OVERVIEW OF THE H-2A VISA PROGRAM

U.S. Citizenship and Immigration Services, U.S. Department of Labor and U.S. Department of State

November 9, 2021
H-2A Filing Process

DOL Authority and Program Eligibility

• Before filing an H-2A petition with USCIS, an employer must first obtain a temporary labor certification (TLC) from the Department of Labor (DOL) that certifies
  1. There are not sufficient qualified U.S. workers available to perform the temporary agricultural work; and
  2. The employment of H-2A workers will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

• Must qualify as a U.S. employer (e.g., farm/ranch), agricultural association, or farm labor contractor.
• An agricultural association can participate as a sole employer or file applications on behalf of its employer-members.
• Must have bona-fide need for workers offering temporary full-time employment.
• Agricultural work generally consists of crop laborers, agricultural equipment operators, and ranch/livestock workers.
H-2A Filing Process

DOL TLC Process

- Employer submits a job order, Form ETA-790/790A, to the State Workforce Agency (SWA) where work will be performed to initiate statewide recruitment.
  
  **Timing:** 75 - 60 days before work start date

- Employer submits an H-2A application, Form ETA-9142A, and all other supporting documentation to DOL’s Office of Foreign Labor Certification (OFLC).
  
  **Timing:** No later than 45 days before work start date

- Employer must agree to offer and provide certain work guarantees, such as:
  
  - Housing, workers’ compensation coverage, tools/equipment, and 3 daily meals or cooking facilities for workers to prepare meals.
  
  - Pay or reimburse workers’ transportation and subsistence to-from place of work and daily transportation from worker housing.
  
  - Pay workers timely, at least bi-weekly, and disclose all wage deductions.
  
  - Offer a total number of work hours equal to at least 3/4th of the total workdays in the contract.
H-2A Filing Process

DOL TLC Process

• H-2A applications are reviewed within 7 calendar days of receipt and, if approved, additional recruitment occurs:
  – OFLC posts job on national registry at https://seasonaljobs.dol.gov
  – Employer contacts former workers employed during the previous year or season
  – Employer conducts any other advertising OFLC requires in no more than 3 states
  – OFLC authorizes SWA to circulate job to other states for broader recruitment

• Employer submits an initial recruitment report and any other required documentation for final review.

• A determination to certify the employer’s TLC request will include an email notice of certification and the following one-page electronic decision
  – Form ETA-9142A Final Determination: H-2A Temporary Labor Certification Approval

Timing: No later than 30 days before start date
H-2A Filing Process

DOL TLC Process

• Employer must abide by all terms of the TLC and continue to provide employment to any qualified U.S. worker who applies until **50 percent of the work contract period has elapsed**.
• Employer must retain all documentation supporting the TLC for 3 years in the event of an OFLC audit or other request from a DOL official.

• Foreign Labor Application Gateway (FLAG) system at [https://flag.dol.gov/](https://flag.dol.gov/)
  – All application forms and supporting documents can be uploaded and submitted electronically to OFLC
  – Job Orders are automatically routed to SWAs on the employer’s behalf
  – All communications, notices and TLC determinations are issued electronically

For more info, factsheets, FAQs, and tutorials, please visit [https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a](https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a)
USCIS PRESENTATION
What is the H-2A Classification?

Overview

• The H-2A visa program allows employers, employers’ agents, or associations of agricultural producers (named as joint employers) in the United States to petition to fill a temporary or seasonal need and to bring foreign workers to the United States temporarily to perform agricultural labor or services of a temporary or seasonal nature.

• The prospective H-2A employers must obtain certification from the Department of Labor (DOL) that there are insufficient able, willing, and qualified and available U.S. workers to perform the needed labor or services.
What is the H-2A Classification?

Overview

• DHS regulations define an employer’s **temporary need** as employment that is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

• **Seasonal need** is defined as employment that is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and that requires labor levels above those necessary for ongoing operations.
What is the H-2A Classification?

Overview

• There is no annual cap on the number of H-2A nonimmigrant visas that may be issued.

• USCIS generally may only approve H-2A petitions for nationals of countries the Secretary of Homeland Security, in consultation with Department of State (DOS), has designated as eligible to participate in the program. However, USCIS may approve petitions for nationals of countries not on the list if it is determined to be in the interest of the United States.

