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H-2A: Getting the Workers you Need Legally

Farm Credit East

Leonard J. D'Arrigo, Esq.

Immigration Practice Group

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Overview

Need for reliable supply of seasonal workers not being met

- U.S. government conflicted about availability of US workers
- Patchwork of prior programs has not led to viable solutions

H-2A Program serves 7,700 agricultural employers

- Fills over 75,000 jobs out of 1.2 million farming positions.
- More than ½ of the 1.2 million positions filled by illegal workers

What does a seasonal/temporary business do to get the workers it needs?

THE PROBLEM OF ILLEGALITY



Basic rule: No visa problem can be fixed inside the U.S.

- If an alien has violated their visa status (overstay, illegal employment), the problem can only be fixed by the alien departing the U.S. and re-entering
- Re-entry may be enough; other cases require new visa stamp at home
- Cannot amend / change / extend / file visa applications if not currently in valid status

Three- and ten-year bars: You can't go home again

- IIRAIRA 1996: if leave the U.S. after being "unlawfully present" in the U.S. for:
6 months - cannot return to the U.S. for THREE YEARS
12 months or more – cannot return to the U.S. for TEN YEARS
- Can't fix visa status in the U.S., but can't leave to obtain new temporary or permanent visa status at US consulate @ permanent illegality
- Illegal Immigration Problem would be greatly reduced by eliminating the bars

Conclusion: You can't fix the status of a worker who is illegal

- Don't waste your time trying to "fix" the status of an illegal worker while in the U.S.
- Verify status of worker before you spend money on the process – and be suspicious

Who May Qualify for H-2A Classification?



The H-2A temporary agricultural program allows agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary/seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle, and requires labor levels above what is necessary for ongoing operations. Employment is of a temporary nature when the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year. The employer demonstrate:

- There are not sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which nonimmigrant foreign workers are being requested; and
- Employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Who is an Employer Under the H-2A Program?



- Must qualify as a U.S. employer (Farms/Ranch), association of agricultural producers or farm labor contractor
- Associations of agricultural producers can participate as a sole employer, agent with one member, or joint employer with multiple members
- Work must consist of agricultural labor or services, such as planting, raising, cultivating, harvesting, or production of any agricultural or horticultural commodity
- Work must be full-time (35 hours or more a week)
- Employer's need for workers must be seasonal or temporary in nature, such as a recurring growing cycle (generally lasting 10 months or less)



H-2A VISAS - AGRICULTURAL WORKERS: The Fast Track?

Requirements	Applications Steps	Timetable	Duration
<p>Job must be “agricultural Labor or services”</p> <p>Job must be temporary or seasonal</p> <p>Employer must recruit pursuant to DOL and continue to hire available Americans up to 50% of contract period</p> <p>Worker housing must meet DOL/DOH standards, inspection</p> <p>Must pay Prevailing Wage determined by USDOL (\$12.83/Hour)</p>	<p>Place Job Order with SWA between 60-75 days prior to need date; and begin recruitment; file with USDOL Chicago</p> <p>File visa petition with USCIS</p> <p>Issuance of visa to alien</p> <ul style="list-style-type: none"> - If in US, change status with visa petition - If overseas, apply at US consulate overseas for entry visa <p>Usually work with in-country agent to facilitate visa issuance</p>	<p>Pre-filing recruitment 75 days prior to need; File 45 days in advance of need</p> <p>Deficiency notice sent within 7 days</p>	<p>Granted for up to 10 months</p> <p>Renewable for total of 3 years; re-recruit each season</p> <p>Cost</p> <p>DOL: \$100 per appl. + \$10 per job</p> <p>USCIS filing fee: \$460</p> <p>Recruitment costs</p> <p>Consular processing fees \$100 – \$300</p>



H-2A Considerations

Definition of 'agricultural employment' expanded then retracted under regs

- "Incidental activities" removed: "work activity of the type typically on a farm and incidental to the agricultural labor or services for which an H-2A labor certification was approved"
- "Agricultural Labor or Services": other work typically performed on a farm that is not specifically listed on [Form 9142] and is minor (i.e. less than 20% of the total time worked on the job duties listed on the application), and incidental to the agricultural labor or services for which H-2A worker was sought
- DOL recognizes the unpredictable nature of weather and the need for flexibility in assigning tasks.

