

H-2B Visa Program Summary

1. GENERALLY

The H-2B classification allows foreign nationals who are citizens of certain named countries, with limited exceptions, to accept temporary non-agricultural employment in the United States, after the employer has obtained temporary labor certification by establishing that there were no willing, able and qualified U.S. workers available during the period of recruitment. The temporary job may be professional, skilled, or unskilled.

“Petitioner” is intended to refer to the employer.

2. CHECKLIST OF REQUIREMENTS

To qualify for the H-2B classification, the following requirements must be met:

- » Temporary need based on one-time occurrence or seasonal, peakload, or intermittent need
- » H-2B visa number available
- » Offer of full-time employment
- » Citizen of country designated on H-2B Countries List
- » Payment of prevailing wage
- » Certified ETA 9142 temporary labor certification for non-agricultural employment with State Workforce Agency (SWA) job order

A. Temporary Service or Labor on One-Time Occurrence or Seasonal, Peakload, or Intermittent Need

The Petitioner **must** establish that:

There are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work;

Employing H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers; and

Its need for the prospective worker’s services or labor is temporary, regardless of whether the underlying job can be described as temporary. The employer’s need is considered temporary if generally the period of duration is one year (or for a specific one-time need of up to 3 years) and it is one of the following:

- » **One-time occurrence** – A Petitioner claiming a one-time occurrence must show that it has:
 - An employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.
 - Not employed workers to perform the service or labor in the past, and will not need workers to perform the services or labor in the future.

- » **Seasonal need** – A Petitioner claiming a seasonal need must show that the service or labor for which it seeks workers is:
 - Traditionally tied to a season of the year by an event or pattern; and
 - Of a recurring nature.

There is no seasonal need if the time period when the employer does not need the service or labor is:

- Unpredictable;
 - Subject to change; or
 - Considered a vacation period for your permanent employees.
- » **Peakload need** – A Petitioner claiming a peak load need must show that it:
 - Regularly employs permanent workers to perform the services or labor at the place of employment;
 - Needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand; and
 - The temporary additions to staff will not become part of the employer's regular operation.
 - » **Intermittent need** – A Petitioner claiming an intermittent need must show that it:
 - Has not employed permanent or full-time workers to perform the services or labor; and
 - Occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The Petitioner must be able to document the “temporary need.” Typically, evidence includes:

- » A statement from the Petitioner that contains: a description of the employer’s business history and activities (i.e., primary products or services) and schedule of operations throughout the year; an explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need; an explanation regarding how the request for temporary labor certification” is a one-time occurrence, seasonal, peakload, or intermittent need; and if applicable, a statement justifying any increase or decrease in the number of H-2B positions being requested for certification from the previous year.
- » Summarized monthly payroll records for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked.
- » Annualized and/or multi-year work contracts or work agreements, invoices, or client letters of intent, with a clear statement of the specific end date of the project or contract.
- » Other evidence that demonstrates how the job opportunity exists and “is temporary in nature.”

B. H-2B Visa Number Available

There is a statutory numerical limit, or “cap,” on the total number of foreign workers who may be issued an H-2B visa or otherwise granted H-2B status during a fiscal year. Currently, Congress has set the H-2B cap at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1 - March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 - September 30).

A petition is counted towards the cap once it reaches USCIS (see step 5 below). Once the H-2B cap is reached, USCIS may only accept petitions for H-2B workers who are exempt from the H-2B cap.

Due to the high number of applicants, there is a likelihood that the Petitioner does not meet the cap and that, despite going through the application process, the employer cannot petition for any foreign workers. For example, during the last application period, the USDOL received about 96,000 applications, for a total of 33,000 visas.

C. Offer of Full-Time Employment

The position must be full time, which is defined as 35 hours per week.

D. Citizen of Country Designated on H-2B Countries List

Subject to some limited exceptions, H-2B petitions may only be approved for nationals of countries that the Secretary of the Department of Homeland Security has designated as eligible to participate in the H-2B program.

The Department of Homeland Security publishes the list of H-2B eligible countries, which is valid for one year from publication. Effective Nov., 2021, nationals from the following countries are eligible to participate in the H-2B program are listed in Appendix A.

E. Pay the Prevailing Wage

The offered wage must equal or exceed the higher of the prevailing wage or the highest wage required by any Federal, State or local law. The wage cannot be based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage. Any piece-rate pay must be shown to be no less than the normal rate paid by non-H-2B employers and must result in a rate at least equal to the offered wage.

F. Obtain Certified ETA 9142 Temporary Labor Certification

See application process below.

3. APPLICATION PROCESS AND TIMELINE

The H-2B application process has several steps to be completed before the Department of Labor, State agencies and USCIS. A summary of the steps is below.

A. Step 1: Petitioner Requests Prevailing Wage Determination (PWD) from the USDOL

The employer must request PWD from the USDOL by filing form ETA Form 9141. The request must be filed between 150 and 135 days before work start date.¹ This determination, which will have a validity period of between 90 and 365 days, must be valid on the date the job order is posted.

