Chicago National Processing Center
Ask the CO’s: H2 Visa Programs

Office of Foreign Labor Certification
Employment and Training Administration
United States Department of Labor
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Workload Trends
H-2A Rental or Public Accommodations
H-2A Farm Labor Contractors
H-2A Temporary Need
H-2B Advanced Filing Tips
H-2B Temporary Need
H-2A/B Tips for Responding to Audits.
Workload Trends

Shane Barbour, Center Director – Chicago National Processing Center
FY 2018 Workload

- 11,300 labor certifications
- 242,700 workers certified
- 97% certification rate
- 62% of certifications for individual farms-ranches
- 43% of workers certified for farm labor contractors

Top States of Employment

<table>
<thead>
<tr>
<th>State</th>
<th>FY 2012</th>
<th>FY 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>8,475</td>
<td>32,300</td>
</tr>
<tr>
<td>Florida</td>
<td>6,945</td>
<td>30,400</td>
</tr>
<tr>
<td>Washington</td>
<td>7,086</td>
<td>24,800</td>
</tr>
<tr>
<td>North Carolina</td>
<td>10,536</td>
<td>21,700</td>
</tr>
<tr>
<td>California</td>
<td>3,089</td>
<td>18,900</td>
</tr>
</tbody>
</table>
US Department of Labor
H-2A Applications Received, FY 2012 vs. FY 2018

![Graph showing H-2A Applications Received for FY 2012 and FY 2018]

- FY 2012
- FY 2018

- October
- November
- December
- January
- February
- March
- April
- May
- June
- July
- August
- September

The graph illustrates the number of H-2A applications received each month for the fiscal years 2012 and 2018. The peak months for applications are observed in January and February for both years.
Q1 and Q2 (Oct 1<sup>st</sup> through March 31<sup>st</sup>)

<table>
<thead>
<tr>
<th></th>
<th>FY 2016</th>
<th>FY 2017</th>
<th>FY 2018</th>
<th>FY 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workers Requested</td>
<td>93,319</td>
<td>108,463</td>
<td>137,855</td>
<td>148,472</td>
</tr>
<tr>
<td>Apps Received</td>
<td>5,616</td>
<td>6,486</td>
<td>7,483</td>
<td>8,556</td>
</tr>
</tbody>
</table>
H-2B Program Features

- 9,490 applications processed during FY 2018
- 98% certification rate
- Peak season (Dec-Feb; July-Aug)

Top Occupations of Employment

<table>
<thead>
<tr>
<th>Occupation</th>
<th>FY 2012</th>
<th>FY 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Landscaping ...</td>
<td>24,094</td>
<td>67,112</td>
</tr>
<tr>
<td>Forest and Conservation</td>
<td>7,522</td>
<td>11,093</td>
</tr>
<tr>
<td>Maid and Housekeeping</td>
<td>3,113</td>
<td>9,180</td>
</tr>
<tr>
<td>Amusement and Recreation</td>
<td>5,125</td>
<td>7,865</td>
</tr>
<tr>
<td>Meat, Poultry and Fish ...</td>
<td>1,304</td>
<td>6,011</td>
</tr>
</tbody>
</table>
US Department of Labor
H-2B Applications Received, FY 2012 vs. FY 2018

![Graph showing H-2B applications received in FY 2012 vs. FY 2018](image-url)
US Department of Labor
H-2B Applications Received and Worker Requested

January (1st week)

<table>
<thead>
<tr>
<th>Year</th>
<th>Workers Requested</th>
<th>Apps Received</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2016</td>
<td>27,061</td>
<td>1,552</td>
</tr>
<tr>
<td>FY 2017</td>
<td>53,220</td>
<td>2,993</td>
</tr>
<tr>
<td>FY 2018</td>
<td>81,678</td>
<td>4,535</td>
</tr>
<tr>
<td>FY 2019</td>
<td>96,490</td>
<td>5,276</td>
</tr>
</tbody>
</table>
H-2A Rental or Public Accommodations

Lynette Wills, H-2A Certifying Officer
H-2A employers must provide housing

Housing maybe either rental or other public accommodations. Rental or other public accommodations must meet local standards for such housing

In absence of local standards, State standards will apply. If neither local or State standards exist DOL OSHA standards at 29 CFR 1910.142 apply
• Charges for rental housing must be paid directly by employer to owner/operator of the housing.

