

TEGL 11-07, Change 1
Questions from SWA Training Webinars – Round 1

Positive Recruitment

Q1. For states in which H-2A processing takes place in only certain locations, should employers' advertisements direct applicants to the nearest local State Workforce Agency (SWA) office or the nearest location that processes H-2A applications?

A1. Because the employer must advertise in the area of intended employment, advertisements should direct applicants to the nearest local SWA office. If the nearest local SWA office does not have access to the H-2A job offer, it should request a copy from the nearest location in the state designated for processing H-2A applications.

Job Orders

Q2. Now that America's Job Bank is no longer operable, is there a list of acceptable or preferred sites on which SWAs should circulate electronic job orders?

A2. With the advent of the Internet, the need to "clear labor" among states (i.e., connect job seekers and employers across state lines, is no longer a challenge, as the Internet has enabled easy and universal access to job openings. State-sponsored job banks, private job banks, and private business job listings on the Internet are equally available to everyone, regardless of area of residence. SWAs are encouraged to communicate with other SWAs to decide on an effective way to disseminate job orders (e.g., via fax or email).

50% Rule

Q3. How will a SWA know the date foreign workers depart for the place of employment? Who determines what amount of time is reasonable to allow foreign workers to travel from their homes to the place of employment?

A3. Title 20 CFR § 655.106(e)(1)(i) sets forth the guidelines for determining the date foreign workers depart for the place of employment. Unless the employer informs the SWA in writing of a different departure date, the date H-2A workers depart for the place of employment is considered to be three days before the employer's date of need.

Who must verify employment eligibility?

Q4. Why must the SWA, and not the employer, make a determination that certain workers are eligible to work legally in the United States?

A4. Section 274A(a)(1)(B) of the Immigration and Nationality Act, as amended (INA), requires every person or entity who hires workers to verify employment eligibility of every such hired worker. Section 274A(a)(1)(B) also requires every agricultural association, agricultural employer, or farm labor contractor who recruits or refers workers for a fee, to verify employment eligibility of every such recruited or referred worker. However, § 274A(a)(5) of the INA stipulates that SWAs may verify employment eligibility of referred workers and issue a certification of such verification. Employers in possession of such a certification are deemed to have complied with the verification process.

Section 218(c)(3)(A) of the INA stipulates that H-2A labor certifications may only be issued if DOL determines there are not sufficient “eligible individuals who have indicated their ability to perform such labor or services.” The Department of Labor (Department or DOL) fulfilled its statutory mandate by publishing regulations at 20 CFR § 655.106(a) that state “no U.S. worker-applicant shall be referred unless such U.S. worker...is able, willing, and eligible to take such a job.” Section 218(i)(1) of the INA defines an eligible individual, with respect to employment, as “an individual who is not an unauthorized alien...with respect to that employment.”

Taken together, these provisions prohibit SWAs from referring ineligible (including non-work authorized) workers to an H-2A job order. In order to perform their referral function under the H-2A program, SWAs must verify work authorization. Therefore, SWAs are instructed to complete the I-9 process to determine whether a worker is eligible to work in the job opportunity prior to referring such worker to an H-2A job opportunity. U.S. Citizenship and Immigration Services (USCIS) regulations at 8 CFR § 274a.6 set forth the process by which SWAs may complete Forms I-9 prior to referral and issue certifications to employers. Employers in possession of a SWA-issued certification for a referred worker are not required to complete Form I-9 for that worker.

Q5. Which SWA official must complete Form I-9 and retain related records?

A5. The SWA official who actually refers the worker to an H-2A job order must ensure Form I-9 has been completed by the SWA. Because original (not photocopied) documents must be examined and recorded, any SWA official who has personal contact with the worker may complete Form I-9. If multiple SWA officials at various levels have personal contact with the worker, the SWA may implement its own plan for delegation of responsibilities to ensure Form I-9 is completed prior to referral.

