

Beyond H-2A: Permanent Foreign Labor Options in Agriculture

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OVERVIEW



Need for reliable supply of labor 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 140,000 jobs out of all farming positions
- Estimated more than ½ of the 1.2 million farming positions filled by illegal workers

Hiring workers without documentation a risky business

- Increasing ICE enforcement
- Interruption of business if ICE raids
- Interruption of business if workers FEAR ICE raids and leave
- Presentation of false documents can lead to charges of identity theft

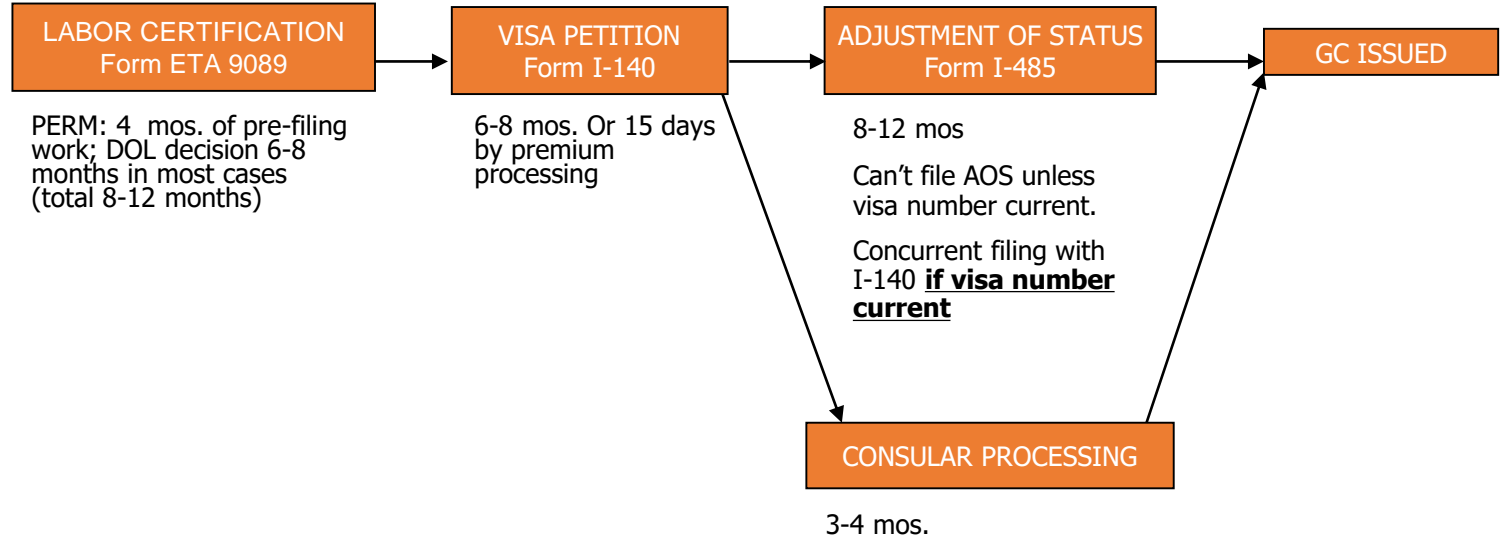
How do agricultural employers get the workers they need?

BENEFITS OF GREEN CARD SPONSORSHIP



- ANY position qualifies
- Dairy Farms can actually file for Milking positions as this is year-round employment
- Flexibility in developing job descriptions – can combine cropping duties with ag equipment operation and milking unlike H-2A
- If timed carefully, you can continue to bring in H-2A workers until the last stage of the green card process is filed, eliminating the need for H-2A

THE EMPLOYMENT-BASED “GREEN CARD” PROCESS



COST FOR GREEN CARD PROCESSING



Green Card Processing involves 3 Phases:

- (1) PERM Labor Certification: No Government Fee, but all processing/legal fees and advertising costs must be paid by employer
- (2) I-140 Immigrant Visa Petition: Government fee of \$700; can request 15-day processing for additional \$1,410
- (3) I-485 Application to Adjust to Permanent Resident Status: Government filing fee of \$1,225 (includes work and travel permit)

The above do not include attorney fees for preparing applications, which will depend on the number of workers being sponsored.

Tip: Stages 2 and 3 can be charged back to workers. Consider preparing reimbursement agreement requiring workers to stay with you for a certain number of years after receiving green card (2-5 years).

