

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Employment and Training, Workforce Development Programs

THE COLORADO NONIMMIGRANT AGRICULTURAL SEASONAL WORKER PILOT PROGRAM

7 CCR 1104-01

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

CHAPTER 1 GENERAL PROVISIONS

Rule 1-1 Authority

This regulation is adopted pursuant to the authority in Sections 8-3.5-104 and 8-3.5-112, C.R.S. and is intended to be consistent with the requirements of the State Administrative Procedures Act, Section 24-4-101, *et seq.* (the "APA"), C.R.S. and the Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program Act, Section 8-3.5-101 *et seq.* (the "Act"), C.R.S.

Rule 1-2 Statement of Basis and Purpose

These regulations are promulgated by the Division of Employment and Training, Workforce Development Programs to establish uniform rules for the implementation of the Act.

The main purpose of these regulations is to establish requirements for participation in the Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program (the "Program") and ensure implementation of the Program complies with applicable state and federal law.

These regulations establish minimum requirements to expedite the federal labor certification application and approval process for the issuance of H-2A visas by the United States government. The purpose of the Program is to ensure that Colorado agricultural employers have labor sufficient to meet the seasonal demands of the agriculture industry.

Rule 1-3 Scope

This regulation shall govern procedures used to implement the Nonimmigrant Agricultural Seasonal Worker Pilot Program. This regulation shall not apply, replace, or in any way supersede the responsibilities of the Division of Employment and Training, Workforce Development Programs, in its administration of the foreign labor certification program.

Rule 1-4 Effective Date

This regulation is effective upon signature.

Rule 1-5 Basis for Emergency

On February 13, 2008, the United States Department of Labor and the United States Department of Homeland Security issued complementary sets of proposed regulations substantially changing federal and state requirements for the administration of the H-2A visa program. In December 2008, the United States Department of Labor and the United States Department of Homeland Security announced that these final regulations will be implemented in January 2009. In order to comply with federal H-2A and immigration requirements, rules for the Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program could not be adopted until federal rules were finalized.

Rule 1-6 Definitions

- A. “Agent” means a person or entity in the business of:
- (1) Developing and submitting appropriate application materials to the state employment security agency and the department responsible for issuing labor certifications for a specific employer and job; and
 - (2) Coordinating local recruitment with the employer and state employment security agency; and
 - (3) Developing appropriate documentation of employer requirements and employment terms for use in selecting foreign workers; and
 - (4) Filing for visa petition approval and coordinating visa issuance by the United States consulate or embassy in the worker’s country of origin.
- B. “Application Filing Date” means the date an employer submits to the implementing agency an Employer Assurance Form and the Employer Petition Form. If these forms are submitted on different dates, the “Application Filing Date” shall be the later date.
- C. “Department” means the Colorado Department of Labor and Employment.
- D. “Director” means the Executive Director of the Colorado Department of Labor and Employment.
- E. “Director’s Designee” means the Department of Labor and Employment, Deputy Executive Director; or, the Department of Labor and Employment, Division of Employment and Training, Division Director.
- F. “Division” means the Division of Employment and Training.
- G. “Employee” means a person who works for an employer and is an active participant in the program.
- H. “Employer Assurance Form” means the Division form submitted and signed by the employer whereby the employer agrees to comply with Section 8-3.5-105(5), C.R.S.
- I. “Employer Petition Form” means the Division form submitted and signed by the employer whereby the employer requests participation in the Program.
- J. “Implementing Agency” means the Workforce Development Programs, within the Department of Labor and Employment, Division of Employment and Training.
- K. “Pilot Program Year” means the twelve-month period beginning October 1 and ending September 30 of each year. The Pilot Program Year shall be expressed in terms of overlapping calendar years. For example, Pilot Program Year 2008-09 shall equal calendar period of October 1, 2008, to September 30, 2009. The Pilot Program Year shall be used exclusively by the Department to set program fees and the annual number of allowable workers under the Program, and for no other purpose.
- L. “Program” means the Nonimmigrant Agricultural Seasonal Worker Pilot Program.
- M. “Specialty Crops” means commonly recognized fruits, vegetables, tree nuts, dried fruits, and nursery crops (including floriculture).

