

# H-2A: 101

## Addressing Persistent Labor Shortages

Jason Resnick  
Senior Vice President and General Counsel  
Western Growers

New Mexico State University and  
The Chile Pepper Institute

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# Overview

- **Why Use H-2A ?**
  - Growers in the western U.S. are experiencing serious shortages of domestic workers
  - H-2A may be the only means of obtaining a legal and reliable agricultural workforce
  - If H-2A is the only option, employers must understand how to best make it work for their farming operations

# Eligibility

- **You must be an agricultural employer:**
  - Place of business physically located in the U.S
  - Possess a valid FEIN
  - Have the ability to hire, pay, fire, supervise, or otherwise control the work of the workers you employ
  - Can be a grower or a farm labor contractor
- **The work must consist of agricultural labor or services:** e.g., planting, raising, cultivating, harvesting, or production of any agricultural or horticultural commodity or secondary agriculture)
- **Full-time work:** At least 35 hours (or more) per work week; and,
- **The need for the work must be seasonal or temporary in nature**
  - Tied to a certain time of the year by a recurring event or pattern (e.g., annual growing cycle), normally lasting 10 months or less.

# H-2A Agricultural Clearance Order Application Process

- **STEP ONE: Submit your job order to State Workforce Agency (SWA)**
  - Prepare and submit an agricultural job order (Form ETA-790A) via **U.S. DOL's Foreign Labor Application Gateway (FLAG)**
  - Must attest to compliance with all program requirements
  - Reviewed by the SWA that serves the state where the actual work will be performed. In New Mexico, the SWA is **the New Mexico Department of Workforce Solutions**
- The SWA will review the job order and accept, deny or issue a notice of deficiency, requiring modification
  - **When: Beginning 75 to 60 days before the start date of work**

# H-2A Agricultural Clearance Order Application Process

- **STEP TWO: File your H-2A Application with the Chicago National Processing Center (NPC)**
  - After obtaining approval from the SWA...
  - Submit H-2A application (Form 9142A) to the OFLC via FLAG
    - The Chicago NPC will review your application, notify you of any deficiencies, and provide you with additional instructions for completing the temporary labor certification process
  - SWA will conduct housing inspection
- **When: No less than 45 calendar days before the start date of work**

# H-2A Recruitment

- **STEP THREE: Conducting Recruitment for U.S. Workers**
  - Job order placed in interstate clearance system
  - Job order posted on electronic job registry
    - <https://seasonaljobs.dol.gov/jobs>
  - The recruitment of U.S. workers is also conducted by the employer who
    - Must contact workers employed in prior years
    - Hire any willing, able and qualified U.S. worker during the recruitment period
- **When: Recruitment begins on the date you receive the Notice of Acceptance from the Chicago NPC and ends at the Fifty percent point of the contract.**

# H-2A Temporary Labor Certification

- **STEP FOUR: Complete the Temporary Labor Certification Process**
  - Submit any additional documents you must submit to the Chicago NPC (e.g., workers' compensation certificate) in order to receive a final determination
  - Should labor certification be granted, move on to the USCIS.
- **When: No less than 30 calendar days before the start date of work**

# H-2A Temporary Labor Certification

- **STEP FIVE: File Petition for Nonimmigrant Visas**
  - Once CNPC issues Labor Certification via email, file the Petition for Nonimmigrant Visas (Form I-129) with United States Customs and Immigration Services (USCIS)
- **When: As soon as possible, but 30 days or sooner before start date of work is best**

# Program Requirements

- **Must provide elevated wages and benefits for H-2A workers and U.S. workers in H-2A jobs, including:**
  - Adverse effect wage rate (AEWR) (In 2020, \$12.91 in NM)
    - 2021 AEWR not yet published
  - Free housing and transportation between housing and worksite
    - Housing and transportation must meet federal, state and local standards
  - Reimbursement of in- and out-bound transportation and subsistence and visa immigration-related costs. If workers pay in-bound costs, they are treated as a deduction and can't reduce first week's wages below minimum wage or AEWR