PERM LABOR CERTIFICATION



MOST COMMON EMPLOYMENT- BASED GREEN CARD PROCESS:

- Application by employer to USDOL to certify individual and position after statutorily mandated recruitment campaign
- Nearly all positions qualify
- Process requires significant employer involvement including payment of legal fees for DOL phase



STRATEGIES TO NAVIGATE AROUND H-2A

- H-2A is Seasonal/Temporary
- PERM/Green Card is year-round permanent
- Must distinguish H-2A positions from year-round positions
- Example: Dairy farms file as Farmworker/Crop for H-2A. Can file for Farmworker/Animal Caretaker or Milker for green card as this is year-round



Timeline with H-2A Program

- Can begin the process while workers outside the U.S. or in the U.S.
- Workers can enter on H-2A throughout the DOL stage of filing (approximately 8-12 months)
- Once DOL phase is approved (PERM Labor Certification), workers should enter U.S. on H-2A before filing stage 2 & 3 with USCIS
- After 90 days of arrival on H-2A, final stages of application filed with USCIS. Once filed, workers are in valid status to remain in the U.S. until final green card approval
- Workers can apply for work authorization documents as part of the last stage of filing. They will not longer need H-2A status

Timeline without H-2A Program: Consular Processing

- Identify workers you want to sponsor outside the U.S.
- Workers will remain outside the U.S. for duration of green card process
- Once DOL and USCIS approve the applications, workers will process their immigrant visas at U.S. Consulate in home country
- Once issued, workers enter as U.S. Permanent Residents/Green Card holders
- Total processing time is approximately 2 years



PHASE 1: DOL LABOR CERTIFICATION

Once a decision to pursue a “green card” on behalf of the foreign national employee is made, the PERM process includes the following basic steps:

1. Employer registers with the U.S. Dept. of Labor: Start early – often delays to verify existence
2. Employer identifies a year-round position and develops job description and requirements for the position – distinct from H-2A seasonal position.
3. Submit prevailing wage determination to the U.S. DOL (3-4 months): wage based on a 4 tier wage level for county, not AEW.
4. Job Order placed with SWA for 30 days Employer recruits/advertises for position
5. Newspaper advertising placed
6. Recruitment report prepared
7. Finalize and submit Form ETA 9089 to DOL after 30 day waiting period
8. Employer organizes and maintains records of recruitment for possible DOL audit
9. DOL reviews the application and approves, audits, or denies it

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PREVAILING WAGE ESTIMATE FOR FARMWORKER: ANIMALS

Information from <http://www.flcdatacenter.com>

Wage level determined by location of employment (state/county) and experience requirements. All start at a Level 1 and increase based on experience.

Area Title: Buffalo-Cheektowaga-Niagara Falls, NY MSA

OES/SOC Code: 45-2093

OES/SOC Title: Farmworkers, Farm, Ranch, and Aquacultural Animals

- **Level 1 Wage:** \$9.97 hour - \$20,738 year
- Level 2 Wage:** \$11.84 hour - \$24,627 year
- Level 3 Wage:** \$13.72 hour - \$28,538 year
- Level 4 Wage:** \$15.59 hour - \$32,427 year



PREVAILING WAGE ESTIMATE FOR AG SUPERVISOR

Information from <http://www.flcdatacenter.com>

Wage level determined by location of employment (state/county) and experience requirements. All start at a Level 1 and increase based on experience.

Area Title: ALBANY-SCHENECTADY-TROY, NY

OES/SOC Code: 45-1011

OES/SOC Title: First-Line Supervisors of Farming, Fishing, and Forestry

- **Level 1 Wage:** \$18.83 hour - \$39,166 year
- Level 2 Wage:** \$23.40 hour - \$48,672 year
- Level 3 Wage:** \$27.96 hour - \$58,157 year
- Level 4 Wage:** \$32.53 hour - \$67,662 year

ALIEN MUST BE QUALIFIED FOR THE POSITION



DOL basic rule: applicant for a labor certification must meet the position's minimum education and experience requirements at the time of hire, not at time of filing ETA 9089

- Normally cannot use work experience gained at the current employer to meet the position's minimum requirements. **Exception:** if the prior position was not substantially comparable" to the position in the application ("Farmworker vs. Ag Equipment Operator"; "Farmworker vs. Supervisor/Foreman"; "Milker vs. Crop Positions"
→ less than 50% of the job duties are the same (Matter of Delitizer Corp. of Newton, 88-INA-482, 1990 WL 300025)
- Employee must be able to provide letters from prior employers confirming experience, skills or technologies required in job description
- What counts as the "same employer"?
→ Same Federal Employer Identification Number (EIN)



BASIC RECRUITMENT STEPS FOR NON-PROFESSIONAL POSITIONS

- Employer/Attorney requests prevailing wage determination for the position from the DOL
 - Must pay 100% of prevailing wage at time permanent residency is granted
 - Employer submits job order to the SWA (State Workforce Agency); SWA posts for at least 30 days. Each state usually has their own job bank.
- **TWO** Sunday newspaper advertisements
 - Must include employer's name and location and a description of the position
 - Does not need to include wage
 - May be on consecutive Sundays, but must fall between 30 and 180 days prior to submission of PERM application
- Advertising will expire after 6 months

INTERNAL POSTING – “NOTICE OF FILING”

Posting serves to notify interested parties of an application for labor certification

- Done in a DOL-required format different than what an employer would normally use.
- Must include wage information (may be a range, but bottom of range must be the higher of the prevailing wage or the actual wage)
- Posting required for 10 **business** days (not calendar days)
→ DOL says weekends and federal holidays do not count as business days, even if the employer is open for business
- Posting must be done between 30 and 180 days prior to the filing of the PERM application
- Posting is to be done on any and all in-house media normally used for recruitment for similar positions (bulletin boards, company newsletters, internal e-mail, etc.)



