer their FLC responsibilities.

Wagner-Peyser funding allocations under the State Unemployment Insurance and Employment Service Operations account in Fiscal Year (FY) 2009 are available to States for activities supporting federal administration of FLC programs. The estimated FY 2009 appropriation for state FLC activities is approximately \$15,129,000, consistent with the omnibus appropriations bill signed into law March 11, 2009. Of this amount, \$95,000 was retained at the National Office level for discretionary activities. The remaining disbursement totals \$15,034,000. A total of \$5,107,435 was provided under the continuing budget resolution in effect through March 6, 2009. Distribution of remaining grant funds is in progress and dependent on approval by the Office of Foreign Labor Certification of state workplans. An estimate of each SWA's total FY 2009 funding is provided.

Extension of FY 2008 Annual Plan for Remainder of FY 2009

To establish and maintain eligibility for FLC grant funding, SWAs must comply with this TEGL and other applicable guidance and regulations of the Department. Upon receipt and approval of the plan at the National Office, OFLC, the Grant Officer in ETA's Division of Federal Assistance will issue an additional Notice of Obligation to provide the balance of funds due to each state from its annual allocation.

SWA Responsibilities

SWAs are responsible for administering grant funds for FLC programs within established guidelines. These responsibilities include:

1. Certifications and Assurances

Regulations require recipients of SWA grants to submit various standard certifications and assurances. These have already been provided under the PY 2008/FY 2009 Wagner-Peyser Annual Funding Agreement and the FY 2008 Foreign Labor Certification Agreement. Current SWA regulations at 20 CFR Part 658, Subpart E (20 CFR 658.400-658.426) cover the complaint and appeals procedures. Regulations at 20 CFR Part 653, Subpart F and 20 CFR Part 654, Subpart E apply to housing inspection activities under the reimbursable grant.

2. Utilize Mandated Forms for Inter-Agency Communications

SWAs must utilize the proper formats to ensure uniform communications. These formats include, but may not be limited to, the following:

- **Form ETA-232 (OMB Approval No. 1205-0017 Exp. 08/31/2010)**
Form ETA-232 is the Domestic Agricultural In-Season Wage Report.
- **Form ETA-232A (OMB Approval No. 1205-0017 Exp. 08/31/2010)**
Form ETA-232A is the Wage Survey Interview Record.
- Other ETA forms that contain a valid Office of Management and Budget (OMB) control number and expiration date.

3. Reporting Responsibilities

The required reports are listed below:

- **ETA-9130 (OMB Approval No. 1205-0461 exp. 11/30/2009)**
The ETA-9130 is the Financial Status Report and must be submitted by the SWA on a quarterly basis for each fiscal year of funds.
- **ETA-9127 (OMB Approval No. 1205-0457 Exp. 04/30/2009 extension pending)**
The ETA-9127 is the Quarterly Activity Report and a completed form must be submitted by the SWA on a quarterly basis for each fiscal year. SWAs must correct deficiencies to the form upon request by the National Office.

Conclusion

Grant funding balances will be issued to SWAs upon availability of funds. The National Office Grant Officer will issue a Notice of Obligation (NOO) to SWAs upon approval of the SWA updated FY 2008 Annual Plan. Budgets can only be approved for annual plans after the National Office (Office of Foreign Labor Certification) has approved the Annual Plan for the Agricultural/Non-Agricultural programs.

Estimated FY 2009 FLC Funding Levels*

Alabama	\$77,345	Nebraska	\$104,228
Alaska	\$70,715	Nevada	\$79,917
Arizona	\$264,905	New Hampshire	\$86,623
Arkansas	\$81,763	New Jersey	\$599,434
California	\$2,415,253	New Mexico	\$81,763
Colorado	\$230,269	New York	\$1,364,539
Connecticut	\$257,974	North Carolina	\$201,475
Delaware	\$98,147	North Dakota	\$90,479
Florida	\$582,509	Ohio	\$202,939
Georgia	\$541,925	Oklahoma	\$77,345
Guam	\$66,295	Oregon	\$85,991
Hawaii	\$66,295	Pennsylvania	\$557,882
Idaho	\$210,578	Puerto Rico	\$66,295
Illinois	\$420,659	Rhode Island	\$70,715
Indiana	\$70,715	South Carolina	\$89,059
Iowa	\$79,555	South Dakota	\$79,555
Kansas	\$118,997	Tennessee	\$165,881
Kentucky	\$325,642	Texas	\$936,362
Louisiana	\$161,671	Utah	\$98,210
Maine	\$289,562	Vermont	\$101,085
Maryland	\$505,471	Virgin Islands	\$66,295
Massachusetts	\$766,566	Virginia	\$842,627
Michigan	\$293,765	Washington	\$207,534
Minnesota	\$100,173	Washington, DC	\$116,708
Mississippi	\$92,813	West Virginia	\$72,925
Missouri	\$123,632	Wisconsin	\$126,829
Montana	\$75,135	Wyoming	\$72,925

*Amount includes funds distributed during the Continuing Resolution period(s). The total SWA grant allocation for FY 2009 is \$15,034,000.