# Program Requirements

- **Three-Fourths Guarantee of Wages**—employer required to guarantee work equal to at least  $\frac{3}{4}$  of workdays of the total period of contract
  - Accurate recordkeeping is critical.
  - Earnings and payroll statements must include the hours offered to workers, separate from any hours offered over and above the guarantee

# Major Compliance Challenges

- **Incidental work**—work outside of duties described in job order is prohibited. Will bring workers outside of job order into “corresponding employment”
- **Corresponding employment**—U.S. workers performing any work included in job order or any work performed by H-2A workers
  - U.S. workers in corresponding employment are entitled to H-2A wages and benefits
  - Job descriptions must be carefully written to avoid bringing entire workforce into corresponding employment
- **50% Rule**—an H-2A employer must hire any qualified U.S. worker seeking to work in H-2A job up through 50% of contract period

# Major Compliance Issues

- **Deductions from wages**—all deductions must be listed in job order and are unauthorized if not listed
- Deductions that are primarily for the benefit of the employer are unauthorized, including:
  - In-bound transportation, subsistence and visa-related fees
  - Facilitator costs (recruiters in foreign countries)
  - Fees paid by H-2A worker to be selected for job are **illegal**

# Compliance Challenges

- **Abandonment of job and termination for cause**—employer must give DHS notice if H-2A workers abandon job within 2 days after abandonment (defined as failure to come to work for 5 consecutive days) or termination for cause. Failure to do so is up to \$1,500 fine
  - Must give DOL notice if U.S. worker and/or H-2A worker abandons job or is terminated within 2 days
  - Failure to provide notice can result in having to pay  $\frac{3}{4}$  guarantee and civil money penalties to each worker, resulting in astronomical potential liability

# Compliance Challenges

- **Disclosure of the work contract—**
  - H-2A workers must receive copy of the job order and approved labor certification or a written contract with all terms and conditions of employment in language workers understand no later than when applying for visa
  - U.S. workers must be given same information no later than date work begins

# Summary of Compliance Challenges

- **Notice of worker rights—**
  - In addition to providing a copy of the job contract, employers must post a notice of workers' rights under the H-2A program in English and any other language spoken by a significant number of workers
  - DOL provides a poster that can be used

# Compliance Challenges

- **Farm Labor Contractors (H-2ALC)**—must meet all requirements of employer plus the following additional ones when applying for H-2A workers:
  - Copies of contracts with each employer;
  - Names and locations of all growers to which workers are provided;
  - A copy of all MSPA-FLC registrations;
  - Original surety bond, amount depends on number of workers employed

# Compliance Challenges

- **Strike and lockout provisions**—Cannot use H-2A workers if 2 or more employees declare themselves on strike or locked out

# Navigating the H-2A Program— Best Practices

- **Don't use unless committed to mastering program technical requirements**
  - Hire an agent or an attorney to file on your behalf
  - Invest in training staff
  - Conduct regular self-audits
  - Rely on association resources and experts
  - Mistakes in application process can result:
    - In deficiency notices, delays and denials
    - Costly back pay and civil money penalties
    - Potential debarment from program

# Navigating the H-2A Program— Best Practices

- **Carefully write your job order and application—they are treated as a contract**
  - They are critical in attempting to limit “corresponding employment”
  - Certain terms and conditions may lead to deficiencies and denials—be able to justify them

# Navigating the H-2A Program— Best Practices

- **DOL views all employer actions as potentially discriminating vs. U.S. workers**
  - Document all actions taken regarding U.S. workers, i.e., why were they not hired? Why were they fired? Why were they treated differently?
  - Document all disciplinary actions or differences in treatment
  - Be aware of and comply with detailed recordkeeping requirements

# Navigating the H-2A Program— Best Practices

- **After a Wage and Hour Division audit—don't be afraid to challenge findings and demands**—they are “pushing the envelope” on many issues
  - Example: Demand that Arizona employers pay  $\frac{3}{4}$  of all wages for workers who voluntarily quit after a few days because employer didn't give DOL notice of quits within 2 days of their quitting. W&H later changed policy after employer challenges

# Questions?

*Thank you!*

Jason Resnick  
Senior Vice President and General Counsel  
Western Growers  
[jresnick@wga.com](mailto:jresnick@wga.com)