

Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2A Temporary Agricultural Foreign Labor Certification Program
2010 Final Rule, Round 9
October 30, 2015

Job Offers, Assurances, Obligations

Productivity Standards

1. I pay my workers based on a piece rate and require a productivity standard. Do I list the productivity standard on my ETA Form 790?

Yes. Labor productivity standards, which may be required as a condition of job retention, 20 CFR 655.122(l)(2)(iii), and are commonly defined as the amount of output per worker, must be listed on the ETA Form 790.

Under the H-2A regulations, if an employer who pays based on a piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977 or, if the employer first applied for H-2A temporary labor certification after 1977, such standards must be no more than those normally required by other employers for the activity in the area of intended employment at the time of the employer's first H-2A application, ETA Form 9142, *Application for Temporary Employment Certification*. 20 CFR 655.122(l)(2)(iii). Accordingly, the State Workforce Agency (SWA) and Chicago NPC CO's review of an employer's productivity standard on the ETA Form 790 will be based on the year in which that employer first applied for H-2A program certification. Therefore, when you prepare the job offer using the ETA Form 790, please make sure you indicate the first year you applied for H-2A program certification.

If the employer first applied in 1977 or before, the productivity standard for workers in each crop or agricultural activity where a piece rate will be paid must be the same as the employer required of its workers in 1977. 20 CFR 655.122(l)(2)(iii). The SWA or Chicago NPC CO may request evidence from the employer to establish that the productivity standard listed on its ETA Form 790 is the same as it required in 1977.

Where the employer first applied for H-2A temporary labor certification after 1977, the productivity standard for each crop or agricultural activity must be no more than that normally required by other employers in the area of intended employment in the year the employer filed its first H-2A application. 20 CFR 655.122(l)(2)(iii). For example, if the employer first applied for H-2A program

certification in 2014 and specified a productivity standard for harvesting oranges in Polk County, Florida, the employer's ETA Form 790 must contain productivity standards that are not higher than those normally required by other citrus harvesting employers (H-2A and non-H-2A program users) within that local area of intended employment in 2014. When reviewing an employer's productivity standard, the SWA and Chicago NPC CO consider available information, such as surveys and filing data, related to the crop or agricultural activity in the year the employer first filed. Either the SWA or Chicago NPC may request evidence from the employer demonstrating that the productivity standard listed on its ETA Form 790 is no more than that normally required by other employers in the area of intended employment in the year the employer first applied for H-2A program certification.

Reminder: A separate FAQ under the "Productivity Standards" subheading discusses the limitation on productivity standard increases. Click [here](#) to access that FAQ.

2. How do I list the productivity level I require on the ETA Form 790?

For recruitment and enforcement purposes in the H-2A program, productivity standards must be expressed in static, objective, and quantifiable terms based on the hours or days of work needed to produce a unit of production, and specified in a manner that is easily understood by the worker. Thus, the State Workforce Agency (SWA) and Chicago National Processing Center (NPC) will evaluate whether the productivity standards specified by an employer in the job order are static, objective, quantified, and able to be understood by the worker. "A worker must pick at least 3 crates of fruit per hour" is an example of a static, objective, quantified, and understandable productivity standard language.

The H-2A regulations require that where employees are paid a piece rate, e.g., a wage rate the employer assigns to each "unit" or quantity of goods a worker processes, the worker's pay must be supplemented, as necessary, so that the worker's earnings are at least as much as the worker would have earned if the worker had instead been paid at the applicable hourly wage rate for each hour worked. 20 CFR 655.122(l)(2). In some cases, employers tie their productivity standards to the applicable hourly wage rate by requiring that a worker's output be at least enough to equal the hourly rate, so that the employer does not have to supplement the piece rate earned. Such productivity standards will not be acceptable, because they are not static (i.e., the hourly wage rates are subject to change during the course of a work contract period or from one year to the next). Thus, where the minimum hourly wage rate increases but the piece rate wage does not, the effect is to create an ever-increasing (i.e., non-static) productivity standard. Moreover, such a requirement does not specifically quantify the expected output per worker and does not clearly communicate to the worker the output required for job retention in the specific crop or agricultural activity.

Similarly, the use of vague productivity standards, such as requiring workers to “perform work in a timely and proficient manner,” “perform work at a sustained, vigorous pace,” “make bona fide efforts to work efficiently and consistently considering climatic and other working conditions,” “keep up with the crew,” “produce at a rate that does not detrimentally affect other workers’ productivity,” or “perform work in the amount, quality, and efficiency of other workers” are also unacceptable. Such standards lack objectivity, quantification, and clarity. In these circumstances, the SWA and/or the Chicago NPC Certifying Officer (CO) will require the employer to remove any vague benchmarks and specify productivity standards that are static, quantified, objective, and understandable to the worker in each crop or agricultural activity.

- 3. Many farms in my local area have productivity standards for workers that are higher than mine. I first applied in the H-2A program in 2009. Can I increase the productivity standards on my *Application for Temporary Employment Certification*, ETA Form 9142, that I intend to file in the future?**

In most cases, a productivity standard may not be increased. If the employer first applied for H-2A temporary labor certification in 1977 or before, the productivity standard for workers in each crop or agricultural activity must remain at the employer’s 1977 standard. 20 CFR 655.122(l)(2)(iii). Where the employer first applied for H-2A temporary labor certification after 1977, the productivity standard must remain at the standard that was normally required by other employers in the area of intended employment in the year the employer first applied for H-2A workers. 20 CFR 655.122(l)(2)(iii). Therefore, in the example above, although other employers in the local area may have higher productivity standards for workers, the employer’s productivity standards established in 2009 (i.e., the year it first applied for H-2A temporary labor certification) cannot be raised in any subsequent years.