

H-2A Program Overview

H-2A Certification for Temporary or Seasonal Agricultural Work

The H-2A program allows agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of temporary or seasonal nature. Before the U.S. Citizenship and Immigration Services (USCIS) can approve an employer's petition for such workers, the employer must file an application with the Department of Labor stating that there are not sufficient workers who are able, willing, qualified and available and that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers. The regulations provide for numerous worker protections and employer requirements with respect to wages and working conditions.

This document is a quick overview of the qualifying criteria.

Qualifying Criteria

To be able to hire non-immigrant workers, an application must be filed with three different government agencies (State Workforce Agency, Department of Labor and Department of Homeland Security). The first application (the job order) is also called the 790. This application will become the contract between the employers and all employees working in H-2A jobs.

The benefits that must be included in a job offer and other conditions that must be satisfied depend on the prevailing practices which exist for the occupation, crop and area you intend to operate. You will often hear us refer to prevailing practices in the industry or normal and accepted practices in your area.

Employer Must Meet the Following Conditions:

Domestic U.S. workers have preference

Must hire all U.S. workers who are able, willing, qualified and available first.

Contract of Employment – 790

The contract/790/job order must include:

- Employer information
- Number of workers requested
- Start and end dates of the contract
- Estimated hours of work per week
- Wages: hourly or piece rate
- Job descriptions/duties
- Work & housing rules
- Work & housing locations
- Other material terms and conditions of employment

Recruitment/Worker Qualifications: Employers should not create qualifications that are designed to weed out domestic applicants. The employer is permitted to list in the contract only those qualifications which are essential to carrying out the job and which are normally required by other employers who do not participate in the H-2A program.

Wage Rates

Wages: The rate of pay must be the same for U.S. workers and H-2A workers. The hourly rate must be at least as high as the applicable Adverse Effect Wage Rate (AEWR), federal or state minimum wage, applicable prevailing hourly or piece rate or the agreed-upon collective bargaining wage. The AEWR is established by the Department of Labor for every state.

If a worker will be paid on a piece rate basis and the piece rate does not result in an average hourly rate of at least as high as the applicable hourly rate, for the pay period, the worker's pay must be supplemented to the applicable hourly rate. The piece rate offered must not be less than the prevailing rate in the area of intended employment for the same crop and/or activity.

The employer must keep accurate records with respect to a worker's earnings and hours offered. The worker must be provided with a complete statement of hours worked and related earnings on each payday. The employer must pay the worker at least twice monthly or more frequently, depending on the crop and area.

Housing and Meals

Housing: The employer must provide free housing to all workers who are not reasonably able to return to their residence the same day (generally 60 miles or 1 hour). Such housing must be inspected and approved according to appropriate standards. Rental housing which meets local or state health and safety standards may be provided.

In the state of Ohio, Ohio Department of Health, is the Government Agency responsible for inspection and certification of Migrant Agricultural and H-2A workers housing.

Meals: The employer must provide cooking facilities, utilities and utensils at no cost to employees while occupying employer-provided housing or provide 3 meals a day to each worker. If meals are provided, the employer may charge each worker a daily amount not to exceed annually set maximums.

Travel Expenses

Transportation: There are two types of transportation required that the Employer must cover: inbound and outbound transportation and local transportation for any worker who is eligible for housing.

Inbound & Outbound Transportation

The amount of transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. The inbound & outbound transportation also includes all costs associated with travel expenses such as, meals, lodging, and visa expenses.

1. The employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work.
2. Upon completion of the work contract, the employer must provide return transportation or reimburse the worker the cost of the lowest commercial transportation to the place of recruitment and pay costs of subsistence during transport. If the employer advances transportation costs or provides transportation to foreign workers, the employer must do the same for U.S. workers.

Local Transportation

1. The employer must provide free transportation between the employer's housing and the worksite for any worker who is provided housing. The employer must also provide free transportation at least once a week for the workers so they can meet some of their needs, (e.g. store, bank, laundry).

All employer-provided transportation must comply with all applicable federal, state or local laws and regulations and must provide, at a minimum, the same transportation safety standards, driver licensure and vehicle insurance.

Others

Workers' Compensation Insurance: The employer must provide workers' compensation insurance. Proof of insurance coverage must be provided to the Department of Labor before certification is granted.

Tools and Supplies: The employer must furnish, without charge, all tools, supplies and personal protective equipment required in the performance of the specified work.

Three-Fourths Guarantee

The employer must guarantee to offer each worker employment for the hourly equivalent of at least three-fourths of workdays of the period during which the work contract and all extensions are in effect.

For example, if a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks × 48 hours/week = 480 hours × 75 percent = 360).

A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays, as these days are not mandatory.

Former Domestic Workers

Under the H-2A program rules, employers are required to invite back all former domestic workers that finished the previous season with the employer.

Fifty Percent Rule

The employer must hire any qualified U.S. worker who applies for a job until fifty percent (50%) of the period of the work contract has elapsed.

Full Time Employment

Even though the program is temporary and seasonal, the job it is a full-time job. That means that the employer is expected to offer a minimum of 35 hours per week. Also, under the H-2A program the employer is required to offer a day off (Sabbath).

Generally, employers may use H-2A for jobs lasting up to 10 months or less within a given year.

Disclosure of Contract

The employer must provide to an H-2A worker no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable.

H-2A Process Filing Steps

Ohio Department of Health

Contact inspector no later than 85 days prior to date of need

Varnum LLP

Submit ETA 790 to Varnum for legal review at least 85 days before date of need

State Workforce Agency (SWA)

Submit ETA 790 75 – 60 days prior to date of need

Department of Labor (DOL)

Submit upon SWA Acceptance, but no later than 45 days prior to date of need

Notice of Deficiency (NOD)

Received within 7 days after submission

Respond to Notice of Deficiency within 5 days

Notice of Acceptance (NOA)

Received within 7 days of submission

Recruitment Report

Submit report to DOL no later than 7 days after receiving NOA

Department of Homeland Security (DHS)

United States Citizenship & Immigration Service (USCIS)

Submit I-129 upon DOL Certification: Approximately 30 days prior to date of need

Request for Evidence (RFE)

Received via postal mail 7-10 days after notice

Respond to RFE once requested information and/or documentation has been collected

I-797B Approval Notice

Received after USCIS determines Employer eligibility

Department of State (DOS)

Consulates Abroad

Worker appointments scheduled 2 – 3 weeks prior to arrival date

New Employer Form

Name of Company: _____

Contact Name: _____

Phone Number: _____

Email Address: _____

Address: _____

Crops: _____

Typical Dates of Need: _____ to _____

Number of Workers Needed: _____

Farm Bureau Member?* Yes No

Type of Application: Fixed-Site Joint Employer Farm Labor Contractor

How did you hear about us? _____

Contact:

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**Farm Bureau membership required for all program participants.*



OUR PROCESS

1. Pre-approval Management Review (required/120 days before date of need)
2. Drafting/preparation of application (100 to 90 days before date of need)
3. Filing job order with SWA/DOL (75 to 60 days before date of need)
4. Recruitment report
5. Assistance with domestic worker interviews
6. Preparation and filing with U.S. Citizenship and immigration Service
7. Arrangement of visa appointments at the U.S. Consulate
8. Arrangement of transportation for workers
9. Welcoming workers, reimbursement of travel expenses and documentation
10. Bilingual training and orientation (e.g. I-9's, W-4's, WPS, etc.)