

Whiteman Osterman & Hanna LLP – Immigration Practice Series



I. H-2A visas: An Overview

The H-2A visa allows United States agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform 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.

II. Requirements for an H-2A Employer:

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

1. The job offer must be for an agricultural position 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-2A workers and American workers in H-2A positions in accordance with the U.S. Government's Adverse Effect Wage Rate (currently set at \$12.38 for NY)

5. Employer must provide H-2A workers and those American workers who are not reasonably able to return to their residence at the end of the day with free housing
6. Employer must pay inbound transportation and subsistence expenses, as well as return transportation in some cases (current rate set at \$51.00 per day with receipts, or \$12.09 per day)
7. Employer must guarantee its H-2A and U.S. workers holding H-2A positions work for $\frac{3}{4}$ of the contract period
8. Employer must provide 3 meals/day (chargeable to workers) or provide kitchen facilities
9. Employer must provide Workers Compensation Insurance

Before employing H-2A workers, an agricultural employer must make an active effort to recruit U.S. workers. This means newspaper and radio advertising in areas of the expected labor supply.

III. Requirements for an H-2A employee:

Almost every admissible alien is eligible to become an H-2A worker if they are on the "eligible country list". To be eligible, an alien must meet two requirements:

1. The alien must have a valid job offer from an eligible H-2A employer; and
2. The alien must intend to return to his or her home country at the expiration of the H-2A visa.

IV. Filing procedure:

Generally, there are three things that must be done before a nonimmigrant worker can begin his or her employment.

1. Labor certification:

The first step in the H-2A visa application process is labor certification. In filing this, the employer must demonstrate that qualified workers are not available in the United States and that the foreign worker's employment will not adversely affect wages and working conditions of similarly employed U.S. workers. The State Department of Labor will inspect worker housing. The U.S. Department of Labor (DOL) will either grant or deny the labor certification.

2. Employer's Visa application:

The second step is petitioning the USCIS for the actual H-2A visa with form I-129. If your application is approved, the USCIS will notify the consulate in the alien's home country.

3. 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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