• An H-2A worker’s stay is limited by the term of the approved H-2A petition. An H-2A worker may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay.

• Generally, a person who has held H-2A nonimmigrant status for a total of 3 years must depart and remain outside the United States for an uninterrupted period of 3 months before seeking readmission as an H-2A nonimmigrant.
Typical Use of the Program

<table>
<thead>
<tr>
<th>Top 10 States of Employment</th>
<th>Review of Petitions Certified For FY 2021 (End of Year)</th>
<th>(% of total certified for FY 2021 EOY)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>44,706</td>
<td>14.10%</td>
</tr>
<tr>
<td>Georgia</td>
<td>35,205</td>
<td>11.10%</td>
</tr>
<tr>
<td>California</td>
<td>32,333</td>
<td>10.20%</td>
</tr>
<tr>
<td>Washington</td>
<td>28,727</td>
<td>9.00%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>23,479</td>
<td>7.40%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>12,473</td>
<td>3.90%</td>
</tr>
<tr>
<td>Michigan</td>
<td>11,376</td>
<td>3.60%</td>
</tr>
<tr>
<td>Arizona</td>
<td>10,842</td>
<td>3.40%</td>
</tr>
<tr>
<td>New York</td>
<td>9,192</td>
<td>2.90%</td>
</tr>
<tr>
<td>Texas</td>
<td>8,553</td>
<td>2.70%</td>
</tr>
</tbody>
</table>

## Typical Use of the Program

### Review of Petitions Certified For FY 2021 (End of Year)
(\% of total certified for FY 2021 EOY)

<table>
<thead>
<tr>
<th>Top 10 Occupations (based on SOC Codes)</th>
<th>Total Petitions</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farmers and Laborers, Crop</td>
<td>274,939</td>
<td>86.60%</td>
</tr>
<tr>
<td>Agri. Equip. Operators</td>
<td>20,308</td>
<td>6.40%</td>
</tr>
<tr>
<td>Farmworkers, Farm, Ranch, and Aqua</td>
<td>13,357</td>
<td>4.20%</td>
</tr>
<tr>
<td>Construction Laborers</td>
<td>3,518</td>
<td>1.10%</td>
</tr>
<tr>
<td>Agricultural Workers, All Other</td>
<td>1,196</td>
<td>0.40%</td>
</tr>
<tr>
<td>Heavy and Tractor Trailer Truck Drivers</td>
<td>1,084</td>
<td>0.30%</td>
</tr>
<tr>
<td>Graders &amp; Sorters, Agri. Products</td>
<td>810</td>
<td>0.30%</td>
</tr>
<tr>
<td>First-Line Supervisors of Agri. Crop</td>
<td>759</td>
<td>0.20%</td>
</tr>
<tr>
<td>Farm Labor Contractors</td>
<td>550</td>
<td>0.20%</td>
</tr>
<tr>
<td>Packers and Packagers, Hand</td>
<td>280</td>
<td>0.10%</td>
</tr>
</tbody>
</table>

*See: [DOL H-2A Selected Statistics, FY 2021](https://www.dol.gov/). For additional information on historical H-2A program use, see [https://www.uscis.gov/tools/reports-studies/reports-and-studies](https://www.uscis.gov/tools/reports-studies/reports-and-studies).*
Growth of the H-2A Program

- Between 2010-2019, H-2A positions certified by DOL increased more than 220%
- Producers of Vegetables and Melons, and Fruit and Tree Nuts, are the dominant users of H-2A

H-2A Filing Process

Overview

• Before filing an H-2A petition with USCIS, an employer must first obtain a temporary labor certification (TLC) from the Department of Labor (DOL) that certifies:
  • There are not enough U.S. workers who are able, willing, qualified and available to do the temporary work; and
  • The employment of H-2A nonimmigrant workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

For more info: [https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a](https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a)
H-2A Filing Process

Overview

- As part of the TLC process, the prospective H-2A employer must engage in recruitment efforts for U.S. workers.
  - Prospective employers must file job orders and initiate U.S. worker recruitment with the local State Workforce Agency (SWA) and to accept applications referred by the SWA.
  - Prospective employers must hire any willing, able, and qualified U.S. applicant up to the 50% point of the contract period.
  - After completing initial U.S. worker recruitment, the employer must submit a recruitment report to ETA’s Chicago National Processing Center.

