H-2A FILINGS AND H-2ALC—FLC REQUIREMENTS

APMA Forum

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APMA
AGRICULTURAL PERSONNEL MANAGEMENT ASSOCIATION

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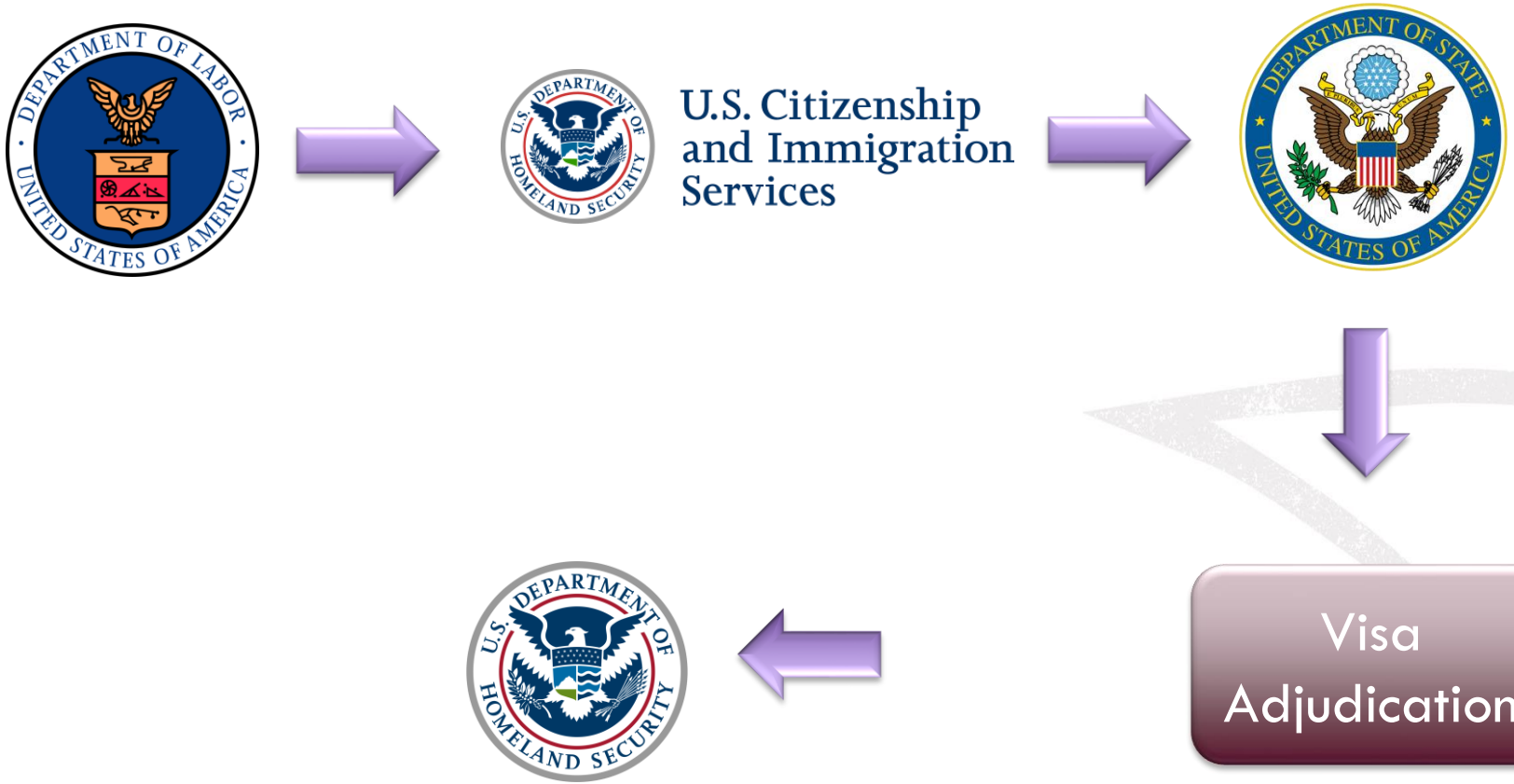
H-2A Visa Process Overview



H-2A Visa Program

Let's Get Started

- The H-2A program takes serious planning.
- It's a contract; not at-will employment.
- File your H-2A job order and application as early as the regulations permit
- For growers using farm labor contractors, stay engaged.
  - Ensure executed work contracts accurately reflect your needs for farm labor
  - Request a copy of the H-2A job order and application
  - Request a copy of the 7-day Notice of Acceptance (NOA) or Deficiency (NOD)
  - Request daily status notifications beginning 30 days before your expected start date of work to see if OFLC issued a final decision

H-2A Labor Contractor (H-2ALC) Defined

- An H-2ALC is a person who meets the definition of an "employer" under the H-2A Program and does not otherwise qualify as a fixed-site employer or an agricultural association (or an employee of a fixed site employer or agricultural association) and who is engaged in any one of the following activities:
  - Recruiting
  - Soliciting
  - Hiring
  - Employing
  - Furnishing
  - Housing
  - Transporting

