

Fact Sheet #26A: Section H-2A of the Immigration and Nationality Act (INA)

This fact sheet provides general information concerning the application of the H-2A requirements to the agricultural industry for H-2A applications submitted between January 17, 2009 and March 14, 2010. For applications submitted on or after March 15, 2010, see Fact Sheet 26. For applications submitted prior to January 17, 2009, see Fact Sheet 26B.

Introduction

The Immigration and Nationality Act (INA) authorizes the lawful admission of temporary, nonimmigrant workers (H-2A workers) to perform agricultural labor or services of a temporary or seasonal nature. These regulations also apply to the employment of U.S. workers newly hired by employers of H-2A workers in the same occupations and during the period of time set forth in the ETA-approved job order for which the H-2A workers were sought. Such U.S. workers hired by H-2A employers are engaged in corresponding employment.

Employers petitioning for H-2A workers must apply to the Secretary of Labor for a certification that “there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition,” and that “the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.”

Overview of Employer Contractual Obligations

Recruitment of U.S. Workers: In order to demonstrate the need for a specific number of H-2A workers, employers must initially attempt to find U.S. workers to fill these positions. Employers must initiate positive recruitment of U.S. workers no more than 75 calendar days and no fewer than 60 calendar days from the date of need and must continue to offer employment to qualified U.S. workers until the end of the recruitment period, which is 30 days after the first date the employer requires H-2A services or the last date of the employer’s need in the applicable area of employment, whichever is sooner. Employers must offer to the U.S. workers terms and working conditions which are not less favorable than those offered to the H-2A workers.

Termination of Workers: Employers are prohibited from hiring H-2A workers if the employer laid off U.S. workers within 60 days of the date of need, unless the laid-off U.S. workers were offered and rejected the agricultural opportunities for which the H-2A workers were sought. A layoff of similarly employed U.S. workers shall be permitted where all H-2A workers were laid off first. Employers may only reject eligible U.S. workers for lawful, job-related reasons. In order to negate a continuing liability for wages and benefits of such workers, the employer must notify the Department of Homeland Security (DHS) and the Department of Labor (DOL) not later than two working days from the termination or abandonment. Employers must maintain records concerning any worker who was terminated and the reason for such termination.

Rates of Pay: In every H-2A employment situation, the employer must pay all covered workers at least the highest of the applicable “Adverse Effect Wage Rate” (AEWR) in effect at the time recruitment for the position was begun, the applicable prevailing wage, or the Federal or State statutory minimum wage. Wages may be calculated on the basis of hourly or “piece” rates of pay. The piece rate must be no less than the piece rate

prevailing for the activity in the area of intended employment. The appropriate rate should be obtained from the Employment and Training Administration National Processing Center prior to commencing any recruitment.

Work Contract: No later than on the first (1st) day of work, the employer must provide a copy of the work contract which describes all the terms and conditions of employment to each covered worker. In the absence of a separate, written work contract, the employer must provide each worker with a copy of the job order that was submitted to and approved by DOL. The work contract must state:

- the beginning and ending dates of the contract period as well as the location(s) of work;
- any and all significant conditions of employment, including payment for transportation expenses incurred, housing and meals to be provided (and related charges), specific days workers are not required to work (i.e., Sabbath, Federal holidays);
- the hours per day and the days per week each worker will be expected to work during the contract period;
- the crop(s) to be worked and/or each job to be performed;
- the applicable rate(s) for each crop/job;
- that any tools, supplies, and equipment required to perform the duties assigned will generally be provided by the employer at no charge;
- that state workers' compensation insurance or its equivalent will be provided at no cost to the worker; and
- any deductions not required by law which the employer will make from the worker's paycheck.

Guarantees to All Workers: Employers certified for H-2A must agree to provide each covered worker an offer of at least 75% of the hours in the contract period – called the “three-fourths guarantee.” For example, if a 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 need to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/week = 480 hours x 75% = 360).

If during the total work contract period the employer does not offer sufficient hours to the U.S. or H-2A worker to reach the total amount required to meet the three-fourths guarantee, the employer must pay such worker the amount the worker would have earned had the worker actually worked for the guaranteed number of days. Wages for the guaranteed 75% period would be calculated at no less than the rate stated in the Work Contract.