CHAPTER 2 AGENTS

Rule 2-1 Requirements

The implementing agency may retain Agents for the Program. The implementing agency shall establish requirements for Agents that intend to participate in the Program. These requirements shall include a list of services that must be provided to an employer by participating Agents. Any person or entity interested in providing Agent services for the Program shall submit appropriate application materials to the implementing agency for consideration. The implementing agency will review application materials and will identify the Agent(s) that meet the specific application requirements. Agents that meet the application requirements shall be required to certify compliance with all Program statutes, rules, policies, and procedures.

Rule 2-2 Relationship with Employers

Employers seeking Agents through the Program shall contact the implementing agency for a listing of Agents that have been determined to comply with Program requirements. Employers shall select and contact the Agent for assistance in obtaining workers for the Program. The employer and Agent may enter into an agreement for services but the Department, Division, and implementing agency shall not be a party to such agreements.

Rule 2-3 Compliance

Listed Agents who do not meet specific Program requirements or who do not comply with all Program statutes, rules, policies, and procedures as determined by the implementing agency shall be removed from the implementing agency's Agent listing and shall be barred from participation in the Program for a period of time determined by the Director or the Director's Designee.

CHAPTER 3 EMPLOYERS

Rule 3-1 Program Eligibility

Pursuant to 8-3.5-104, C.R.S., participation in the Program for Pilot Program Year 2008-09 shall be limited to producers of specialty crops.

Rule 3-2 Applications

Each employer that intends to participate in the Program shall apply with the implementing agency. An application shall be considered filed when an employer signs and submits to the implementing agency the "Employer Petition Form" and the "Employer Assurance Form" provided by the Division.

Rule 3-3 Employer Petition Form

The implementing agency shall designate and make available an Employer Petition Form. An employer that intends to participate in the Program shall sign and submit the Employer Petition Form to the implementing agency.

Rule 3-4 Employer Assurance Form

In addition to the Employer Petition Form, an employer shall sign and submit an "Employer Assurance Form". The employer's signature on the form signifies that the employer agrees to comply with the provisions of Section 8-3.5-105(4), C.R.S. and any federal, state, and local employment laws.

Rule 3-5 Notifications

The implementing agency shall notify an employer if an employer is approved or denied participation in the Program. If an employer is approved, the implementing agency shall also notify the employer of the approved total number of workers and the total program fees in accordance with Chapter 4 of this rule.

CHAPTER 4 FEES

Rule 4-1 Application Fees

The Director of the Division shall charge an employer an application processing fee to cover the actual, reasonable, and necessary expenses to administer this program. The application processing fee will be calculated based on the number of workers approved by the implementing agency. For Pilot Program Year 2008-09, the fee for each approved worker is one hundred dollars (\$100). On or before September 30 of each year, the Director of the Division will adjust the fee, if necessary, based on anticipated program expenditures and the total number workers allowable statewide in the Program for the ensuing Pilot Program Year.

CHAPTER 5 ENFORCEMENT

Rule 5-1 Penalty to Employer for Failure to Report a Worker Who Has Absconded

If an employee absconds his or her employment and the employer, with reckless disregard, fails to notify the Department within the timeframe specified in Rule 8 CFR 214.2(h) (5) (vi) (A), the Director of the Division may deny the employer future participation in the program or may impose a fine of up to two hundred dollars per day for each day of violation.

Rule 5-2 Violation of Statute

In addition to the penalties listed in Rule 5-1 of this rule, pursuant to Section 8-3.5-110, C.R.S, the Director or the Director's Designee may take enforcement actions against any person who, with reckless disregard, is believed to have violated or assisted in the violation of any provision of the Act. Such enforcement actions may include assessment of a fine of up to five thousand dollars per violation.

Within thirty days after the date of issuance of a Notice of Violation, persons subject to enforcement actions and fines may file a written request for a hearing with the Director. If the alleged violator fails to timely request a hearing, all provisions of the notice of violation shall become final and not subject to further administrative review.

If the alleged violator fails to pay an assessment after it has become final, or after a court of competent jurisdiction has entered final judgment in favor of the Department, the Director or the Director's Designee shall refer the matter to the State Controller and the State Attorney General, who shall recover the amount assessed by action in the appropriate court of competent jurisdiction, and the appropriateness of the final order imposing the penalty shall not be subject to review.

Rule 5-3 Reckless Disregard

For purposes of Chapter 5 of this rule, "reckless disregard" means the willful failure of an Agent, employer, employee, or other person to comply with the requirements of this Act; or the willful failure of an Agent, employer, employee, or other person to cause another person to fail to comply with this act.

Editor's Notes

History

Entire Emer. Rule eff. 12/19/2008.