

# H-2A (Agricultural) and H-2B (Non-agricultural) Temporary Labor

## TEMPORARY EMPLOYMENT TO MEET TEMPORARY NEEDS (H-2)

### GENERAL

### AGRICULTURAL (H-2A) AND NON-AGRICULTURAL (H-2B) TEMPORARY LABOR

United States (U.S.) employers may petition for skilled or unskilled foreign workers to meet temporary or seasonal needs in positions for which qualified U.S. workers are not available. The H-2 nonimmigrant classifications include H-2A for agricultural workers and H-2B for non-agricultural workers. **IMPORTANT!** Both the services for which the employer requests H-2 labor approval and the employer's need for such services must be temporary. Petitions of employers determined to have an ongoing or continuing need for the H-2 services sought will be denied.

### Annual Quota

There is an annual cap of 66,000 visas available for H-2B workers. There is no annual cap on visas for H-2A workers.

### Blanket Petitions

A single petition may cover an unlimited number of workers as long as they will perform the same services, work in the same location, and, in most cases, come from places that are served by the same U.S. consulate. It is not necessary to identify requested H-2A beneficiaries by name (unless only a single worker is needed) if they are unnamed on the underlying labor certification. H-2B beneficiaries must be named unless circumstances (e.g., emergencies) make identification by name impossible. The number of unnamed beneficiaries must always be stated on the petition.

### Substitution of Beneficiaries

In cases involving unnamed beneficiaries, or where the temporary services needed require no training or experience, beneficiaries may be substituted after the petition is approved as long as they meet criteria set forth in the labor certification and petition.

### Duration of stay and extensions

Approved H-2 petitions will specify a period of employment, not to exceed one year, that matches the employer's stated need. Extensions can be granted in increments of up to one year, each requiring a new labor certification

and USCIS petition, but the maximum stay cannot exceed three years. Any alien who has held H-2 status for three years is barred from H-2A or other classification for agricultural labor until he/she has remained outside of the United States (US) for an uninterrupted period of six months.

## **Dual Intent**

Unlike H-1B workers, H-2A and H-2B workers may not have the dual intent of working temporarily under a petition for nonimmigrant services and applying for employment-based permanent residence status.

## **Dependents**

Family members of H-2A or H-2B principals, if admitted under the H-4 classification, may not be employed in the U.S.

## **H-2A AGRICULTURAL LABOR**

Employers may meet temporary or seasonal needs for agricultural labor by petitioning for H-2A classification for one or more alien beneficiaries to work for a specified temporary time period. Successful petitions for H-2A workers will have demonstrated both of the following:

- Employment of the temporary alien workers will not adversely affect wages or working conditions of similarly employed workers in the U.S. Offered wages and conditions are comparable to standard wages and conditions in the geographical area where services will be performed.
- Domestic work-authorized individuals who are willing, able and qualified to perform the needed services are not available when, where, or in the numbers needed.

## **Association Petitioners**

An association of employers with similar needs (e.g., citrus growers) may itself file a petition and be permitted to transfer the H-2A workers among any of its member employers that have stipulated to the conditions of H-2A eligibility in an attachment to the USCIS petition. The association may also petition as a joint employer with its members. Where they share supervision or control of workers, the association and employer members also share compliance responsibilities and liabilities.

## **Housing Requirement**

Employers must arrange for housing of nonimmigrant temporary agricultural workers. They may choose to furnish housing that meets Federal standards for temporary labor camps or, if applicable, secure housing that meets state/local standards for rental, public, or other substantially similar class of habitation.

## **H-2B NON-AGRICULTURAL LABOR (skilled or unskilled)**

Employers may fill temporary needs for skilled and unskilled non-agricultural labor by petitioning for H-2B classification for one or more alien individuals to work for a specified temporary time period. Successful petitions for H-2B workers will have demonstrated both of the following:

- The proposed employment of the foreign worker will not displace a U.S. worker or affect working conditions of similarly employed US workers.
- The sponsor's need for the skills to be provided by the alien worker is temporary.

## **What is a temporary need?**

Examples of temporary needs are one-time-only needs (e.g., special projects), peak load situations (i.e., need for given services is continual but the required level of staffing varies), seasonal needs (e.g., resort held), and intermittent needs (e.g., entertainers who don't meet the standards for O or P classification).

## **Termination**

A sponsoring employer who dismisses an H-2B worker prior to the end of the period of authorized stay is responsible for paying the reasonable costs of return transportation to the alien's last place of foreign residence.

## **Employment Agencies**

Employment agencies do not qualify as H-2B petitioners to fill the temporary needs of their clients. This is because they are considered to have a permanent (ongoing) need for temporary services themselves even though the needs of their individual clients may be temporary.

## **Procedures**

### **H-2A**

### **Agricultural Labor**

### **STEP 1**

#### **U.S. Department of Labor, Employment and Training Administration**

Application for certification consists of Form ETA 750, Part A, and Form ETA 790, the description of needed services and services required to be provided by the employer (wages, transportation, foods, housing etc.). Duplicate applications must be submitted to the appropriate regional Department of Labor Employment and Training Administration office and the local state employment services office.

### **STEP 2**

## **U.S. Department of Justice, Immigration and Naturalization Service (INS)**

Form I-129, with the H supplement, is filed at the USCIS Service Center with jurisdiction over the place where the needed services will be performed. The approved Labor Certification (or denial of appeal, to which the USCIS will give deference in making the final decision that qualified domestic labor is unavailable) must be included. The petition may cover the same number of workers covered in the accompanying Labor Certification. Association petitioners must file attachment to petition showing that all employer members to whom H-2A workers may be transferred agree to the H-2A conditions. When the beneficiary is already present in the U.S. in nonimmigrant status, application for change of status to the H-2B category is also filed on USCIS Form I-129 (step 3 is avoided in such cases).

### **STEP 3**

## **U.S. Department of State, foreign consular offices**

Application (including I-797B USCIS approval notice) for a visa to enter the U.S. is filed on State Department Form OF 156. The temporary workers will be interviewed and must satisfy consular offices that they intend to depart the U.S. after the approved temporary period and that they will maintain their residences and other ties abroad during that period.

## **H-2B**

## **Skilled/Unskilled Non-agricultural Labor**

### **STEP 1**

## **U.S. Department of Labor, Employment and Training Administration**

Application for certification is made on Labor Department Form ETA 750, Part A to the appropriate state employment services office.

### **STEP 2**

## **U.S. Department of Justice, Immigration and Naturalization Service (INS)**

The procedure is the same as for H-2A workers, except that where a labor certification has been denied, countervailing evidence addressing the reason(s) why the Labor Department would not issue the certification may be submitted with the Form I-129 and H Supplement.

### **STEP 3**

## **U.S. Department of State, foreign consular offices**

Same as H-2A, except that it is common for the tear-off portion of the Form I-797B to be used as a basis for a consulate to issue a visa even if the consulate has not received notification directly from the USCIS.

Contact our office to speak with a member of our Immigration Group.