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H-2A 101

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First, Disclaimers

I am not an attorney and have no desire to be one. This presentation should not be construed as legal advice.

It is not intended to be exhaustive; the H-2A program is complex and ever-changing. Should you decide to go down this path, please engage experienced immigration counsel.



What is the H-2A program

Non-immigrant, temporary foreign worker visa program for agricultural employers. Employers can hire foreign workers for tough-to-fill season jobs. Employers must demonstrate a temporary or seasonal labor need; this is not year-round labor.

Employers must demonstrate insufficient US workers able, willing, and qualified to perform the job AND no adverse effect on wages/working conditions of US workers.



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What is the H-2A program (cont'd)

Temporary: Employer's need for temporary workers lasts no longer than 1 year (Reality: DOL won't certify contract periods longer than 10 months).

Seasonal: Employment tied to certain time of year by event or pattern and requires labor levels far above those necessary for ongoing operations.

Agriculture: "Farming in all its branches," including secondary agricultural activities "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations..."



Basic Requirements



U.S. Recruitment: Employers must offer employment to any qualified US worker willing and able to perform the job for the period of need. Must offer re-employment to any workers employed in the job in the last year. Refusal to hire can only be for lawful, job-related reasons. Obligations to hire US applicants continues until the 50% point in the H-2A contract period



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Basic Requirements (cont'd)



Corresponding Employment: You cannot give preferential treatment to foreign workers. US workers performing the same (or substantially similar) job duties entitled to same terms, conditions, benefits, and protections as H-2A workers



Basic Requirements (cont'd)

Wages

Employers must pay the *highest* of (1) the Adverse Effect Wage Rate (AEWR) (2) state prevailing wage; (3) collective bargaining wage; or (4) state/federal minimum wage.

The AEWR is the applicable rate in most cases. It is updated annually based on NASS survey data (average of all crop and livestock occupations)

A recent update to the AEWR are wages based on occupational classifications



Basic Requirements (cont'd)



Housing: Employers must provide free housing to all non-local workers. “Non-local” workers are those who live outside a reasonable commuting distance (US and foreign)

State Workforce Agency (SWA) must inspect/approve housing for the full number of requested workers.

You may use rental/leased housing (including public accommodations like hotels/motels)



Basic Requirements (cont'd)

Travel: Employer must pay or reimburse non-local workers for inbound and outbound travel costs (transportation, daily meals, and reasonable lodging).

If not paid in advance, employer must reimburse full inbound travel no later than the 50% point in the contract.

Outbound travel is reimbursed at the end of the contract. This allows the employer to not be responsible for outbound travel if the worker abandons the job or is terminated for cause.



Basic Requirements (cont'd)

Prohibited Fees:



It is unlawful to solicit or receive any fees from workers, either directly or indirectly, in consideration of employment.

If workers pay fees to a 3rd party, you as the employer are responsible for reimbursing them and reporting the violation to the appropriate authority.

If a violation is reported at the consular interview, all workers could be rejected on the petition.



Basic Requirements (cont'd)

Other considerations:

Employer must pay all visa-related costs and any border crossing fees. You are not responsible for passport fees.

If housing does not have kitchen facilities, employers must provide three daily meals. You may deduct for meal costs up to a federal limit.

Employer must provide free daily transportation to and from worksite, and weekly transportation to nearest town.



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Before you file

Decide whether to use an agent/attorney (I highly recommend the attorney option). **Do not overestimate what can be handled internally.**

Get housing in order. Do you own housing units, or will you lease? Are the units compliant with the applicable standards?

Validate your business – is your information current and accurate (ownership structure, location, etc)

Decide on the exact parameters of the H-2A job description. What tasks will be performed? What are minimum requirements?



Agents/Attorneys

Most offer a range of services related to the H-2A process (recruiting, filing, audit preparations, logistics, etc.).

Be sure to understand the responsibilities of both parties.

Get **EVERYTHING** in writing.

Do your due diligence. Not all 3rd parties are equal.

- The H-2A program is more than just paperwork....self-filing is risky and can be more expensive in the long run.



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What is the process for applying?

State Workforce Agency (SWA): File job order containing all terms and conditions of employment.

US Department of Labor (DOL): Apply for a temporary labor certification.

US Citizenship and Immigration Services (USCIS): File a non-immigrant visa petition.

US Consulate: Workers attend visa interview and apply for the H-2A visa.



State Workforce Agency (SWA)



What to File: ETA form 790 (“Job Order”) containing all terms and conditions of employment.

When to File: No earlier than 75 days and no later than 60 days before your start date of need.

How to File: Submit to SWA via the Foreign labor Application Gateway (FLAG) system.



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State Workforce Agency (SWA) (cont'd)

SWA evaluates the Job Order for compliance with H-2A regulations and state law.

Employers must list all tasks you need workers to perform. If you don't list it, H-2A workers can't do it.

You must identify minimum job requirements (i.e. experience, licensing/certifications, etc.)

SWA acceptance opens intrastate recruitment period.



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State Workforce Agency (SWA) (cont'd)



During the recruitment period, you must offer employment to any qualified US applicant willing and able to perform the job for the period of need.

You must contact/interview US applicants for all sources (walk-ins, SWA referrals, etc.) and document the hiring outcome.

You must contact any former US employees eligible for rehire and offer them the H-2A position.



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US Department of Labor (DOL)

What to File: ETA Form 9142 along with a copy of the approved Job Order and supporting documents.

When to File: No later than 45 days before your start date of need. You may file immediately upon SWA acceptance.

How to File: Online via FLAG system.



US Department of Labor (DOL) (cont'd)

The form is titled "Application for Temporary Employment Certification (ETA Form 9142)" and is issued by the U.S. Department of Labor. It contains several sections for the employer to complete, including:

- Employer-Based Recruitment:** A section for the employer to describe their recruitment efforts.
- Temporary Based Information:** A section for the employer to provide details about the temporary workers, including their names, addresses, and dates of employment.
- Recruitment Results:** A section for the employer to provide information about the results of their recruitment efforts, including the number of applicants and the number of workers hired.
- Compliance with Obligations:** A section for the employer to provide information about their compliance with the requirements of the temporary employment certification process.

DOL evaluates Job Order and application for compliance with H-2A regulations. DOL acceptance opens interstate recruitment period. DOL provides instructions on recruitment obligations and advertising instructions. Employer must provide DOL with initial recruitment results; your recruitment report documents compliance with obligations and contact with applicants.



US Citizenship and Immigration Services (USCIS)

What to File: Form I-129 (“visa petition”) along with original labor certification and supporting documents.

When to File: Immediately upon receipt of electronic labor certification from the DOL.

How to File: Online via myaccount.uscis.gov



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US Consulate

After petition approval, schedule visa interview appointments at a US consulate or embassy in the workers' home country.

Exact process varies by country and consulate.

Once the worker receives their visa, they are able to book travel to your worksite.



Closing thoughts

Under Interim Secretary of Labor Julie Su, the Biden administration added numerous complexities to the program, including differentiated wages and farm worker protections.

While the program under the first Trump administration saw exponential growth, it is unclear what impact the second administration will have.

Should you decide to embark on this journey, take a competent and trusted partner with you.

