H-2A: GETTING AGRICULTURE WORKERS YOU NEED LEGALLY
TODAY’S AGENDA

1. About GrowPro
2. Who Qualifies for H-2A?
3. Requirements & What to Consider
4. H-2A Certification Process
5. Additional Employer Obligations
6. Q&A
GrowPro®

Greenhouse Growers
Insurance

Why Choose GrowPro?
• 30 years of industry experience
• Carrier rated A+, financial size XV by A.M. Best
• Industry experts for risk control guidance and proper valuation of operations & equipment
• Competitive rates & flexible payment plans
• Expert claims handling
• World-class risk control services

Eligibility Map
Available in ALL states

Target States
Other Eligible states
H-2A: Getting the Agricultural Workers You Need Legally

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OVERVIEW

Need for reliable supply of labor not being met
- U.S. government conflicted about availability of US workers
- Patchwork of prior programs has not led to viable solutions

H-2A Program serves 13,000 agricultural employers
- Fills over 268,729 jobs out of all farming positions
- Estimated more than ½ of the 1.2 million farming positions filled by illegal workers

Hiring workers without documentation a risky business
- Increasing ICE enforcement
- Interruption of business if ICE raids
- Interruption of business if workers FEAR ICE raids and leave
- Presentation of false documents can lead to charges of identity theft

How do agricultural employers get the workers they need?
The Problem of Illegality

**Basic rule:** No visa problem can be fixed inside the U.S.
- If a foreign national has violated their visa status (overstay, illegal employment), the problem can only be fixed by the alien departing the U.S. and re-entering
- Re-entry may be enough; other cases require new visa stamp at home
- Cannot amend / change / extend / file visa applications if not currently in valid status

**3 and 10 Year Bars: You can’t go home again**

IIRIRA 1996: if leave the U.S. after being “unlawfully present” in the U.S. for:
- 6 months - cannot return to the U.S. for THREE YEARS
- 12 months or more – cannot return to the U.S. for TEN YEARS
- Can't fix visa status in the U.S., but can't leave to obtain new temporary or permanent visa status at US consulate → permanent illegality

Illegal Immigration Problem would be greatly reduced by eliminating the bars

**Conclusion: You can’t fix the status of a worker who is illegal**

- Don't waste your time trying to “fix” the status of an illegal worker while in the U.S.
- Verify status of worker before you spend money on the process – and be suspicious
Who May Qualify Under H-2A?

The H-2A temporary agricultural 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 a temporary/seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle, and requires labor levels above what is necessary for ongoing operations. Employment is of a temporary nature when the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year. The employer demonstrate:

- There are not sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which nonimmigrant foreign workers are being requested; and
- Employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.
Who is an Employer Under H-2A?

- Must qualify as a U.S. employer (Farms/Ranch), association of agricultural producers or farm labor contractor
- Associations of agricultural producers can participate as a sole employer, agent with one member, or joint employer with multiple members
- Work must consist of agricultural labor or services, such as planting, raising, cultivating, harvesting, or production of any agricultural or horticultural commodity
- Work must be full-time (35 hours or more a week)
- Employer’s need for workers must be seasonal or temporary in nature, such as a recurring growing cycle (generally lasting 10 months or less)
# H-2A VISAS - AGRICULTURAL WORKERS: The Fast Track?