Housing: Employers must provide or secure housing at no cost to H-2A workers and U.S. workers who are not reasonably able to return to their permanent residence at the end of the work day. Employers may elect to secure rental (public) accommodations for the covered workers. In such cases, employers are required to pay all housing-related charges directly to the owner or operator of the housing. Whether employer-provided or secured, employers must submit a timely, formal written request for a preoccupancy housing inspection to the State Workforce Agency (SWA) and must attest on the Application that such housing complies with applicable local, State, and/or Federal housing standards.

Transportation: Employers must provide daily transportation between the worker's living quarters and the employer's worksite at no cost to covered workers living in employer-provided or secured housing. Employer-provided transportation must comply with all applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

Inbound & Outbound Expenses: If not previously advanced or otherwise provided, the employer must reimburse covered workers for reasonable costs incurred for the transportation and daily subsistence from the

appropriate U.S. consulate or port of entry to the place of employment once the worker completes 50% of the work contract period. Upon completion of the work contract, the employer must provide or pay for the covered worker's transportation and daily subsistence from the place of employment to the appropriate U.S. consulate or port of entry.

Records Required: Employers must keep accurate records of the number of hours of work offered each day by the employer and the hours actually worked each day by the worker.

On or before each payday, every worker must be provided an hours and earnings statement showing hours offered, hours actually worked, hourly rate and/or piece rate of pay, and if piece rates are used, the units produced daily. The hours and earnings statement must also indicate total earnings for the pay period and all deductions from wages. Deductions not otherwise required by law must be reasonable and must be specified in the job offer and/or work contract.

Additional Assurances and Obligations: Employers must also attest that the specific job opportunity for which the employer is requesting H-2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute. In addition, employers must attest that they have not and will not discriminate against – or discharge without just cause – any person who has filed a complaint, consulted with an attorney or an employee of a legal assistance program, testified, or in any manner, exercised or asserted on behalf of himself/herself or others any right or protection afforded by sec. 218 of the INA or the H-2A regulations.

H-2A Labor Contractors

An H-2ALC is a person who meets the definition of an “employer” under H-2A 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 in regards to any worker subject to the H-2A regulations: recruiting, soliciting, hiring, employing, furnishing, housing, or transporting.

While H-2A does not require labor contractors to register as such with the Department, any person who is subject to MSPA as a Farm Labor Contractor (FLC) must register with the Department and be issued an FLC Certificate of Registration prior to engaging in any farm labor contracting activity. If required, H-2ALCs are obligated to provide their respective MSPA FLC Certificate of Registration number and to identify the farm labor contracting activities they are authorized to perform.

In addition to meeting the assurances and obligations that any other H-2A employer must meet, H-2ALCs must fulfill the following requirements:

- Conduct separate positive recruitment in each area of intended employment;
- List the name and location of each fixed-site agricultural business to whom they expect to provide H-2A workers;
- List the dates of employment;
- Provide a description of the crops and activities the workers are expected to perform; and
- Contact all U.S. workers employed in the previous season to inform such workers of the job opportunity.

Surety Bond: H-2ALCs are required to provide proof of ability to discharge financial obligations under H-2A by obtaining a surety bond. Such bond shall be procured in the following amounts (and shall be written to cover liability incurred during the term of the work contract period listed on the application):

- \$5,000 for a labor certification with fewer than 25 employees;
- \$10,000 for a labor certification with 25 to 49 employees; and
- \$20,000 for a labor certification with 50 or more employees.

The bond must be payable to the U.S. Department of Labor, Administrator – Wage and Hour Division, 200 Constitution Avenue, NW, Room S-3502, Washington, D.C. 20210.

Housing and Transportation: H-2ALCs must attest that housing (including housing owned, operated, or secured by the fixed-site employer) and transportation provided or secured complies with applicable safety and health standards. For transportation, this includes transportation provided by the employer to transport the workers to and from the worksite and living quarters on a daily basis.

Where to Obtain Additional Information

This publication is for general information and is not to be considered in the same light as official statements of position contained in the [regulations](#).

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4US-WAGE (1-866-487-9243).

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