Attachment No.: 2

Update of FY 2008 ANNUAL PLAN

WORKLOAD SUPPLEMENT

(Insert Agency Name) _____ has prepared the following information and assurances for delivering labor certification/attestation services during FY 2009.

A. Foreign Labor Certification Workload

Category of Labor Certification and Attestation Services		FY 2009 Workload ⁽¹⁾
A. Number of job orders related to H-2A temporary labor certification applications processed and expected to be processed.		
B. Number of H-2B temporary non-agricultural labor certification applications processed and expected to be processed. ⁽²⁾		
C. Number of prevailing wage surveys conducted and expected to be conducted in agricultural activities.		
D. Number of housing inspections conducted and expected to be conducted in anticipation of H-2A orders.		
E. Number of prevailing wage determinations provided and expected to be provided to employers for non-agricultural occupations by the following categories:		
	PERM	
	H-1B	
	H-2B ⁽³⁾	
	H-1B1	
	E-3	
F. Number of Full Time Equivalent (FTE) staff funded by this grant.		
G. Any plans for changes in existing operations, including the prevailing wage program, which will substantially affect negotiated goals.		

- (1) Workload includes actual labor certification/attestation services provided between October 1, 2008 and March 31, 2009, and planned services for the remainder of FY 2009.
- (2) Workload includes only H-2B applications filed with the SWA during FY 2009 prior to implementation of new USDOL regulations that were processed and expected to be processed. Effective January 18, 2009, the SWA was no longer responsible for receiving and processing H-2B applications.
- (3) Workload includes wage determinations processed during FY 2009 prior to implementation of new USDOL regulations as well as those processed and expected to be processed under the H-2B transition procedures effective January 18, 2009. Employers with a start date of need for H-2B workers on or after October 1, 2009, no longer file wage determination requests with the SWA.

B. Conducting Housing Inspections

As a condition for receiving funds in support of the Secretary's responsibility, the Agency agrees to schedule and conduct pre-occupancy inspections of housing under the applicable Federal regulations to be furnished to migrant and seasonal farmworkers or other U.S. workers, or to nonimmigrant foreign workers admitted to the United States under temporary labor certification programs for temporary employment in agriculture or logging.

In accordance with the applicable Federal regulations, employers are required to provide housing at no cost, or public housing, for workers who are not reasonably able to return to their place of residence the same day. The housing must meet the applicable local, state, or federal standards, and be sufficient to house the number of workers requested.

1. Special Assurances.

- The state shall adhere to the applicable Federal regulations, and actual housing inspections may be conducted under certain conditions in accordance with OSHA standards at 29 CFR 1910.142, Temporary Labor Camps.
- To the extent practicable, the Agency will encourage employers who expect to obtain their certification 30 days before the date of need to have housing ready for inspection.
- To the extent practicable, the Agency will be prepared to conduct housing inspections prior to the filing of applications/job orders, if so requested by the employer.
- To the extent practicable, the Agency will plan to schedule housing inspections prior to the filing of H-2A applications for those employers who regularly use the H-2A program.
- The Agency (check one) **WILL** **WILL NOT** utilize an alternative method(s) for conducting pre-occupancy housing inspections (i.e., State Health Department, Agricultural Department, etc.).

Detailed Explanation of Alternative Method (if applicable):

2. Allowable Costs.

- Costs may be attributed to activities in support of tasks described in 20 CFR Part 654 Subpart E, Housing for Agricultural Workers and/or 29 CFR 1910.142, Temporary Labor Camps, and for indirect support as a fair share of overhead.

3. Performance Standards.

- The state's performance will be reviewed according to the applicable Federal regulations and housing standards.

4. Reporting.

- Required reporting of activity as specified on Office of Management and Budget (OMB) approved ETA forms. Financial reporting will be as specified by ETA.
- States should plan to track the costs associated with conducting pre-occupancy housing inspections to assist the National Office OFLC in the allocation of future resources. The costs include, but are not limited to, staff resources, travel expenditures, and administrative costs.

C. Statement of Work for Agricultural Wage Surveys

As a condition for receiving funds in support of the Secretary's responsibility, the Agency agrees to conduct prevailing wage surveys of agricultural and logging activities in accordance with ETA Handbook No. 385 and all applicable Federal regulations.

1. Special Assurances.

The state shall submit to the National Office OFLC a plan for the surveys it is scheduling for the coming year. This plan includes all the surveys which will be conducted by the state in the upcoming season. Accordingly, the state's survey targets are based on estimated job order activity to be produced by H-2A applications.