<table>
<thead>
<tr>
<th>Requirements</th>
<th>Applications Steps</th>
<th>Timetable</th>
<th>Duration</th>
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<tbody>
<tr>
<td>Job must be “agricultural Labor or services”</td>
<td>Place Job Order with SWA between 60-75 days prior to need date; file with USDOL Chicago; DOL issues Notice of Acceptance and begin recruitment</td>
<td>60-75 days prior need</td>
<td>Granted for up to 10 months</td>
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<tr>
<td>Job must be temporary or seasonal (tied to crop of agricultural event).</td>
<td>File visa petition with USCIS</td>
<td>Deficiency notice sent within 7 days</td>
<td>Renewable for total of 3 years; re-recruit each season</td>
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<td>Possibly “breeding” of horses if seasonal program.</td>
<td>Issuance of visa to alien - If in US, change status with visa petition - If overseas, apply at US consulate overseas for entry visa</td>
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<td>Employer must recruit pursuant to DOL and continue to hire available Americans up to 50% of contract period</td>
<td>Usually work with in-country agent to facilitate visa issuance</td>
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<td>Worker housing must meet DOL/DOH standards, inspection</td>
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<td>Must pay Prevailing Wage determined by USDOL (AEWR)</td>
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**Cost**

- **DOL**: $100 per appl. + $10 per job
- **USCIS filing fee**: $460
- **Recruitment costs**: Consular processing fees $100 – $300
H-2A Considerations

Definition of ‘agricultural labor’ expanded then retracted under regulations

Under IRS Regulations at 26 CFR 31.3121(g): includes Services performed on a farm by an employee of any person in connection with any of the following activities constitute agricultural labor:

- (i) The cultivation of the soil;
- (ii) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or
- (iii) The raising or harvesting of any other agricultural or horticultural commodity.

(2) Services performed in connection with the production or harvesting of maple sap, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry constitute agricultural labor only if such services are performed on a farm. Thus, services performed in connection with the operation of a hatchery, if not operated as part of a poultry or other farm, do not constitute agricultural labor.

Distinction between agricultural and non-agricultural important because

- H-2A visas are not subject to cap on number of visas each year
- H-2A imposes requirements for on-site inspections of housing, provision of meals & living facilities if workers cannot return ‘home’ at night
H-2A Wage Requirements

Employer must offer, advertise in recruitment, and pay workers the highest of the following:

- Adverse Effect Wage Rate (AEWR)
- Prevailing Hourly Wage or Piece Rate
- Collective Bargaining Wage
- Federal or State Minimum Wage

NY: $14.29
NJ: $13.34
CT: $14.29
MA: $14.29

Any discretionary bonuses or higher wage rates must be disclosed in job order and advertising – “Raises and/or bonuses may be offered to any worker in the specified occupation at the company’s sole discretion based in individual factors, including work performance, skill or tenure.”
H-2A Labor Certification Process: State DOL

- Employer submits the Form ETA-790 and informs the SWA of intent to file a future application for H-2A workers
- Job order must meet minimum regulatory content requirements (20 CFR 653 Subpart F and 20 CFR 655.122)
- SWA reviews job order and notifies employer of any deficiencies within 7 days OR, if acceptable, begins recruitment of U.S. workers within the state
- Employer will typically request that the SWA inspect housing for farmworkers during this timeframe
H-2A Job Order Contents

The job order contains the minimum content requirements under 20 CFR 655.122(d) and must include the following:

- Provision of Housing
- Provision of Workers’ Compensation
- Provision of Tools, Supplies, and Equipment
- Provision of Meals or Cooking Facilities
- Provision of Transportation and Daily Subsistence
- Three-Fourths Guarantee
- Hours/Earnings Records, Rates and Frequency of Pay
- Abandonment or Termination for Cause
- Contract Impossibility
- Required Deductions from Worker’s Pay
- Work Contract or ETA Form 790 and attachments
H-2A Housing

Employer must provide housing to all workers (U.S. workers in corresponding employment and H-2A workers) who cannot reasonably return to their permanent home at the conclusion of the workday. Ensure the housing remains in compliance with applicable safety and health standards.

- Housing must be ready for occupancy 30 days prior to date of need
- Housing requires inspection by SWA or DOH
- Rental or public housing acceptable: may require SWA or DOH inspection
- Housing for 5 or more workers requires DOH inspection.