H-2A Labor Contractors

- H-2ALCs must be registered with the DOL under MSPA
- Must provide their respective MSPA FLC Certificate of Registration number
- Must identify the farm labor contracting activities they are authorized to perform

Farm Labor Contractors (FLC) Certificates

- H-2ALCs generally must have a valid FLC Certificate identifying the activities it is authorized to perform
- Persons employed by the H-2ALC to perform farm labor contracting activities (e.g., driving covered workers) must have a valid FLC Employee (FLCE) certificate
- H-2ALCs should monitor FLC/FLCE expiration dates and submit FLC/FLCE renewal documentation timely to the Department's Wage and Hour Division (WHD)

FLC/FLCE Certificates

- Submit to OFLC the following documentation:
  - Copy of all current FLC and FLCE Certificates for the employer (even if expired) covering the H-2A application; ***and***
  - Evidence WHD is extending the validity of each current FLC/FLCE Certificate while the renewal request(s) is/are pending processing
- Request "Acknowledgment Letter" from WHD recognizing receipt of a renewal application and stating continued authority to operate under current FLC/FCLES
- OFLC will not accept general notices of receipt or other documentation providing status of a pending application (e.g., WHD emails)
- Where practicable, OFLC issues multiple notices to obtain compliance documentation prior to issuing a final determination

FLC/FLCE Certificates-H-2ALCs Transporting Workers

- Valid FLC/FLCE Certifications or WHD Acknowledgment Letter demonstrating authority to operate
  - Must show FLC authorization in sufficient numbers to transport workers including authorized vehicles; and/or
  - Must show FLCE authorizations in sufficient numbers of employees to drive vehicles to transport workers
- The Total number of H-2A workers requested for certification cannot exceed the number of vehicles and employees authorized/available to drive all workers daily
- Example: The employer is requesting 50 H-2A workers. There must be capacity for at least 50 as shown as available in the vehicle authorization section on the FLC Certification

Definition of Agriculture

- FLSA definition: Agriculture is "farming in all its branches and among other things includes the **cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities.** (Primary Agriculture)
- FLSA Secondary agriculture: Activities that are **"performed by a farmer or on a farm as an incident to or in conjunction with such farming operations"**
- IRS Definition: "agricultural" includes the art or science of cultivating land, harvesting crops or aquatic resources, or raising livestock.
- Agriculture does not include operations performed off a farm if performed by employees employed by someone other than the farmer whose agricultural products are being worked on

H-2A Job Order Requirements

- H-2ALCs must:
  - List the name and location of each fixed-site agricultural business to which they expect to provide H-2A workers
  - List the dates of each employment opportunity, and a description of the crops and activities the workers are expected to perform at each area of intended employment (AIE)
  - Submit a copy of each work contract between the H-2ALC and the agricultural business to which they expect to provide workers
  - Provide proof that all housing and transportation if provided or secured by the fixed-site employer complies with applicable safety and health standards
  - Obtain and submit the original surety bond with the H-2A Application.

H-2ALC Bond Requirements

- The surety bond must be written to cover liability incurred during the term of the work contract period listed on the H-2A Application and must remain in effect for a period of at least 2 years from the expiration date of the labor certification.
- H-2ALC minimum surety bond amounts:
  - $5,000 for a temporary labor certification (TLC) with fewer than 25 employees
  - $10,000 for 25 to 49 employees
  - $20,000 for 50 to 74 employees
  - $50,000 for a labor certification with 75 to 99 employees
  - $75,000 for a labor certification with 100 or more employees.
- The bond must be payable to: **Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-3502, Washington, DC 20210.**

Temporary Need Determinations

- The ***employer's need for the services or labor to be performed*** must be seasonal or temporary in nature; not the length of job opportunity itself
- Temporary need assessments are determined on a case-by-base basis and are fact-driven
- DOL will scrutinize the employer's filing in making its temporary need determinations, but the relevance of the filing history depends on the totality of circumstances
- Just because DOL approved your H-2A labor certifications in prior years does not mean you will not receive a NOD, denial or revocation based on a lack of temporary seasonal need for the same or a similar position

Temporary Need: H-2ALCs

- The ***H-2ALC's need for the duties to be performed*** must be seasonal or temporary in nature; not the need of each fixed-site agricultural business on the specific application
- Consider the Area of intended employment (AIE) ((i.e., within normal commuting distance of worksites listed in the application/job order)
  - Applications filed by H-2ALCs are limited to a single AIE
  - OFLC will map the distances of each worksite from the first (primary) worksite listed on the application or, if applicable, a designated pick-up point for daily transportation
  - Based on this mapping, OFLC will determine whether it is reasonable for a worker in the area to travel these distances to-and-from based on an 8-10 hour workday