Distinction between agricultural and non-agricultural important because

- H-2A visas are not subject to cap on number of visas each year
- H-2A imposes requirements for on-site inspections of housing, provision of meals & living facilities if workers cannot return 'home' at night
- H-2A workers get paid transportation in both directions; H-2B transport home only if terminated early

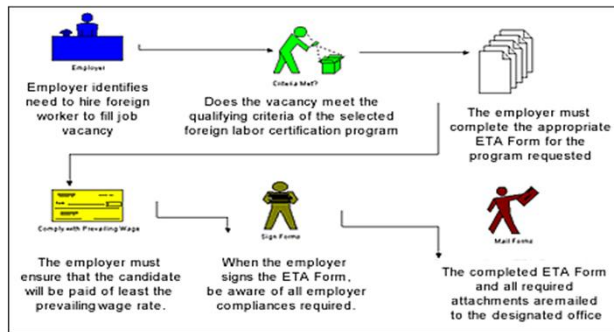


H-2A Wage Requirements

Employer must offer, advertise in recruitment, and pay workers the highest of the following:

- Adverse Effect Wage Rate (AEWR) currently set at \$12.83/hour
- Prevailing Hourly Wage or Piece Rate
- Collective Bargaining Wage
- Federal or State Minimum Wage

Any discretionary bonuses or higher wage rates must be disclosed in job order and advertising – *“Raises and/or bonuses may be offered to any worker in the specified occupation at the company’s sole discretion based in individual factors, including work performance, skill or tenure.”*



H-2A Labor Certification Process

– State DOL

- Employer submits the Form ETA-790 and informs the SWA of intent to file a future application for H-2A workers
- Job order must meet minimum regulatory content requirements (*20 CFR 653 Subpart F and 20 CFR 655.122*)
- SWA reviews job order and notifies employer of any deficiencies within 7 days OR, if acceptable, begins recruitment of U.S. workers within the state
- Employer will typically request that the SWA inspect housing for farmworkers during this timeframe



Department
of Labor

H-2A Job Order Contents

The job order contains the minimum content requirements under 20 CFR 655.122(d) and must include the following"

- Provision of Housing
- Provision of Workers' Compensation
- Provision of Tools, Supplies, and Equipment
- Provision of Meals or Cooking Facilities
- Provision of Transportation and Daily Subsistence
- Three-Fourths Guarantee
- Hours/Earnings Records, Rates and Frequency of Pay
- Abandonment or Termination for Cause
- Contract Impossibility
- Required Deductions from Worker's Pay
- Work Contract or ETA Form 790 and attachments



H-2A Housing

- Housing must be ready for occupancy 30 days prior to date of need
- Housing requires inspection by SWA or DOH
- Rental or public housing acceptable: may require SWA or DOH inspection
- Housing for 5 or more workers requires DOH inspection.

See FAQ Round 12



H-2A Labor Certification Process – Post-Filing

Within 7 days after submission of ETA9142 through ICERT:

- Department reviews application for obvious errors or inaccuracies and compliance with program requirements
- Issues Notice of Deficiency or Acceptance –If deficiency is issued, employer has 5 business days to respond
 - If application is accepted, employer positively recruits for U.S. workers
- SWA is required to submit a housing inspection report (*if applicable*)



H-2A Initial Recruitment Report

- Employer must prepare, sign, date, and submit a written recruitment report on a date specified by the CO in NOA
- Recruitment report must contain the following information:
 - ü Identification of each recruitment source by name
 - ü Name/contact information of each U.S. worker who applied for the job and the disposition of each worker
 - ü Confirm that former US employees were contacted and by what means
 - ü Explanation of the lawful job-related reason(s) for not hiring each U.S. worker (if applicable) recruitment report

If no lawful bases for disqualifying U.S. worker, DOL will deduct one requested H-2A worker for each qualified U.S. worker



H-2A Notice of Acceptance : The Recruitment

The Notice of Acceptance directs the employer to place advertising:

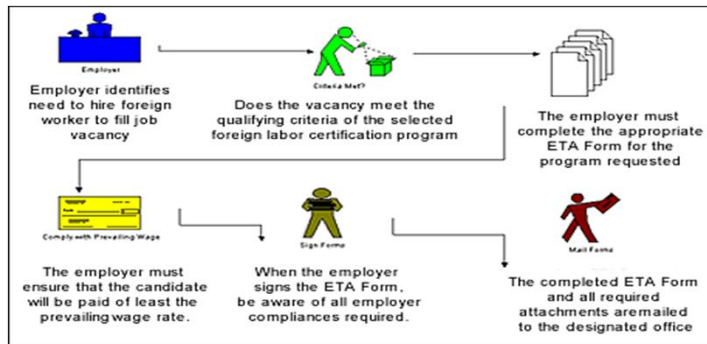
- Place 2 print advertisements in local area
- Contact U.S. employees from prior season/year
- Conduct out-of-state recruitment (*not more than 3 states*) – *may be online advertising unless print specified*
- Additional recruitment can be ordered at the discretion of the Department
- Positive recruitment must occur no later than 3 days before the start date of work
- Report of recruitment efforts can be submitted by the date specified in the Notice of Acceptance even if not all ads completed