If workers voluntarily request to live in own separate housing, obtain request in writing

See DOL FAQ Round 12
H-2A Labor Certification Process: U.S. DOL/OFLC

Employer will submit the following documents through DOL FLAG System:

- Form ETA 790, Agricultural Clearance Order (between 60 and 75 days prior to need)
- Form ETA 9142A, Application for Temporary Employment Certification (at least 45 days prior to need) with supporting documents
- Appendix A - signed and dated copy of original
- Itinerary of worksites (*if applicable*)
- Workers compensation coverage
- SWA housing inspection report(s) or other documentation demonstrating rental/public accommodation housing meets standards and sufficient to house all workers – provided by SWA
- Agent agreement/documentation demonstrating authority to represent the employer and MSPA registration (*if applicable*)
H-2A Labor Certification Process: Post-Filing

Within 7 days after submission of ETA9142 through FLAG:

- Department reviews application for obvious errors or inaccuracies and compliance with program requirements
- Issues Notice of Deficiency or Acceptance – If deficiency is issued, employer has 5 business days to respond
- SWA is required to submit a housing inspection report
H-2A Notice of Acceptance

The Notice of Acceptance directs the employer to conduct recruitment:

- No longer any newspaper advertising
- Employers only need to contact U.S. employees from prior season/year
- DOL automatically places job posting on new seasonaljobs.dol.gov website
- Additional recruitment can be ordered at the discretion of the Department
- Report of recruitment efforts must be submitted by the date specified in the Notice of Acceptance even if not all ads completed (within 7 days of issuance of NOA)
H-2A Initial Recruitment Report

- Employer must prepare, sign, date, and submit a written recruitment report on a date specified by the CO in the Notice of Acceptance.

- Recruitment report must contain the following information:
  - Identification of each recruitment source by name
  - Name/contact information of each U.S. worker who applied for the job and the disposition of each worker
  - Confirm that former US employees were contacted and by what means
  - Explanation of the lawful job-related reason(s) for not hiring each U.S. worker (if applicable) recruitment report

If no lawful bases for disqualifying U.S. worker, DOL will deduct one requested H-2A worker for each qualified U.S. worker.
Issuance of H-2A Labor Certification

- Temporary labor certification will be granted no later than 30 days before start date of work as long as all program requirements are met.
- Employer has rights to appeal any denial determination or partial certification of its request for H-2A workers.
- Department issues an original certified Form ETA-9142A by email to the employer and/or agent/attorney.
- Department instructs the employer to submit the certification page of Form ETA-9142A and a signed and dated copy of Appendix A to the appropriate USCIS Service Center (California).

Important Reminder: Employers must consider and hire U.S. workers until 50 percent of the certified period of work has elapsed.
The DOL’s Final Determination

- In the H-2A program, DOL issues a final determination 30 days before the start date of work as long as all program requirements are met.

- Common reason(s) for delaying the H-2A final determination is the employer or authorized representative not providing . . .
  - Housing documentation for farmworkers
  - Valid farm labor contractor licenses
  - Proof of valid workers’ compensation coverage
  - Valid surety bond for labor contractors
  - Recruitment report

- DOL provides employers with additional time to submit required documents to obtain certification, rather than issue a denial forcing employers to choose between filing an appeal or new application.

- Some pre-certification amendments possible, such as changing needs dates or number of workers, but no changes allowed after certification.
General Filing Tips/Issues

Post-Certification Recruitment Obligations

- Employers must continue to cooperate with the SWA in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies for the job opportunity until 50 percent of the certified period of work has elapsed.

- Employer must continue to update the initial recruitment report submitted to the CO for certification throughout the entire recruitment period.