While the SWA that completes Form I-9 must retain the completed form and accompanying certification for three years, such retention may take place on-site or off-site, so long as the SWA is able to retrieve the records within three days of a request made by a Department of Homeland Security (DHS), Department of Justice (DOJ), or DOL official.

Whose employment eligibility must be verified?

Q6. Why are SWAs only required to verify employment eligibility for workers referred to H-2A job orders?

A6. At this time, SWAs are only required to verify employment eligibility for workers referred to H-2A job orders. The reasons for requiring verification for H-2A referrals are discussed elsewhere in this document. In the future, the Employment and Training Administration may expand the employment eligibility verification requirement to include referrals to other types of job orders.

Q7. Is it discriminatory to verify employment eligibility only for workers referred to H-2A job orders? Does it matter whether the majority of workers referred to H-2A job orders are of a particular national origin?

A7. It is not discriminatory to verify employment eligibility only for workers referred to H-2A job orders. Such workers must by statute be eligible workers, authorized to work in the job opportunity. The verification requirement applies to all H-2A applicants, regardless of national origin, which ensures the provision will not be applied in a discriminatory fashion.

I-9 Process

Q8. The Form I-9 handbook indicates Forms I-9 should not be completed for job applicants, but should only be completed for people actually hired. When should SWAs complete the I-9 process?

A8. USCIS regulations at 8 CFR § 274a.2 apply to employers; USCIS regulations at 8 CFR § 274a.6 apply to SWAs and incorporate some, but not all, portions of § 274a.2. The Form I-9 handbook reflects the requirements found in § 274a.2, only some of which apply to SWAs. While § 274a.2 instructs employers to complete Forms I-9 for new hires, but not job applicants, § 274a.6 states that SWAs may complete Forms I-9 for workers prior to referral.

Q9. When must a SWA issue a certification to an employer? Should SWAs send copies of completed Forms I-9 to employers?

A9. USCIS regulations at 8 CFR § 274a.6(c) stipulate that SWAs that complete the I-9 process in accordance with regulatory requirements must issue a certification for each referred worker whose employment eligibility was verified

through the process. The certification must be issued directly to the employer, in person or by mail, within 21 business days. SWAs should not send employers a copy of Form I-9. The employer must retain the certification in lieu of completing Form I-9.

Q10. What information must be contained in the referral notice?

A10. A SWA-issued job order or other referral form serves as evidence of the employer's compliance with § 274A(a)(1)(B) of the INA during the period of time between SWA referral and employer receipt of the SWA certification. USCIS regulations at 8 CFR § 274a.6(c)(2) state that such job orders or other referrals forms must contain the following:

- (1) The worker's name;
- (2) The date of referral;
- (3) The job order number or other identifying referral number;
- (4) The name and title of the SWA official who referred the worker; and
- (5) The SWA's telephone number and address.

Q11. If a SWA refers the same worker to multiple H-2A job orders, must the SWA complete a new I-9 for each referral?

A11. If a SWA refers to an H-2A job order a worker who was previously referred by the SWA to another H-2A job order, the SWA may choose to either: (1) complete a new Form I-9 and issue a new certification to the employer, or (2) examine the old, previously completed, Form I-9 and take appropriate action.

IF the SWA chooses to examine the worker's old Form I-9 **AND** no more than three years have passed since completion of the old Form I-9 **AND** Form I-9 shows the worker is still authorized to work, **THEN** the SWA should update Form I-9 by completing section 3 **AND** the SWA should issue a new certification to the employer. Otherwise, the SWA should complete a new Form I-9 and issue a new certification to the employer.

To complete section 3:

- (1) If the worker has a new name, different from listed in section 1, enter the new name in part A.
- (2) Because the SWA is not making a hiring decision, do not complete part B.
- (3) If the worker's work authorization expires on or after the date of updating Form I-9 and the worker chooses to present a new combination or work document with a later expiration date, annotate the new document information in part C and include the new expiration/restriction information on the employer certification. The new document may be a different type of combination or work document than initially presented. If the work authorization has already expired, the SWA must complete a new Form I-9 and may not merely update the old Form I-9.
- (4) Sign and date the attestation at the bottom of section 3.