Temporary Need – H-2ALCs

- OFLC will expect H-2LC to explain how the nature of the employer's need is seasonal or temporary when filing multiple applications for jobs that are the same or substantially similar in the same AIE ***and***
  - For continuous or consecutive (i.e., back-to-back) periods lasting 10 months or longer
  - For overlapping periods of need lasting 10 months or longer
  - For different periods of need without meaningful break in employment

Worker Housing

- When completing the H-2A Job Order…
  - Briefly describe the type of housing (e.g., motel/hotel, labor camp, single family house)
  - Identify the total units for the type of housing and total occupancy
  - If a physical address is not available, use the "Additional Housing Information" field to disclose directions or GPS coordinates
- Communicate with the SWA as soon as possible when there are any changes to the housing units after submission
- Prepare the housing as early as possible and be ready for the inspection visit, where applicable.

Housing for Workers: Rental/Public Accommodations

- Employer must submit documentation identifying which housing standards apply (i.e., local, State, or Federal) and demonstrating compliance with those standards.
- Examples of acceptable documentation:
  - SWA inspection report or certification
  - Local, state or federal housing authority inspection report or certification
  - Written statement, signed and dated, from employer or by the person or entity that owns/controls the housing that **(1)** identifies the applicable standards, **(2)** confirms that no local, State or Federal inspection is required, and **(3)** attests that housing unit(s) is/are compliant with applicable standards (*see* FAQs Round 12)

H-2A Job Orders: Labor Contractors (H-2ALCs)

- Make sure the H-2A Job Order, Addendum B, contains:
  - Names and locations of ***each fixed-site agricultural business*** where the worker(s) will perform labor or services.
  - Expected beginning and end fates of work
  - Identify the crops or activities the worker(s) will perform
- Make sure there is (are) fully-executed work contract(s) with ***each fixed-site agricultural business*** identified on the Addendum B

Best Practices:

- Make sure the address for each fixed-site agricultural businesses identified in the work contract **match** the address listed in Addendum B

Meals for Workers: Disclosure on Job Order

- Providing kitchen facilities for workers to prepare meals
- Disclose to workers how meals will be provided, including any appropriate meal charges, in the event kitchen facilities become temporarily unavailable
  - **Have a plan!**

Contract Impossibility (CI)

- H-2A contracts may be terminated upon request to the CO, under special, unforeseen circumstances (e.g., lost crop due to wildfire)
- CI requests will only be granted for events outside scope of known or recurring risks to operations in the crop or commodity (e.g., known plant diseases or pest pressures)

Best Practices:

- Submit your CI request to tlc.chicago@dol.gov as soon as practically possible
- Explain how the CI circumstance impacts the employer's business operations and, as a result, the specific services or labor performed by the workers
- Examples of supporting documentation can include:
  - Statement from SWA, agricultural extension office, or other local or state official confirming impact on the employer's operations
  - Evidence of insurance claim demonstrating damage/loss of crops or commodities
  - Local weather reports and statements demonstrating how the unforeseen and adverse weather impact the continued performance of work under the H-2A certification

Post-Certification Extension Requests

- If less than 2 weeks, no need to request permission from DOL. File petition directly with USCIS.
- If more than 2 weeks, send requests to tlc.chicago@dol.gov
- Requests must justify, in writing, due to weather conditions or other unforeseen factors reasonably beyond the employer's control
- Ensure request does not conflict with the employer's assurance regarding its need being seasonal or temporary in nature

Good Practices: Employer's written justification should explain the following:

- How the circumstance could not have been reasonably foreseen
- How the circumstance impacts business operations and, as a result, the need to extend the ***specific services or labor performed by the workers***
- How long an extension is needed and specify the end date of work
- If extension takes employer over 12 months, justification must be related to an extraordinary (i.e. rare or unusual) event or circumstance

Visa Processing: Best Practices

- File H-2A Petitions as early as possible
  - Visa holders may apply for admission one week prior to work date
- Applications should be accurate and truthful
  - Don't use generic templates
  - Contact information for petitioners, applicants and worksites should be accurate
  - Look to various consulates for appointments
    - Some consulates may have earlier availability

H-2A Interview Waiver Eligible Cases

Who may qualify?

- Workers that do not require an interview:
  - Workers who have had the same type of visa (H-2A or H-2B)
  - Expiration of visa less than 48 months ago.
  - First-time workers

Note:
Workers with issues that may have been previously resolved may be required to do an interview.

COVID Vaccination and Testing Requirements for U.S. Entry

- Beginning Jan. 22, 2022, DHS will require that all inbound foreign national travelers crossing U.S. land or ferry POEs – whether for essential or non-essential reasons – be fully vaccinated for COVID-19 and provide related proof of vaccination.
  - Present evidence of having completed WHO-approved vaccination.
  - CanSino (widely available in Mexico) and Sputnik (Russian vaccine available in MX) are not currently WHO approved.
- There is *currently* no COVID-19 testing requirement for travelers at land POEs
- Employers and their agents should screen prospective workers to ensure compliance.

Any questions?