B. Step 2: Petitioner Submits a Job Order to the Applicable State Workforce Agency

Between 75 and 90 days before the start date, the employer must submit a job order must be submitted to the State Workforce Agency (SWA) serving the area of intended employment. Each state has a slightly different process to place the job order (I am familiar with New Hampshire and Maine).

This order must contain extensive information about the job opportunity, specifically:

- » Name the employer and provide contact information;
- » State that the position is full time and temporary;
- » Indicate the number of job openings;
- » Describe the position with sufficient information to apprise U.S. workers of the services or labor to be performed, including:
 - Duties;
 - Minimum education and experience required;
 - Work hours and days;
 - Anticipated start and end dates of the position;
- » Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside;
- » State the offered wage or range of offered wages, ensuring that the offer equals or exceeds the higher of the prevailing wage or the federal, state, or local minimum wage;
- » If overtime is available, indicate that fact and the amount to be paid for it;
- » If training will be provided, say so;

¹ The start date must be either April 1 or October 1.

- » State that the employer's standard for computing wages is a single work week;
- » Indicate the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent;
- » If the employer provides the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits to be provided;
- » State that the employer will make all paycheck deductions required by law;
- » Specify other paycheck deductions;
- » Detail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order. Subsistence refers to meals and, if required, lodging costs incurred on the employer's behalf along the way.;
- » State that the employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, if the worker completes the certified period of employment or is dismissed from employment for any reason by the employer before the end of the period;
- » If the employer will provide daily transportation to and from the worksite, say so;
- » State that the employer will reimburse the H-2B worker within the first week for all visa, processing, border crossing, and other related fees;
- » Indicate that the employer will provide, without charge or deposit, all tools, supplies, and equipment required for the job;
- » Articulate the "three-fourths guarantee," discussed later in this chapter, whereby employment must be offered for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period, if the period of employment is 120 days or more days, or each 6-week period of employment is less than 120 days;
- » Instruct applicants to inquire or apply to the nearest SWA office of the state in which the advertisement is appearing; and
- » Include the SWA contact information.

The SWA will review the job order and notify USDOL within six business days if the order does not comply with applicable criteria. The SWA is to post the job order upon receipt of the Notice of Acceptance from USDOL (step 3 below). This posting will alert job applicants within the state that the job is available. During the recruitment period (step 4 below), the employer must interview all applicants who applied through the SWA.

C. Step 3: Petitioner Submits Temporary Labor Certification Application to USDOL

Concurrently with the SWA submission (that is, within 75 and 90 days before the start date), the Petitioner must submit form ETA 9142B with the USDOL in order to receive a Temporary Employment Certification (TEC).

The TEC is filed electronically, enclosing copies of: (1) PWD; (2) job order being concurrently submitted to SWA; (3) copies of all contracts with agents and/or recruiters, including foreign recruiters; and (4) evidence of temporary need.

The USDOL will conduct a randomized lottery to assign each application a group (A, B, C, D, etc.). This determines the order in which the USDOL will review petitions and issue notices of acceptance or deficiency.

Since the Petitioner can only proceed with the steps below after USDOL reviews the petition and the USDOL typically receives more applications than number of visas available, applications that fall within groups C, D and after are likely not going to make the cap.

Upon receipt, USDOL reviews the application and job order for compliance, and issues an Notice of Acceptance (NOA) (in which case the Petitioner may proceed with the recruitment) or Notice of Deficiency (NOD) (in which case the Petitioner must remedy the deficiency detected by the USDOL).

D. Step 4: Employer Conducts Recruitment and Submits Report

After receiving the NOA, the employer must complete recruitment of U.S. workers within 14 calendar days of when the NOA is issued. However, “the employer must accept referrals and applications of all U.S. applicants until 21 days before the employer’s start date of need.

The NOA will indicate which recruitment steps must be completed by the employer, but they generally include:

- » Place a notice in place of employment for 15 business days
- » Contact employees from last year
- » Posting the job opportunity in the SWA system
- » Posting the job opportunity by the USDOL on *SeasonalJobs.dol.gov*.

On or before date specified in the NOA, the employer must prepare, sign, and date a recruitment report. Recruitment report cannot be submitted until the Notice of Job Opportunity posting period has been completed and all recruitment action has been completed.

The recruitment report must: (i) identify each recruitment activity or source by name; (ii) list the name and contact information for each U.S. worker who applied or was referred and state whether job opportunity was offered to the U.S. worker and he declined; (iii) confirm the former U.S. employees were contacted if applicable and by what means; (iv) confirm if bargaining representative was contacted or that posting was done; (v) confirm that community based organization was contacted if applicable; (vi) confirm that additional recruitment was conducted; and (vii) the lawful job-related reason that each U.S. worker who applied was not hired. The employer has a duty to update the recruitment report within 21 days before the employment start date.

The USDOL will review the report and will then issue a decision to may grant, deny, or partially certify a TEC. A certified application is valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified in the TEC. If a TEC is issued, the employer may then submit an application to USCIS.