• Check with the SWA in area of intended employment to determine if local or State standards require inspection
  • If SWA inspection is required, the employer must submit a copy of the SWA inspection report or certification.
Employers must submit documentation to the CO identifying which standards (i.e., local, State, or Federal) apply to the rental housing or public accommodations it will use, and demonstrate that the housing or accommodations comply with those standards.

Employers are encouraged to submit this documentation when filing the H-2A Application for Temporary Employment Certification, Form ETA-9142A.
If SWA or another local, State, or Federal authority inspection is not required, the employer must submit:

- Submit written statement, signed and dated, identifying applicable housing standards and confirm that no local, State, or Federal inspection is required;
- Attest that the accommodations are compliant with applicable standards.
- The written statement may be prepared and signed either by the employer, the employer’s attorney or agent, or the person or entity that owns, controls, or otherwise operates the housing.
If rental housing or public accommodation standards require inspection by local, State, or Federal authority other than the SWA, employer must submit copy of official documentation from that authority.

Documentation may include, but is not limited to, a certificate from the local or State Department of Health or building department (e.g., the current certificate of occupancy).
Business and tax licenses are not sufficient to show housing meets applicable standards

All required housing documentation must be provided prior to issuance of Final Determination
H-2A Farm Labor Contractors

Ishel Quintana, H-2A Certifying Officer
In FY 2017, Applications Received from H2ALC’s increased by 32% as compared to FY 2016

- 2000 applications filed by H2ALC’s in FY 2018
- Current FY19 on track for double digit increase in number of applications filed
- 43% of workers certified are for farm labor contractors
Issues with H2ALC documentation submitted

- Itinerary not submitted or not complete - missing dates of work at specific locations, missing worksites, gaps of time when no work is performed listed, general inconsistent information
- Original surety bonds not submitted, surety bonds not signed by principal, surety bonds for incorrect amount, bonds being sent to WHD instead of CNPC
- Work contracts not submitted, not signed or dated, letters of intent provided, incomplete set of work contracts submitted (multiple fixed site growers), general inconsistencies
- FLC documents not submitted, documents expired, insufficient number of vehicles to transport workers, insufficient number of drivers to transport workers or alternative explanation, assurance to renew FLC not provided
H-2A Temporary Need

John Rotterman, H-2A Certifying Officer
Issues with Temporary and Seasonal Need

- The burden is on the employer to establish that its need is temporary or seasonal.
- We are seeing industries and occupations which do not facially possess a temporary or seasonal need, e.g., poultry, greenhouses, etc.
- Employers should affirmatively present, or be prepared to in response to a NOD, documentation to substantiate their claimed need.
  - Payroll showing increases in labor need corresponding to the period sought.
  - Sales showing the same.
  - Documentation to substantiate statements made in the application.
H-2B Advanced Filing Tips

Alejandra Dominguez, H-2B Certifying Officer
All Cases:

- Valid ETA-9141 Prevailing Wage Form (PWD) – unless an emergency filing
  - Multiple worksites
  - Highest wage (consider increasing min wage)
- Completed Form ETA-9142 (completed online if filing electronically)
  - Email address for employer’s POC
  - Email address for employer’s agent/attorney
Signed and dated Form ETA-9142, Appendix B

Attorney or Agent Documentation (if applicable)

Foreign Labor Recruiter Agreement(s), or a statement that the employer is not using a Foreign Labor Recruiter
- A negative response is required (attachment preferred with clear title)

State Workforce Agency (SWA) Job Order
- Expedite amendments to job orders

Forestry Cases (Itinerary Issues)
H-2B Temporary Need

Leslie Abella, H-2B Certifying Officer
Always remember to check information in the application against the regulatory requirements for the type of temporary need requested.

Employers can help avoid a Notice of Deficiency (NOD) if the temporary need basis is well established up front.

Additional documentation is not required with the filing, but the employer’s temporary need should be fully explained in its Statement of Temporary Need.
The employer’s Statement of Temporary Need must explain:

(a) The nature of the employer’s business or operations

**TIP:** Historical information about the company is not needed. Information about the nature of the employer’s business or operations as they relate to a temporary need should be provided.

(b) Why the job opportunity and number of workers being requested for certification reflect a temporary need, and
(c) How the employer’s request for the services or labor to be performed meets the chosen standard of a seasonal, peakload, one-time occurrence, or an intermittent basis.

*TIP:* Employers should be mindful that their Temporary Need Statement is complete and addresses these topics.
If a NOD is received, the employer must keep in mind that the response to the NOD must serve to establish the regulatory requirements, as well as be responsive to what is specifically asked for.