RECRUITMENT – PRACTICE POINTERS

- Standard of Review for Professional Positions: “Minimally Qualified” – cannot disqualify workers if they meet the minimum requirements of the position
- Do not have foreign national employee review resumes
- Employer is not required to inform U.S. Worker why he/she not qualified
- Employer may disqualify an applicant for only lawful objective business-related reasons, not for unstated requirements or duties
- Employer not required to contact U.S. Worker who is facially unqualified
- Limited ability to disqualify for “soft” reasons (e.g. poor hygiene, non-professional demeanor, overall “nut-job”)
- Consider applicants who could be trained to perform duties within a reasonable amount of time based on occupation
- Before filing ETA9089, ensure that recruitment report prepared that includes details on when/how applicants were contacted and reasons why U.S. workers were rejected
- Maintain all resumes and documentation of contact with applicants (telephone/email log)

PERM SPONSORSHIP QUESTIONS

Immediately after the ETA 9089 is submitted, DOL will e-mail the employer contact person listed on the PERM application (or, if e-mail is not successful, by telephone) to confirm the employer's intent to file a labor certification.

- Employer MUST respond to telephone or e-mail with 7 days, or the case will be denied – CHECK SPAM FOLDER!
- DOL will ask the employer four sponsorship questions:
 1. Are you, or do you work for, the employer referenced above?
 2. Are you aware that an Application for Permanent Employment Certification was filed on your behalf?
 3. Do you have an opening for [JOB TITLE] in [JOB LOCATION]?
 4. Are you sponsoring [NAME OF ALIEN] for this position?

For a bona fide labor certification the correct answer to each of these questions is “YES.”



RECORDS OF RECRUITMENT

While a completed Form ETA 9089 is the only item actually sent to DOL in a PERM application, the employer must keep all recruitment records for 5 years in case of audit.

- Copy of prevailing wage determination
- Proof of all advertisements and postings
- All resumes received
- Reasons for rejection of all applicants
- Proof of alien's qualifications
- Business necessity justification (if applicable)
- Proof of contact of laid off workers (if applicable)

ADJUDICATION OF PERM APPLICATION



DOL will certify, audit, or deny a PERM application

- no Notices of Findings and no chance to go back and make amendments to the application
- only way to correct errors on application is to withdraw and re-file
- Upon receipt of PERM application, DOL makes an initial credibility determination of application using publicly available databases to determine whether the employer exists, verifies telephone numbers, addresses, etc.
- Any data entry errors or inconsistent answers on ETA 9089 are discovered automatically, resulting in denial of application
- Actual human being at DOL begins substantive review of application only after this initial screening is completed

Most cases are adjudicated in 6-8 months.

DOL AUDIT



Enforcement of the PERM program is through audit of approximately 50% of PERM applications. For employers that use the H-2A program, there is a greater chance of audit to clarify that the position is year-round.

Audits is either “random” or “for cause”. Standards triggering a “for cause” audit include:

1. Use of foreign language requirement
 2. Filing of H-2A applications for the same position
 3. Use of business necessity justification for requirements that are not “normal”
 4. Job duties/requirements that include a combination of occupations
 5. Potential alien control of recruitment (family relationship, fewer than 10 employees in business)
 6. Roving Employees/Off-site placements
- Employer has 30 days to respond to audit letter
 - Failure to comply with audit could result in supervised recruitment for next 2 years

DOL AUDIT – Standard Requests

Standard/Automatic Audit Requests include:

- Provide copies of all advertising, recruitment report, and resumes of applicants
- Letters from employer and beneficiary confirming that no money was paid to the employer in connection with the PERM application process
- Business Justification Explanation and Evidence if position requirements are not “normal” to the occupation
- Explanation as to why U.S. Applicants could not be trained within a reasonable amount of time to perform the position
- Explanation of whether you have hired seasonal workers in this position and how it is year-round

PHASE 2 AND 3: USCIS PROCESSING



- After DOL issues the Labor Certification, employer files I-140 Immigrant Visa Petition and I-485 Application to Adjust to Permanent Resident State with USCIS
- Filing Fees: Form I-140 (\$700); Form I-485 (\$1,225 – includes worker and travel permit)

USCIS PROCESSING



- Worker will be scheduled for an in-person interview at the USCIS office in their area of residence
- A decision on the green card application will be made at the interview
- If approved, Permanent Resident Card arrives within 2 weeks

The information in this presentation is intended as general background information on immigration law and PERM issues. It is not to be considered as legal advice with regard to any immigration issue. Immigration law and forms change often and information becomes rapidly outdated.

Additional information on immigration issues, as well as updates on new developments, can be found on our web site at <https://www.harrisbeach.com/practice/immigration-law>.



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