

Is H-2A the Future of Farm Labor?

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H-2A Visa Statistics

- In 2012, the U.S. Consulates issued 65,345 H-2A visas for agricultural employment. This number has been roughly similar since 2008. Mexico has been by far the largest source of H-2A labor of all the available countries.
- 53% of H-2A users have complained to their U.S. Senator or Representative about the difficulties in using the H-2A program
- In Arizona, lettuce is the most widely used crop for H-2A program purposes.

Benefits of H-2A Visas

- ▣ Lower turnover and training costs. Provides mechanism for hiring same foreign-trained employees every year
- ▣ H-2A workers can only work for your company
- ▣ Provides supply of legal labor
- ▣ Helps to prevent loss of revenues due to labor shortages
- ▣ No statutory cap on number of H-2A visas

Biggest Challenges of H-2A

- ▣ Administrative Burden
- ▣ Expensive program for hiring labor
- ▣ Delay in Processing by DOL (OFLC), USCIS or U.S. Consulate Consular Office. Any one of these government agencies can delay or affect outcome of H-2A visas. On average, 72% of H-2A workers come late (22.6 days late).
- ▣ Heavily regulated by Wage and Hour and may carry significant penalties.

Key H-2A Visa Obligations

- ❑ Must conduct labor market test
- ❑ Hire of foreign workers must not affect wages or working conditions of similarly employed U.S. workers
- ❑ Rejection of U.S. applicants must be for lawful bona fide reasons
- ❑ Must provide travel and subsistence
- ❑ Must provide housing
- ❑ The fifty percent rule and $\frac{3}{4}$ rule apply.

DOL Concept of Corresponding Employment

- The H-2A regulations govern any work described in the H-2A job order AND any agricultural work performed by H-2A workers.
- The H-2A regulations also govern and protect any U.S. worker that performs the same job duties as the H-2A workers.

Temporary or Seasonal Need for H-2A Workers

- To qualify for the H-2A program, the employer must have a “need for agricultural services or labor to be performed on a **temporary or seasonal basis**.” 20 CFR § 655.161(a).
- Recent cases have illustrated a Department of Labor trend to deny H-2A worker certification based on an employer’s inability to prove a temporary or seasonal basis. *Matter of Lancaster Truck Lines*, 2014-TLC-00004 (Nov. 26, 2013) (employer’s request for agricultural equipment operators denied because it could not prove temporary or seasonal need).

New H-2A Wage Rates

www.foreignlaborcert.doleta.gov/advertise.cfm

- ▣ California (\$11.01)
- ▣ Arizona (\$9.97)
- ▣ Florida (\$10.26)
- ▣ Hawaii (\$12.91)
- ▣ Nevada (\$10.89)
- ▣ Texas (\$10.86)
- ▣ Idaho (\$10.69)

Travel and Subsistence Expenses

- 11.42 up to 46.00 per day
- These rates are used for reimbursing workers for meal and travel related costs incurred from their home to the worksites.
- Employers must also pay reasonable costs of lodging where necessary during visa processing or travel to the worksites.
- H-2A visas cost \$190.00 per worker.

Immigration Reform

- June of 2013, Senate passed its version of immigration reform bill to improve border security, expand foreign worker visa programs and provide a path to legalization of undocumented immigrants, including agricultural workers.
- House of Representatives has stated it would prefer to take a piece-by-piece approach to immigration reform and has taken any significant steps to move reform measures forward.
- It is now rumored that the House will issue new legislation before the President's annual State of the Union address.

H-2A v. W Visas

- ❑ Like H-2A visa, the W program will continue to require employers to recruit U.S. labor and prove labor shortages before obtaining W visas for foreign agricultural labor.
- ❑ Unlike H-2A, W visa program would provide option for at-will and contract visas.
- ❑ Unlike H-2A visa, W visas would be valid in three year increments. H-2A visas are usually only valid for less than 10 months per year for traditional farming and harvesting positions.
- ❑ Unlike H-2A visa, W visa may provide employers with benefit of “housing allowance” option.
- ❑ Unlike H-2A visa, W visas will eventually be subject to annual cap on visas issued. H-2A has no cap.

Agricultural Blue Card Program

- Under planned reforms, employers may benefit from the legalization of existing agricultural workers.
- To obtain legal working “blue” status, current undocumented ag workers must prove they have worked 575 hours or 100 days during the two year period ending on December 31, 2012.
- Blue card ag workers may apply for permanent residency only if they continue to remain in agriculture, pay a fine and keep up with their taxes.

Top Ten Ways for H-2A Employer to Get Sued by Department of Labor

10. Terminate a local worker or H-2A worker without sending written notice to the government within 2 days.
9. Hold or confiscate workers' passports, visas, or other immigration documents.
8. Don't give H-2A workers an employment contract before they attend their visa interviews in Mexico.
7. Don't give local workers the same employment contract on or before the first day of the season.
6. Don't ensure H-2A workers are provided with 3 meals per day.

Top Ten Ways for H-2A Employer to Get Sued by Department of Labor

5. Don't reimburse or pay foreign H-2A workers for their visa fees and transportation to the United States.
4. Allow foreign recruiters to charge H-2A candidates recruitment fees to cover their efforts for helping your company to find labor in Mexico.
3. Pay only foreign workers the Adverse Effect Wage Rate and not the local workers.
2. Do not hire local worker who apply for the agricultural work because you want to make sure you get all of the H-2A workers requested.
1. Engage in preferential treatment for H-2A workers over local U.S. and permanent resident employees because the H-2A employees work harder and don't complain.

H-2A Job Orders Public

- To see samples of actual H-2A job orders filed by H-2A program users, visit:

<http://icert.doleta.gov/>

H-2A Questions and Answers

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