The employer must provide all documents requested in its NOD. If the employer is unable to submit the requested documents, the employer must explain why the documents were not included in its NOD response.

Documents that are submitted in response to a NOD on temporary need must be responsive to the issue. Also, employers should provide an *explanation* as to how submitted documents are to be read, if not clear, and how the document(s) serve to support temporary need.
H-2A and H-2B
Tips for Responding to Audits

Marva Hamilton, Audit Certifying Officer
Audits may be conducted on certified H-2A applications and any adjudicated H-2B applications

Applications selected within the sole discretion of the Certifying Officer (CO)
Audit begins with issuance of a Notice of Audit Examination (NOAE) Letter:

- Requests documentation related to the application
- Due date for response is no more than 30 days from the issue date
- Letter indicates that failure to comply with the audit process may result in the imposition of additional recruitment requirements, revocation of certified application, or program debarment
Read the Notice of Audit Examination letter carefully and respond to all items requested.

NOAE letters can and do change periodically. Make sure to respond to the instructions in the letter issued to you --- not a previous NOAE.
- A single extension (up to 14 days) may be granted during audit examination

- Extenuating circumstances related to timely or complete responses to audits will be considered on an individual basis

- Employer should make every attempt to submit all information requested in one response.
Tips on Responding to H-2A and H-B Audits

General, Non-Program Specific Tips
Helpful Tips

- Help us complete your audit by providing as much supporting documentation as you can.

- A statement from the employer without supporting documentation is not always sufficient to address a problem we see or a question we have about what was submitted.
Helpful Tips – Recruitment of U.S. Workers

- We need to see documentation that employer continued their recruitment of U.S. workers as required by the H-2A and H-2B regulations.

- These activities should be recorded during the time the recruitment was to take place --- not after the initiation of the audit.
Helpful Tips – Newspaper Advertisement

- We need to see proof that all required advertisements were actually published

- Copies of the actual newspaper page showing the ad, the newspaper name and the publication date is the best documentation
Helpful Tips – Newspaper Advertisement

- You can also submit a notarized affidavit from the newspaper indicating the ads ran and showing the newspaper name, publication dates and ad language.

- Invoices, receipts, requests for advertisement are not acceptable documentation as they don’t necessarily show proof the ad was published.
Helpful Tips – Newspaper Advertisement and Job Orders

- Advertisements and job orders are intended to help the employer recruit available and qualified domestic workers --- new workers

- It’s critical that employers let potential U.S. workers know if they will pay higher wages based on experience or if there will be any other variances in wages
Helpful Tips – Earnings Records

- We’re looking for documentation that shows workers were paid at least the wage required by the regulations.
- Paid wages that are different than advertised wages will be questioned.
- The employer should explain any of those differences up front.
Helpful Tips – Earnings Records

- Few, if any, assumptions will be made about earnings records

- We’re going to ask questions if something is unclear

- We need to see earnings records that are broken down by no less than pay period

- Do not submit monthly summaries or multiple month summaries
Helpful Tips – Earnings Records

- Provide documented explanations if workers do not consistently work full-time hours
- Identify, quantify and explain all deductions
- Exception: The employer does not have to explain Federal, State and Local taxes but just about everything else requires a description
Helpful Tips for Responding to H-2A Audit Examinations
Helpful Tips

- Submit translations of documentation in English, particularly work contracts outside of the certified job order/application

- Ensure the newspaper advertisements contain all minimum content required by 20 CFR 655.152
Helpful Tips

- The reason for the late start” and/or “early end” to work must be explained and documented

- Earning records must be submitted as specified in Departmental regulations at 20 CFR § 655.122(j).
  - When submitting payroll documentation, if the employer has multiple concurrent certs please specify which worker belongs to which cert
Helpful Tips for Responding to H-2B Audit Examinations
Helpful Tips – Job Orders

- Provide proof that the required job order was actually placed and ran

- Copy of the request form asking the SWA to open a job order is not sufficient

- The best documentation would be copies of the screens taken from the SWA website showing entire job order and language
Helpful Tips – Number of Workers / Period of Need

- The number of workers and dates worked do not have to match the application exactly, but if there are significant differences, we need to know why.
Helpful Tips – Early Separation of Workers

- Employer should report any early separation of H-2B workers for any reason

- Many employers quote wage and hour regulations when explaining that they don’t need to report early separation unless it’s more than 30 days; however

- H-2B regulations say that the employer must report any workers that separate early