For more info: https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a
H-2A Filing Process

Overview (continued)

• Once an employer has secured a TLC, the employer must submit a copy of the form granting the TLC along with a complete Form I-129 (H-2A petition) and any other necessary evidence to USCIS.

• If USCIS approves the H-2A petition for a prospective H-2A worker who is outside of the U.S., the prospective worker must either:
  • Apply for an H-2A visa with the U.S. Department of State (DOS); or
  • If the H-2A worker does not require a visa to enter the United States, directly seek admission to the U.S. with U.S. Customs and Border Protection (CBP) at a U.S. port of entry.

Expedited Processing

• In recognition of the time-sensitive needs of the agricultural industry, the adjudication of Form I-129 petitions filed by employers seeking H-2A classification for their workers have been centralized at the USCIS California Service Center (CSC) and prioritized for expedited processing.

• USCIS provides expedited processing without the payment of a premium processing filing fee.

• Petitioners can check the status of a petition using Case Status Online. If the petition has been pending for more than 15 days and without a decision or request for more evidence, authorized individuals may call the USCIS Contact Center at 800-375-5283 to ask about the status of the petition.
Processing Enhancements

• *Electronic notification to DOS*. USCIS sends approval information for H-2A petitions to DOS electronically by the end of the next business day. DOS accepts this electronic information in place of a Form I-797, Notice of Action, approval notice and allows its consular post to proceed with processing an H-2A nonimmigrant visa application, including any required interview.

• *Electronic notification to petitioners*. USCIS sends electronic notifications of receipt and approval to the email address provided by H-2A petitioners in Part 1 of the Form I-129 and to any email address provided for their attorney or accredited representative on a valid Form G-28, *Notice of Entry of Appearance as Attorney or Agent*. 
Processing Enhancements (cont’d)

- **Acceptance of one-page DOL TLC final determination.** On Oct. 1, 2019, USCIS announced it would accept the one-page final determination of the H-2A TLC approval when petitioner submits the Form I-129 to USCIS.

- **Recruitment modernization.** On Sept. 20, 2019, DOL published a final rule to modernize the recruitment required as part of DOL’s TLC process for the H-2A program. To promote modernization and efficiency, as well as to reduce the employer’s burden, the rule removed the requirement that an employer place two print newspaper advertisements and now requires DOL to post the job opportunity on DOL’s SeasonalJobs.dol.gov website on the employer’s behalf.
Processing Enhancements (cont’d)

- **Creation of online USCIS Tip Form for reporting suspected immigration benefit fraud and abuse.** On Mar. 3, 2020, USCIS launched a new online form for reporting suspected fraud and/or abuse to USCIS, which streamlined reporting by replacing three email boxes USCIS used for fraud and abuse reporting and included options to report fraud in the H-2A visa program.

Extension of Stay

- A petitioner may extend a worker’s H-2A status by timely filing a new Form I-129 petition on behalf of the worker.
  - If approved, the H-2 worker need not depart the United States as long as he or she has not reached the 3-year status limit.
- In most cases, a new temporary labor certification from DOL is required before the petitioner can file Form I-129.
- If the Form I-129 petition to extend H-2A worker’s status with the same employer is timely filed, the H-2A worker will be authorized to continue working for up to 240 days while USCIS processes the petition, or until USCIS decides on the petition, whichever comes first.
Change of Employer

• In order for an H-2A worker to change employers, the new employer first must file a temporary labor certification and then file a new Form I-129 petition with the approved labor certification.
  • If approved, the H-2A worker need not depart the United States before changing employers as long as he or she has not reached the 3-year status limit.

• Generally, the H-2A worker cannot begin working for the new employer until USCIS approves the petition.

• Exception: If the new employer has enrolled and is a participant in good standing in E-Verify, the H-2A worker may begin working for the new employer beginning on the “Received Date” noted on the Form I-797 acknowledging receipt of the petition. The H-2A worker is authorized to work for up to 120 days while USCIS processes the petition, or until USCIS’ decision on the petition, whichever comes first.
Employer Notification Requirements

H-2A petitioners must notify USCIS within 2 workdays if any of the following occur:

• **No show**: The H-2A worker fails to report to work within 5 workdays of the latter of:
  • The employment start date on the H-2A petition, or
  • The start date established by the employer;

• **Abscondment**: The H-2A worker leaves without notice and fails to report for work for 5 consecutive workdays without the consent of the employer;

• **Termination**: The H-2A worker is terminated before completing of the H-2A labor or services for which he or she was hired; or

• **Early Completion**: The H-2A worker finishes the labor or services for which he or she was hired more than 30 days earlier than the date specified in the H-2A petition.
Employer Notification Requirements

• Email or mail your notification to the California Service Center at the following addresses.