Issuance of Labor Certification

Important Reminder: Employers must consider and hire U.S. workers until 50 percent of the certified period of work has elapsed



- Temporary labor certification will be granted no later than 30 days before start date of work as long as all program requirements are met
- Employer has rights to appeal any denial determination or partial certification of its request for H-2A workers
- Department issues an original Form ETA-9142A certified on "blue security paper" to the employer
- Department instructs the employer to submit the certified Form ETA-9142A and a signed and dated copy of Appendix A to the appropriate USCIS Service Center



The DOL's Final Determination

- In the H-2A program, DOL issues a final determination 30 days before the start date of work as long as all program requirements are met
- Common reason(s) for delaying the H-2A final determination is the employer or authorized representative not providing . . .
 - Proof of valid workers' compensation coverage
 - Housing documentation for farmworkers
 - Valid farm labor contractor licenses
 - Valid surety bond for labor contractors
 - Recruitment report
- DOL provides employers with additional time to submit required documents to obtain certification, rather than issue a denial forcing employers to choose between filing an appeal or new application
- Some pre-certification amendments possible, such as changing needs dates or number of workers, but no changes allowed after certification



General Filing Tips/Issues

Post-Certification Recruitment Obligations

- Employers must continue to cooperate with the SWA in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies for the job opportunity until 50 percent of the certified period of work has elapsed
- Employer must continue to update the initial recruitment report submitted to the CO for certification throughout the entire recruitment period
- Employer must sign and date the final written recruitment report and be prepared to submit it when requested by the CO in the event of an audit examination or other request from the Department



General Reminders

- Pay the required H-2A certification fees in full and timely (*within 30 days after the certified is issued*)
- Maintain all documents supporting the certification for a period of 3 years
- Report the termination or separation/abandonment of workers in a timely manner (*no later than 2 working days*)
- If changing period of employment requested for certification - ensure changes represent bona fide business need in documentation (*e.g., claiming expected government delays is not an acceptable justification*)



H-2A Visa Petition Process (USCIS)

Once DOL issues H-2A Certification (Form ETA9142), petition must be filed with USCIS

Petition Contents:

- ü Form I-129
- ü I-129H Supplement
- ü Employer Support/Need letter
- ü Original Labor Certificate (Form ETA9142)
- ü \$460 filing fee
 - File with USCIS California Service Center
 - Cannot include both named and unnamed workers on same petition. Best practice is to file under “unnamed workers” for consular processing
 - No premium processing – USCIS will process within 1-2 weeks

Consular Processing of H-2A



Request appointment with consulate through online system, or use in-country agent/recruiter

- Can substitute workers at consulate if necessary
- Each worker completes consular application Form DS-160 on-line
- Pre-pay \$190 application fee at bank designated by consulate
- Required documents for interview:
 - Passport
 - Form DS-160
 - Form I-797, H-2A Approval Notice
 - Fee payment receipt
- H-4 visas almost never issued to dependents

Employer Obligations to H- 2A Workers - Overview



Required benefits to H-2A workers

- Provide free housing
- Pay inbound transportation and subsistence/out-bound transportation
- Guarantee work for $\frac{3}{4}$ of contract period
- Provide 3 meals/day or kitchen facilities
- Provide Workers Compensation insurance
- Provide copy of work contract/ETA 790 to H-2A worker
- Must pay AEWR of \$12.93 to each H-2A worker and all workers performing the same duties

Tax and withholding requirements

- FLSA wage requirements not applicable - no overtime pay required
- Employer does not withhold SS or Medicare for H-2A workers, unless USC – payments to H-2A workers NOT “income”
- Voluntary Federal Income Tax Withholding if employee agrees – written authorization best

Other H-2A Employer Obligations



- Ongoing Recruitment: continue to accept applications up to 50% of the contract; maintain updated recruitment report in file
- Termination of Workers: report any workers terminated or workers that otherwise depart within 2 business days to DOL and USCIS
- Must notify all workers of requirement that they depart U.S. after contract period
- Provide work contract of ETA790 to each worker no later than first workday
- Post and maintain DOL worker protection posters in English and Spanish at worksite
- Adjustment of wages: if AEWR changes upward during contract period, wages must be increased
- Travel Reimbursement: subsistence of \$12.07/day or up to \$51/day with receipts
- Provide all tools, supplies and equipment to workers
- Retain H-2A recruitment report, resumes, advertising for 3 years



