

**Whiteman Osterman & Hanna, LLP -
Immigration Practice Series**



H-2B Primer

The H-2B visa allows United States seasonal employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform non-agricultural labor or services of a temporary or seasonal nature. This visa, like many other employment visas, requires employer sponsorship. The employer must meet several requirements before actually bringing nonimmigrant workers to the United States. If the employer meets the requirements, he or she may bring a nonimmigrant worker into the country for a maximum of 364 days. During that time, the nonimmigrant worker is guaranteed certain rights.

Explanation of “Fiscal Year” for purposes of H-2B Cap Count

H-2B Cap is set at 66,000, which is split between 2 Seasons:

- October 1 (1st Half of FY)
- April 1 (2nd Half of FY)

October 1, 2013 = FY 2014

April 1, 2013 = FY 2013

Fiscal Year is designated by the calendar year in which it ends:

- 1st Half of FY = October 1 to March 31
- 2nd Half of FY = April 1 to September 30

Requirements for an H-2B Employer:

Employers are required to meet the following requirements in order to file for an H-2B visa:

1. The job offer must be for a temporary/seasonal position (seasonal, intermittent, peak load, one-time occurrence, etc) in which the employer anticipates a shortage of domestic workers
2. The job must be for less than one year (usually 10 months)
3. There must be no qualified and willing American workers available for the position
4. Employer's must agree to pay H-2B workers in accordance with the government's prevailing wage for area of employment
5. Employer must pay inbound transportation and subsistence expenses and should reimburse workers for these expenses within the first week of work

Employer must pay work return transportation of worker if the contract period is terminated early
7. Employer must reimburse workers for visa related expenses at the U.S. Consulate in their home country, including recruiter/agent fees and consular processing visa fees. These expenses should be reimbursed within the first week of work
6. Employer must provide Workers Compensation Insurance
7. Employer must pay all workers the required Prevailing Wage Rate plus overtime for over 40 hours
8. While the employer is NOT required to provide housing to H-2B workers, the employer should make arrangements for housing in advance of the workers arrival. The workers are responsible for all housing costs and related expenses
9. Employer must withhold tax and pay all applicable state, federal and social security taxes for H-2B workers.

Before employing H-2B workers, an employer must make an active effort to recruit U.S. workers for a period of 10 days. This includes placing a job order with the State Department of Labor and 2 newspaper advertisements in area of employment.

What is a "Temporary Need"

The Department of Labor defines "temporary need" as ... "Services where the petitioner's need for the duties to be performed, rather than the job itself, is temporary. It is the nature of the employer's need, not the nature of the duties, that is controlling."

The nature of the employer's temporary need for H-2B employment must be seasonal, peak load, intermittent, or a one-time occurrence as defined in 8 CFR 214.2(h)(6)(ii).

(1) One-Time Occurrence

The petitioner must establish that the employer:

- Has not employed workers to perform the services or labor in the past and that it will NOT need workers to perform the services or labor in the future; or
- Has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker

(2) Seasonal Need

The petitioner must establish that the services or labor is:

- Traditionally tied to a season of the year by an event or pattern; and
- Of a recurring nature

(3) Peak Load Need

The petitioner must establish that:

- The employer regularly employs permanent workers to perform the services or labor at the place of employment;
- The employer needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short term demand; and
- The temporary additions to staff will not become part of the petitioner's regular operation

(4) Intermittent Need

The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

Requirements for an H-2B employee:

Almost every admissible alien is eligible to become an H-2B worker. To be eligible an alien must meet three requirements:

1. The alien must be from a country designated by the U.S. government to participate in the H-2B program;
2. The alien must have a valid job offer from an eligible H-2B employer; and
3. The alien must intend to return to his or her home country at the expiration of the H-2B visa.

Filing procedure:

The H-2B application may not be filed earlier than 4 months (120 days) prior to the date of need. The steps in the H-2B filing process include:

1. **Filing Prevailing Wage Determination (Form ETA 9141) with the U.S. Department of Labor through iCERT**

This form details the job offer, duties, requirements and location of the position. Within 30-40 days, U.S. Department of Labor will issue a formal prevailing wage determination specifying the required wage to be paid to the worker. This must be completed prior to advertising and submission of the H-2B application.

It is recommended that the Prevailing Wage Determination be filed 5 months prior to need to allow for sufficient processing time.

2. Placing the Job Order with the State Department of Labor

Once the U.S. DOL issues the prevailing wage determination, the employer must file a job order with the State Department of Labor (SWA), which will run for 10 days. This online posting will be available to all DOL offices in the state who will refer qualified workers to the employer.

3. Recruitment

During the 10-day job order recruitment period, the employer is required to place ONE Sunday and ONE weekday advertisement in the local newspaper in the area of intended employment.

After the 10-day recruitment period has lapsed, the employer must prepare a detailed recruitment report summarizing contact information of all applicants and details regarding any interviews. The report must also specifically state whether an offer was made to the application and if not, why they were not qualified for the position. The report must be completed no fewer than 2 calendar days after end of Job Order AND no fewer than 5 days after last newspaper ad, employer must prepare, sign and date a written recruitment report

4. Labor certification:

Once all recruitment is complete, the employer will file the formal H-2B application with the U.S. Department of Labor (Form ETA 9142) through the iCert system, along with the following supporting documents:

- Signed Attestation Pages of ETA9142
- Temporary Need Statement
- Approved Job Order from SWA

5. Employer's Visa application:

Once the U.S. DOL approves the labor certification application, the employer will file application paperwork with U.S. Citizenship and Immigration Services on form I-129. The petition will specify the number of workers needed and the country in which they will apply. If your application is approved, the USCIS will notify the consulate in the alien's home country.

In most cases, premium processing will be required, since “normal” processing time is approximately 4 months. With premium processing, USCIS will adjudicate the petition within 15 days.

6. Employee's Visa application with the U.S. Consulate:

Finally, the worker has to file their own visa application with the consulate in their country. It is important to note that the employer's petition approval does not guarantee the visa approval of the alien.

For more information, please contact us:

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