- Employer must sign and date the final written recruitment report upon 50% of the contract period and be prepared to submit it when requested by the CO in the event of an audit examination or other request from the Department.
General Reminders

- Pay the required H-2A certification fees in full and timely (within 30 days after the certified is issued)
- Maintain all documents supporting the certification for a period of 3 years
- Report the termination or separation/abandonment of workers in a timely manner (no later than 5 working days of no show)
- If changing period of employment requested for certification - ensure changes represent bona fide business need in documentation (e.g., claiming expected government delays is not an acceptable justification)
H-2A Visa Petition Process: USCIS

Once DOL issues H-2A Certification (Form ETA9142), petition must be filed with USCIS

Petition Contents:
✓ Form I-129
✓ I-129H Supplement
✓ Employer Support/Need letter
✓ Original Labor Certificate (Form ETA9142)
✓ $460 filing fee
  • File with USCIS California Service Center
  • Cannot include both named and unnamed workers on same petition. Best practice is to file under “unnamed workers” for consular processing
  • No premium processing – USCIS will process within 1-2 weeks
H-2A Consular Processing

Request appointment with consulate through online system, or use in-country agent/recruiter

- Can substitute workers at consulate if necessary
- Each worker completes consular application Form DS-160 on-line
- Pre-pay $190 application fee at bank designated by consulate
- Required documents for interview:
  - Passport
  - Form DS-160
  - Form I-797, H-2A Approval Notice
  - Fee payment receipt
- H-4 visas almost never issued to dependents
Employer Obligations to H-2A Workers - Overview

Required benefits to H-2A workers
- Provide free housing
- Pay inbound transportation and subsistence/out-bound transportation
- Guarantee work for ¾ of contract period
- Provide 3 meals/day or kitchen facilities
- Provide Workers Compensation insurance
- Provide copy of work contract/ETA 790 to H-2A worker
- Must pay AEWR to each H-2A worker and all workers performing the same duties

Tax and withholding requirements
- FLSA wage requirements not applicable - no overtime pay required
- Employer does not withhold SS or Medicare for H-2A workers, unless USC – payments to H-2A workers NOT “income”
- Voluntary Federal Income Tax Withholding if employee agrees – written authorization best
Other H-2A Employer Obligations

- Ongoing Recruitment: continue to accept applications up to 50% of the contract; maintain updated recruitment report in file
- Termination of Workers: report any workers terminated or workers that otherwise depart within 2 business days to DOL and USCIS
- Must notify all workers of requirement that they depart U.S. after contract period
- Provide work contract of ETA790 to each worker no later than first workday
- Post and maintain DOL worker protection posters in English and Spanish at worksite
- Adjustment of wages: if AEWR changes upward during contract period, wages must be increased
- Travel Reimbursement: subsistence of $12.46/day or up to $55/day with receipts
- Provide all tools, supplies and equipment to workers
- Retain H-2A recruitment report, resumes, advertising for 3 years
H-2A Payroll Requirements

USDOL requires that you provide your workers with weekly pay statements/earnings records that include the following information:

- Workers name and home address
- Number of hours offered each day
- Number of hours actually worked each day by the worker
- Rate of Pay
- Total earnings per pay period
- Amount of and reasons for any and all deductions taken from earnings
- Any bonuses/credits paid to worker
Farmworker Modernization Act of 2019

- Provides permanent and temporary immigration for ag purposes
- Legalizes undocumented farmworkers already present in U.S.
- Increase number of green cards for Ag workers (40,000)
- H-2A workers could be sponsored for green cards after 10 years – workers can self-sponsor
- Allows indefinite extensions of H-2A during green card process
- For H-2A workers, freeze minimum wage in 2020; prohibit increase during contract period; cap annual wage increase at 3.25%; after 2030, new minimum wage calculation
- Single online portal for processing applications
- Longer grace period for H-2A workers to find other employer
- 50% rule reduced to 33% of contract period
- Extend H-2A period from 1 year to 3 years
- Provide renewable legal status to undocumented farmworkers with 180 days of experience
The information in this presentation is intended as general background information on immigration law and H-2A issues. It is not to be considered as legal advice with regard to any immigration issue. Immigration law and forms change often and information becomes rapidly outdated.

Additional information on immigration issues, as well as updates on new developments, can be found on our web site at https://www.harrisbeach.com/practice/immigration-law.
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