Q12. What will happen if a SWA completes Form I-9 and DHS discovers the worker is not actually authorized to work?

A12. A SWA cannot be charged with a verification violation if it properly completes Form I-9. The SWA will have a good faith defense against sanctions (unless the government can show it had knowledge of the unauthorized status of the worker) if the SWA has done the following:

- (1) Ensured the worker fully and properly completed section 1 of Form I-9 prior to referral;
- (2) Reviewed the required documents, which reasonably appeared genuine and related to the person who presented them;
- (3) Fully and properly completed section 2 of Form I-9, and signed and dated the employer certification (minus the date of hire);
- (4) Retained Form I-9 for the required period of time; and
- (5) Made Form I-9 available upon request of a DHS, DOJ, or DOL officer.

Q13. Are SWAs required to complete Forms I-9 for all H-2A referrals on/after December 15, 2007?

A13. TEGL 11-07 and superseding guidance TEGL 11/07, Change 1, became effective immediately upon issuance. The guidance clarified SWAs' responsibility to verify employment eligibility of each worker prior to referral in response to an H-2A job order. Because the Department was aware that many SWAs did not currently have reliable employment verification systems in place, the Department advised it was granting SWAs a grace period and would begin enforcing the verification requirements beginning December 15, 2007. SWAs are instructed to verify such employment eligibility through the basic I-9 process. Once E-Verify training has been finalized, SWAs may elect to verify employment eligibility through the E-Verify I-9 process. The E-Verify I-9 process involves the E-Verify process in addition to the basic I-9 process.

[Acceptable Documents](#)

Q14. What relevance did the document portion of the training have on TEGL 11-07, Change 1?

A14. TEGL 11-07, Change 1, clarifies that SWAs must verify the employment eligibility of any worker referred to an employer in response to an H-2A job order. As specified in the training, SWAs must comply with the I-9 process outlined in USCIS regulations to verify such eligibility. That process requires SWAs to examine required documents and record document information in section 2 of Form I-9.

The Office of Foreign Labor Certification (OFLC) does not expect SWAs to become document experts or remember the background details of every

acceptable document. The document portion of the training was intended to familiarize SWAs with various acceptable documents. The complete list of acceptable documents is found on page 2 of Form I-9. SWAs are encouraged to refer to the training materials and/or the Handbook for Employers (M-274) if additional guidance is needed to determine which documents are acceptable.

Q15. Form I-9 instructions indicate an employer may accept a receipt for a document. Why did the training indicate SWAs may not accept receipts?

A15. USCIS regulations at 8 CFR § 274a.2 apply to employers; USCIS regulations at 8 CFR § 274a.6 apply to SWAs and incorporate some, but not all, portions of § 274a.2. Form I-9 instructions reflect the requirements found in § 274a.2, only some of which apply to SWAs. While § 274a.2 allows employers to accept receipts during the I-9 process, § 274a.6 states that SWAs may not accept receipts.

Q16. May a SWA accept a document that expires on the day it is examined?

A16. For documents that must be unexpired, each document must contain an expiration date that is on or after the date the SWA is examining the document. A document is considered valid through 11:59pm on its expiration date.

Q17. When must a SWA require a document with a photograph?

A17. A worker may choose to submit either a combination document from list A, or an identity document from list B and an employment eligibility document from list C. If a SWA uses E-Verify, and a worker presents an identity document from list B, that identity document must contain a photograph. Otherwise, the SWA may not limit the documents on lists A, B, or C which are acceptable for the I-9 process.

Q18. When may a worker present an I-94 as documentary evidence of identity and employment authorization?

A18. A foreign passport with an I-94 that authorizes work in the job opportunity is listed on Form I-9 as an acceptable combination document under list A. An I-94 is only evidence of employment eligibility if the class of admission allows work in the specific job opportunity.