H-2A Payroll Requirements

USDOL requires that you provide your workers with weekly pay statements/earnings records that include the following information:

- Workers name and home address
- Number of hours offered each day
- Number of hours actually worked each day by the worker
- Rate of Pay
- Total earnings per pay period
- Amount of and reasons for any and all deductions taken from earnings
- Any bonuses/credits paid to worker

H-2A Challenges and Strategies



H-2A Challenges

- Can be costly for small farms
- Does not “directly” include certain dairy farm workers – “Milkers”
- No year-round coverage
- Must hire any U.S. Workers referred by DOL up to 50% of contract period, laying off current H-2A workers in the process
- Must offer same benefits to all U.S. workers in H-2A positions

H-2A Strategies

- Include multiple farm-owned properties in one application
- Joint sponsorship by multiple farms or agricultural association with same periods of need
- Separate applications for Crop Workers (March 1 to November 30) and Winter Grounds/Maintenance Workers (November 30 to March 1) to achieve year-round coverage
- Can file for Dairies under Crop Worker position

H-2A Enforcement: The New ICE Age

Enforcement emphasis running through all aspects of immigration:

- OLD approach: I-9 raids and round-ups
FOCUS: hospitality, agriculture, construction, manufacturing
- NOW: Worksite enforcement across all industries, states and company sizes
FOCUS: EMPLOYER LIABILITY

Enforcement initiatives expanding rapidly

- Worksite enforcement units embedded in Service Centers
- New ICE initiatives – Notices of Inspection (NOI) to broad range of employers
- New centralized unit to conduct I-9 inspections



I-9 AUDITS: When the Government Knocks...

Employer's I-9s must be produced within three days of service of the Notice of Inspection

- Mail inspection; I-9s are to be sent to a local ICE office
Other documents may be requested, such as payroll list
- On-site inspection: when ICE hopes to gather other evidence, e.g., proof of presence of undocumented workers,
- Neither consent nor a warrant are required for the I-9 inspection
 - Consent/warrant IS required for other information-gathering:
 - Do not give consent without warrant

What immediate defenses does an employer have?

- ICE agents may make unannounced visits and request I-9s or information:
Do not consent to visit; notify attorney, insist on 3 days' notice
- Insist on the statutory 3 days' notice for production of I-9s, even by mail:
- Review all I-9s; correct if necessary; sign & date corrections;
- Limit geographic scope of agent on-site: agent does not have right to roam premises or talk to other employees

I-9 AUDITS: Prevention Planning



Employers can raise in their defense the existence and utilization of a written Employer Compliance Policy

- Procedure for completion of I-9s; training of new staff, internal QA
- Procedure for corrections of errors and for authorized updates (e.g., H-1B portability case approved, H-1B extension approved, etc.)
- Clear statements of policy on
 - employee failure to deliver documents timely for verification;
 - responses to SSA "no match" letters; or
 - requests for visa services inconsistent with status listed on I-9.
- Development of a tickler system for reverification; perform reverifications
- Procedure for retention, storage and purging of I-9s
- Self-audit procedures: internal or by third party?
 - Many sources of self-audit checklists (SHRM, BLR, etc.)
 - Caution: self-audit can lead to continuation of original mistakes



Basic I-9 Compliance: Best Practices

- The formal ICE Raid usually stems from initial I-9 Audit
- Require every new employee to complete Section I on first day of employment
- Employee must provide verification documents by end of 3rd work day or be terminated
- Employee may present any acceptable document(s) listed: do not request a specific document
- Make copies of both sides of all documents
- If employee not a USC, note the visa expiration date and calendar (90 days)
- Keep I-9's separate from other personnel/payroll records
- Train hiring managers on I-9 procedures regularly and document training

**WHITEMAN
OSTERMAN
& HANNA LLP**
ATTORNEYS AT LAW

CONTACT INFORMATION

Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, New York 12260
Tel: (518) 487-7600
Fax: (518) 487-7777
www.woh.com

L.J. D'Arrigo
(518) 487-7642
ldarrigo@woh.com

Seth R. Leech
(518) 487-7760
sleech@woh.com

Brendan Venter
(518) 487-7611
bventer@woh.com



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