1. By email: CSC-X.H-2AAbs@uscis.dhs.gov

2. By mail: California Service Center
   Attn: BCU Section
   P.O. Box 30050
   Laguna Niguel, CA 92607–3004

• Although not required, email notification is strongly recommended to ensure timely notification.
U.S. Department of State
PRESENTATION
H-2A Visa Process Overview

Visa Adjudication
Interagency Collaboration

• DOS develops visa policy with our interagency partners, e.g.
  • DHS
  • DOL
  • USDA
  • Congress

• DHS is our closest partner agency
  • Homeland Security Act, Section 428
Interagency, DOS, & H-2 Visas

- Normal liaison on petition routing to DOS from USCIS

- Collaboration on policy development and implementation
  - Macro level discussion
  - Example – Annual H-2 eligibility list
• Mission Mexico adjudicates 86% of the world’s H-2 visas – 92% of H-2A visas and 74% of H-2B visas. Monterrey processed 61% of the world’s H-2 visas, and 70% of Mission Mexico’s H-2 cases.

• The Northern Triangle countries (El Salvador, Honduras, and Guatemala) in FY 2019 adjudicated 12,798, FY 2020- 7,038, FY 2021-12,443
Hot Topics in H-2 Visas

• H-2 annual review
  • DHS with the concurrence of State reviews the list of H-2 eligible countries on an annual basis https://www.uscis.gov/news/alerts/dhs-announces-countries-eligible-for-h-2a-and-h-2b-visa-programs

• Extension of the H2 interview waiver program through December 31, 2021
  • Secretary of State approval with DHS concurrence
  • 2022 approval is not finalized yet.
H-2 Interview Waiver Eligible Cases

Who is it for?

- For workers who have had the same type of visa (H-2A or H-2B) which expired less than 48 months ago and do not have any potential ineligibility.
- First-time workers that do not have any potential ineligibility.
- Please note: Some applicants may still require interviews if any derogatory information has been discovered or the case is not otherwise clearly issuable. To avoid this, petitioners and recruiters are encouraged to ensure that the information on the application and petition are accurate and honest.
State Department Innovations in 2020

• We used unprecedented flexibilities to process applicants without fingerprints or an interview and extend IW eligibility (this was only for H-2s)

• We used staff from all over the world to adjudicate H-2s remotely (some visas were adjudicated in Singapore or Brussels)

• We nearly reached the same levels as 2019 with limited staffing.

• From March to June 2020, H-2 visas adjudicated in Mexico accounted for half of the world’s visa adjudications.
COVID Conditions

• Diversify your workforce and hire from other countries, think Northern Triangle, or even apply at other Consulates in Mexico, not just Monterrey

• Local health conditions/restrictions and limited capacity/resources at post will equate to longer processing times; this is especially true for applicants who require an interview

• This is the reason interview waiver criteria was expanded (approximately 90% of H2s in FY2021 were issued without interview)
Common Questions

Why was the applicant refused? What is administrative processing?

Many H-2 applicants that are refused are ineligible to receive a visa for past immigration violations or for having criminal convictions.

In some cases, we may suspend processing for specific individuals to investigate their case more closely or request the applicant to provide more information.
Why can’t you tell me more about the applicant’s case?

If a worker is found ineligible for a visa, he or she will receive a refusal letter with the specific reason why they were found ineligible. These records are confidential and we are not able to disclose or discuss the outcome of any visa interview. The worker should communicate this information directly to the agent or petitioner.
How can I expedite a worker’s case at the Embassy or Consulate?