- The state shall submit the results of its prevailing wage surveys (ETA form 232) promptly to the National OFLC as well as to the Chicago National Processing Center, so the correct wage is established for the next cycle of crop activity. Timely submission is critical to ensure release of wage determinations by the National Office well ahead of the crop activity start date.
- All documentation related to wage survey plans and results should be mailed to:
Mr. Ben Orona
Office of Foreign Labor Certification
Employment and Training Administration, USDOL
200 Constitution Avenue, NW
Room C-4312
Washington, DC 20210 Fax: 202-693-2768

2. Allowable Costs.

- Costs may be attributed to tasks described in ETA Handbook No. 385 for crop activities which meet the criteria specified above and for indirect support as a fair share of overhead.

3. Performance Standards.

- The state's performance will be reviewed according to its adherence to the procedures for wage surveys in ETA Handbook No. 385. The procedures contained in the ETA Handbook No. 385 require that prevailing wage surveys be conducted for any crop activity that is anticipated in the upcoming season.

4. Reporting.

- Completed surveys will be submitted on the ETA-232. Financial reporting will be as specified by ETA.
- States should plan to track the costs associated with conducting prevailing wages in order to assist the National Office OFLC in the allocation of future resources. The costs include, but are not limited to, staff resources, travel expenditures, and administrative costs.

D. Cost of H-2A Temporary Labor Certification Activities

The information contained in the table below utilizes data available from FY 2008 to estimate the cost of conducting state activities under the H-2A temporary labor certification program, including applications for logging.

1. Costing Sheet (Including logging)

Activity	Total Number	Total Cost ⁽⁴⁾	Average Cost ⁽⁵⁾
Housing Inspections ⁽¹⁾			
Prevaling Wage/Practice Surveys ⁽²⁾			
Job Orders Processed ⁽³⁾			
Total Cost of H-2A Activities			

(1) Housing Inspections:

- Include in the total cost estimate: travel time, inspection time, travel mileage, and completion of paperwork. Include in the total, all housing inspections started during the prior fiscal year regardless of the final completion date.
- If housing inspections are done by another organization, estimate the cost that the H-2A portion adds to their total cost and include this amount in the table.

(2) Prevailing Wage/Practice Surveys:

- Include in the total cost estimate the development of the survey instrument, postage, collection of responses, collation of information, and publication of results.
- Include in the total, all surveys started during the prior fiscal year regardless of the final completion date.

(3) Job Orders Processed:

- Include in the total cost estimate the creation and maintenance of files, taking into account the cost associated with receiving applications, referring applicants, and releasing orders into inter/intra-state job system.

(4) Average Cost:

- Total Cost / Total Number

(5) Total Cost of H-2A Activities:

- Total Cost of Housing Inspections + Total Cost of Prevailing Wage/Practice Surveys + Total Cost of Job Orders Processed

E. Grant Contact Information

Included below is the point-of-contact for this grant.

Name:	
Title:	
Address:	
Telephone Number:	
E-mail Address:	
Fax Number:	

Attachment No.: 3

Annual Plan Procedures

1. Annual Funding Agreement.

The current agreement includes a Workload Supplement to encompass all Program Year 2008/Fiscal Year 2009 program activities. Notice of Obligation documents for the allotment balances will be issued by the National Office Grant Officer based upon National Office approval of updated FY 2008 Annual Plans.

2. Annual Plan.

The updated FY 2008 Annual Plan includes an Application for Federal Assistance (SF-424), transmittal letter, plan workload/supplement, and budget information. Consistent with National Office guidelines, negotiations between ETA and the Grantee will determine each state's final annual level of funding for Foreign Labor Certification.

- The updated FY 2008 Annual Plan will have a performance period of 12 months beginning October 1, 2008, and ending September 30, 2009.
- The plan package submitted from the states to the National Office Grant Officer should consist of a transmittal letter and one original and two copies of the following:
 - A. Application for Federal Assistance (SF-424)
 - B. Annual Budget and Quarterly Funding Plan (SF-424A—Section D only)
Note: Please include a budget supplement to explain and list all proposed equipment purchases of \$5,000 or more and any subcontracts.
 - C. Annual Plan Workload Supplement.

3. Plan Modifications.

The National Office and the state may jointly modify the updated FY 2008 Annual Plan including negotiated changes in the plan period and in funding levels during the year. The plan modification requests must include a transmittal letter, a revised annual budget, and the quarterly spending plan. The National Office Grant Officer has the authority to execute funding adjustments where a state is not spending at agreed upon levels. When an adjustment is necessary, a unilateral modification may be issued. In the event that the Secretary of Labor may be required by future legislation to carry out other responsibilities not currently anticipated, the states will be requested to submit a modification to the Annual Plan in order to carry out these additional duties.

4. Financial Reconciliation.

After the end of the fiscal year, a financial reconciliation procedure will be conducted to reconcile accounting records maintained by the grantee and the Department of Labor's original accounts. It may become necessary to revise funding levels in the new plan for a particular state when the reconciliation is completed.