The class of admission on an I-94 indicates the type of temporary visa under which the foreign national was admitted. A foreign worker admitted under a temporary work visa (e.g., H-1B, H-1C, H-2A, H-2B, L-1A, L-1B, O-1, O-2, P-1, P-2, P-3, Q-1) is only allowed to work for the employer that filed a subsequently approved I-129 petition with USCIS. Furthermore, the worker is only allowed to work in the specific job opportunity for which USCIS approved the I-129 petition.

Any person admitted to the United States under a temporary work visa (including H-2A) will report directly to the petitioning employer, and will not need to apply with a SWA for referral.

There are only a few classes of foreign nationals for which an I-94 would authorize work for any employer in any job opportunity: (1) refugees; (2) asylees; and (3) certain nationals of the Federated States of Micronesia, the Marshall Islands, and Palau. The I-94 will contain an annotation that clearly indicates such status. A foreign national admitted under any other class of temporary admission (including H-2A) is automatically precluded from referral to an H-2A job order on the basis of an I-94 alone. If such a person is subsequently granted “open market” work authorization (i.e., is authorized to work for any employer in any job opportunity), USCIS will issue an Employment Authorization Document (e.g., Form I-766), listed separately on Form I-9 as an acceptable combination document under list A.

Q19. Must the second identity document under List B be issued by a U.S. government entity, or may it be issued by a foreign government entity?

A19. List B allows workers to submit as an identity document an identification card issued by a Federal, state, or local government entity that contains a photograph or identifying information. Such document must be issued by a U.S. Federal government entity, a U.S. state government entity, or a U.S. local government entity. It may not be issued by a foreign government entity. The term “state” refers to any of the 50 states in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

[E-Verify](#)

Q20. When will E-Verify be available?

A20. E-Verify is expected to be available in January 2008 for a pilot program with a limited number of SWAs. E-Verify will likely be available for all SWAs by June 2008. The Department is entering into a separate Memorandum of Understanding (MOU) with DHS and the Social Security Administration (SSA) whereby SWAs may participate in E-Verify with responsibilities different from those under which employers or designated agents operate (e.g., SWAs will verify employment eligibility prior to a hiring decision). Once the MOU has been approved by all three agencies, OFLC will advise SWAs of training opportunities on SWA use of the E-Verify system. Those SWAs who are interested in being part of the E-Verify pilot program should contact OFLC via e-mail at oflc.e-verify@dol.gov.

Q21. How can a SWA comply with the TEGL if state law prohibits the use of E-Verify?

A21. SWAs must verify employment eligibility of each worker prior to referral in response to an H-2A job order. SWAs are instructed to verify such employment eligibility through the basic I-9 process. Once E-Verify training has been formalized, SWAs may elect to verify employment eligibility through the E-Verify I-9 process. The E-Verify I-9 process involves the E-Verify process in addition to the basic I-9 process. While DOL strongly recommends SWAs to use E-Verify, E-Verify is a voluntary process. Those SWAs who are prohibited by law to participate in E-Verify may elect to continue verification through the basic I-9 process. No state may pass a law to prohibit the basic I-9 process, as § 274A of the INA mandates the process for every person or entity who hires workers and for every agricultural association, agricultural employer, or farm labor contractor who recruits or refers workers for a fee.

Q22. Is there an advantage to using E-Verify?

A22. E-Verify is the best means available for determining employment eligibility and the validity of Social Security numbers. In addition, E-Verify's Photo Screening Tool is the first step in giving users the tools they need to detect identity theft in the employment eligibility process. E-Verify reduces unauthorized employment, minimizes verification-related discrimination, is quick and non-burdensome to users, and protects civil liberties and worker privacy. Initial verification returns results within three to five seconds.

Q23. Is there a cost associated with E-Verify? Which SWA staff will have access to E-Verify?