We encourage all applicants to utilize the interview waiver process if they can to avoid bringing people physically into consular sections while the pandemic is ongoing. If a person requires an interview, the applicant will have to wait for the post to schedule an appointment; given the pandemic an in person interview may not be possible, or it might take longer than usual to be able to schedule.
H-2: 2021 and Beyond

- Improve & expand outreach to stakeholders in the U.S. and overseas
- Build strong relationships with petitioners and agents
- Enhance collaboration between DOS & stakeholders
U.S. Department of Labor
Wage and Hour Division
PRESENTATION
Wage and Hour’s Role in the H-2A Program

• The Wage and Hour Division (WHD) of the U.S. Department of Labor enforces the contractual obligations related to wages, transportation, meals, housing, and all other provisions of the work contract for H-2A workers and workers in corresponding employment.

• WHD also enforces the U.S. worker recruitment requirements and provisions forbidding preferential treatment of H-2A workers.

• WHD conducts investigations for a number of reasons, all having to do with enforcing the law and assuring an employer’s compliance.
Required U.S. Worker Recruitment

• Employers MUST NOT lay off or displace similarly employed U.S. workers within 60 days of the date of need for H-2A workers.

• Before hiring H-2A workers, employers must contact former U.S. workers employed in the same occupation during the past year to solicit their return.

• Employers must maintain a report listing all U.S. workers who applied for the job, whether they were hired, and the lawful job-related reasons for any workers not hired.

• Employers MUST hire any eligible U.S. worker who applies during the first 50 percent of the approved work contract period.
Required U.S. Worker Recruitment

• The employer’s job offer to U.S. workers must include at least the same benefits, wages, and working conditions provided to H-2A workers.

• The employer may not impose restrictions or obligations on U.S. workers that are not imposed on the employer’s H-2A workers.

• The employer must provide employment to any qualified, eligible U.S. worker who applies during the applicable recruitment period.
Disclosure of Working Terms and Conditions

• The employer must provide accurate, **WRITTEN INFORMATION** about the wages, hours, working conditions, and benefits of the employment being offered.

• H-2A workers must receive this information prior to getting a visa and corresponding workers no later than on the first day of work.

• The employer must provide this information in a language understood by the worker.
Wages

• Must be **PAID at least twice per month** at the rate stated in the work contract

• Workers must be informed, in writing, of all **DEDUCTIONS** (not otherwise required by law) that will be made from the worker’s paycheck

• Workers must receive an itemized, written **STATEMENT OF EARNINGS** (pay stub) for each pay period

• The employer must guarantee to offer employment for at least **THREE-FOURTHS** (75%) of the total hours promised in the work contract
Transportation

• Inbound transportation must be provided or, upon completion of 50 percent of the work contract period, reimbursed for reasonable costs incurred to the place of employment for transportation and subsistence (lodging incurred on the employer’s behalf and meals)

• Outbound/return transportation and subsistence must be provided upon completion of the work contract

• Workers living in employer-provided housing must be provided daily transportation, at no cost to the worker, between the housing and the worksite

• All employer-provided transportation must meet applicable safety standards, be properly insured, and be operated by licensed drivers
Housing

• Any worker who is not reasonably able to return to his/her residence within the same day must be provided HOUSING AT NO COST

• Employer-provided housing must meet applicable safety standards

• Workers must be offered three meals per day at no more than a DOL-specified cost, or provided free and convenient cooking and kitchen facilities
Prohibitions against Workers Paying Fees and Retaliation

• Employers and their agents, including foreign recruiters, or anyone working on behalf of the employer, MUST NOT receive payment from any worker for any costs related to obtaining the H-2A certification (such as application and recruitment fees)

• Workers must BE FREE FROM DISCRIMINATION or discharge for filing a complaint, testifying, or exercising your rights in any way or helping others to do so
Additional Employer Obligations

• Employers must provide state WORKERS’ COMPENSATION insurance or its equivalent

• Employers must provide at no cost, all TOOLS, supplies, and equipment required to perform the assigned duties

• Employers must display the required WORKER’S RIGHTS POSTER where employees can readily see it

• Employers must comply with all other applicable laws (including the prohibition against holding workers’ passports or other immigration documents)
WHD Enforcement Authority

• When violations are found, WHD may pursue sanctions and remedies including, but not limited to:
  • Recovery of unpaid wages, including for recruitment fees
  • Assessment of penalties
  • Reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced
  • Debarment from program participation for up to 3 years
Compliance Assistance Resources
About the USCIS Presentation

Author: USCIS Office of Policy and Strategy.

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