E. Step 5: Petitioner Submits Form I-129 to USCIS

After receiving a temporary labor certification for H-2B employment, the Petitioner must file Form I-129 with USCIS. Note that USCIS will accept H-2B petitions until the cap is reached. **In order to file the petition before the cap is reached, the employer must complete all the steps above within the timeframe.**

The petition is filed on form I-129, together with the following documents:

- » Approved TEC from USDOL.
- » Evidence addressing temporary nature of employer's needs.
- » Evidence for the number of employees needed.
- » If applicable, evidence that agent meets qualification above under §214.2(h)(2)(i)(F).
- » Itinerary, including services and dates of engagement and names and addresses of employer and place of work if multiple work sites or if filed by agent.
- » Evidence of applicants' nationality and separate filing for employees from noneligible countries.
- » Filing Fees. Currently, filing fees are \$610. H-2Bs are currently eligible for premium processing (\$1,500), which guarantees that USCIS will issue a decision within 15 business days of filing.

A single I-129 may include more than one worker, and workers could be named or unnamed (will have to be identified later, at the time the worker attends interview at the US consulate or embassy).² The petition may combine different countries from where workers will be coming, but not named and unnamed beneficiaries.

F. Step 6: Prospective Workers Outside the United States Apply for Visa and/or Admission

After USCIS approved Form I-129, prospective H-2B workers who are outside the United States must:

- » Apply for an H-2B visa with the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad and then seek admission to the United States with U.S. Customs and Border Protection (CBP) at a U.S. port of entry; or
- » Directly seek admission to the United States in H-2B classification with CBP at a U.S. port of entry in cases where an H-2B visa is not required.

4. DOCUMENTS NECESSARY TO PREPARE THE PETITION

To prepare an H-2B petition, the employer must provide the following documents:

- » Job description, including duties, offered salary, offered hours, employment period and job requirements, and whether on-the-job training is available
- » Evidence of temporary need (see 2 above)
- » Copies of the foreign national's academic credentials (résumé, degrees including transcripts, and/or employment history, where applicable)
- » Basic information about the company
- » Copy of biographic page(s) of passport(s) of the foreign national and any dependent spouse and children
- » Copies of contracts with recruiters

ABOUT THE AUTHOR



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² If the beneficiary is in the U.S. the H-2B petition must name the beneficiary. However, if the beneficiary is outside the U.S. he need not be named unless USCIS needs the information to establish eligibility or he is not from a participating country under the H-2B program. Unnamed beneficiaries must be shown on the petition by total numbers and their nationalities must be stated.

Appendix: H-2B Eligible Countries List

Effective Nov. 10, nationals of the following countries are eligible to receive H-2A and H-2B visas:

| | | | |
|--------------------------|-----------------|--------------------|----------------------------------|
| » Andorra | » Estonia | » Mauritius | » San Marino |
| » Argentina | » Fiji | » Mexico | » Serbia |
| » Australia | » Finland | » Molodva* | » Singapore |
| » Austria | » France | » Monaco | » Slovakia |
| » Barbados | » Germany | » Mongolia** | » Slovenia |
| » Belgium | » Greece | » Montenegro | » Solomon Islands |
| » Bosnia and Herzegovina | » Grenada | » Mozambique | » South Africa |
| » Brazil | » Guatemala | » Nauru | » South Korea |
| » Brunei | » Haiti | » The Netherlands | » Spain |
| » Bulgaria | » Honduras | » New Zealand | » St. Vincent and the Grenadines |
| » Canada | » Hungary | » Nicaragua | » Sweden |
| » Chile | » Iceland | » North Macedonia | » Switzerland |
| » Colombia | » Ireland | » Norway | » Taiwan*** |
| » Costa Rica | » Israel | » Panama | » Thailand |
| » Croatia | » Italy | » Papua New Guinea | » Timor-Leste |
| » Republic of Cyprus | » Jamaica | » Paraguay* | » Turkey |
| » Czech Republic | » Japan | » Peru | » Tuvalu |
| » Denmark | » Kiribati | » Philippines** | » Ukraine |
| » Dominican Republic | » Latvia | » Poland | » United Kingdom |
| » Ecuador | » Liechtenstein | » Portugal | » Uruguay |
| » El Salvador | » Lithuania | » Romania | » Vanuatu |
| | » Luxembourg | » Saint Lucia | |
| | » Madagascar | | |
| | » Malta | | |

*Moldova and Paraguay are eligible to participate in the H-2A program but they are not eligible to participate in the H-2B program. Moldova's eligibility for the H-2A program remains effective until Jan. 18, 2022.

**Mongolia and the Philippines are eligible to participate in the H-2B program but are not eligible to participate in the H-2A program.

***Regarding all references to "country" or "countries" in this document, it should be noted that the Taiwan Relations Act of 1979, Pub. L. No. 96-8, Section 4(b)(1), provides that "[w]henver the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." 22 U.S.C. § 3303(b)(1). Accordingly, all references to "country" or "countries" in the regulations governing whether nationals of a country are eligible for H-2 program participation, 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1), are read to include Taiwan. This is consistent with the United States' one-China policy, under which the United States has maintained unofficial relations with Taiwan since 1979.