A23. E-Verify is a free and simple-to-use Web-based system that electronically verifies employment eligibility. Users may access E-Verify using any Internet-capable Windows-based personal computer and web browser of Internet Explorer 5.5, Netscape 4.7, or higher (with the exception of Netscape 7.0). To participate, a SWA must register and accept the MOU that details the responsibilities of DHS, SSA, and the SWA. Each site that will perform employment verification queries must register to use E-Verify and sign an individual MOU. Multiple individual users at one site may access the system under the same site MOU. Once a user has completed a tutorial, he or she may begin using the system to verify employment eligibility.

Q24. How can SWAs use E-Verify if E-Verify can only be used after a worker is hired?

A24. USCIS regulations at 8 CFR § 274a.2 apply to employers and require employers to complete Form I-9 within three days of hire. The E-Verify MOU used by employers prohibits employers from utilizing E-Verify to verify employment eligibility of a worker before that worker is hired and/or before the employer completes Form I-9.

In contrast, USCIS regulations at 8 CFR § 274a.6 apply to SWAs and allow SWAs to complete Form I-9 prior to referral. DOL is entering into a separate MOU with DHS and SSA whereby SWAs may participate in E-Verify with responsibilities different from those under which employers or designated agents operate. This MOU will allow SWAs to utilize E-Verify to verify employment eligibility of workers prior to referral.

Q25. Is there any concern regarding reports that E-Verify is an inaccurate system, especially for naturalized U.S. citizens?

A25. The recent report entitled “Findings of the Web Basic Pilot Evaluation” prepared by Westat and submitted to DHS September 2007 suggests that such media reports are unfounded. See <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>. According to the report, the overall rate of erroneous tentative non-confirmations from October 2006 through March 2007 was approximately 0.51%. Because the erroneous tentative nonconfirmation rate is higher for foreign-born U.S. citizens than for non-citizens or native-born U.S. citizens, DHS has indicated it is currently in the process of exploring and implementing many of the Westat recommendations that address the higher erroneous tentative nonconfirmation rate for naturalized U.S. citizens.

It should be noted that no adverse action may be taken based solely on a tentative nonconfirmation. Every worker who is issued a tentative nonconfirmation has the opportunity to resolve such tentative nonconfirmation by phone or in person. After a worker is offered an opportunity to contest and resolve the tentative finding, the E-Verify system will issue an authorized determination, an unauthorized determination, or a final nonconfirmation. During the interim period in which the tentative finding is being resolved, the SWA will refer the worker to the H-2A job order.

Other

Q26. Who will be monitoring SWA participation in the I-9 process?

A26. OFLC will be monitoring SWA participation in the I-9 process.

Q27. What steps will be taken to protect SWAs from abuse by agents who wrongfully accuse SWAs of non-compliance with DOL regulations?

A27. TEGL 11-07, Change 1, as explained during the training sessions, requires the following additional activities: (1) SWA completion of Form I-9 for every worker referred to an H-2A job order, and (2) SWA issuance of a certification to the employer for each worker found eligible for employment after completion of a Form I-9. A SWA that complies with such activities will be in compliance with DOL regulations and agency guidance. Should a situation arise in which an

agent accuses a SWA of non-compliance with DOL regulations, the SWA should consult its own legal counsel for the best course of action.

Q28. Please define the term “SWA.”

A28. The acronym SWA stands for “State Workforce Agency.” USCIS regulations at 8 CFR § 274a.1(i) defines the term “State employment [workforce] agency” as “any State government unit designed to cooperate with the United States Employment Service in the operation of the public employment service system.”

Q29. Please define the term “employment eligibility.”

A29. Section 218(i)(1) of the INA defines eligibility, with respect to employment, as “an individual who is not an unauthorized alien...with respect to that employment.” The following groups of persons are authorized to work: (1) U.S. citizens and nationals, (2) lawful permanent residents of the U.S., and (3) foreign nationals with work authorization that permits employment in the job opportunity (e.g., refugees, asylees, foreign nationals granted employment authorization by USCIS because of their Temporary Protected Status, foreign nationals granted employment authorization by USCIS because of a pending USCIS Application for Adjustment of Status).