

Connect. Recruit. Manage.



INTRODUCTION TO THE H-2A PROGRAM

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ABOUT USA FARM LABOR, INC.

OUR MISSION

USA Farm Labor, Inc. is driven to connect American farms with the global workforce to cultivate a strong future for agriculture worldwide.

OUR VALUES

1. Integrity: We always treat others as we would want to be treated.
2. Fairness: We always strive for win-win solutions.
3. Development: We never stop improving.



H-2A PROGRAM 101

It's no secret: The H-2A Program is complicated. There are a lot of forms, steps, and regulations involved. On top of that, there are decades of history, court cases, and legal precedent that play into how the program functions today.

But don't worry. We'll take care of the nitty-gritty details and make the process as smooth as possible.

However, there are some things about the H-2A Program that you need to know in advance, both to help the process run smoothly and to avoid pitfalls, violations, and penalties from the U.S. Department of Labor. This document provides a brief overview of those things.

Please note however that we are not lawyers. The information provided in this document does not, and is not intended to, constitute legal advice. All information in this guide is for informational purposes only.

Qualifying for the H-2A Program

First, let's start at the beginning. To qualify for the H-2A Program, a business's need for workers must:

- be agricultural in nature,
- not involve processing a commodity from its raw state into an altered state (e.g., canning), and
- be temporary (generally less than ten months long).

The business must also be able to prove that it is unable to find qualified American workers for open job positions—and that hiring H-2A workers will not put American workers at a disadvantage. This is tested during the Advertising Phase of the process.

In addition, except in cases involving Custom Harvesters and Farm Labor Contractors, if the workers will be handling commodities of any kind, at least 51% of each commodity must have been produced by the employer.

The Process

- 1. Pre-Filing** – The government requires a lot of information from you before it will grant you a Temporary Labor Certification. Pre-Filing is the stage where we work with you to get that information together. We will ask you to fill out an application on our database, which will give us most of the information that we will need to prepare your paperwork.

Once we have your information and all the required documents, we will create an Application for Temporary Labor Certification for you and send it to you, along with a packet of documents for you to approve and sign. Please read, electronically sign, and return both the Application and the document packet as quickly as possible. The process cannot move forward until this phase is complete.

- 2. SWA** – We then submit your Application, on your behalf, to your local State Workforce Agency (SWA). The SWA then checks over the Application and, if everything is in order, approves it, creates a Job Order (to advertise the job to individuals seeking similar jobs in your area), and has a housing inspector set up an appointment to visit and inspect your worker housing.
- 3. DOL** – We then submit, on your behalf, the approved Application, along with additional information and documentation, to the U.S. Department of Labor (DOL). Like the SWA, they look over the Application for any problems. If they do not see any issues, they approve the Application.
- 4. Advertising** – The DOL then posts the details of the job on seasonaljobs.dol.gov. The process then pauses for about a

week to give American workers an opportunity to apply to work for you. We call this the Advertising Phase.

During the Advertising Phase (and at any time up until the half-way point of your period of need), if any American workers apply to work for you or are referred to you through the SWA, you must interview them and complete an Interview Form (which we can provide). If the applicant is qualified, willing, able, and available, you must offer the job to the applicant. Failure to do so may be seen as discrimination and may result in heavy penalties.

Be sure to send us copies of all of your Interview Forms so we can generate a Recruitment Report on your behalf. After the Advertising Phase, we submit the Recruitment Report, on your behalf, to the DOL. Once they are satisfied, they will grant you a Temporary Labor Certification, which allows you to request visa petitions from the U.S. Citizenship and Immigration Services (USCIS).

5. **USCIS** – We generate a Petition for a Nonimmigrant Worker and submit it, on your behalf, to the USCIS along with your Temporary Labor Certification and some other documentation. Like the SWA and DOL, they examine all the applicable paperwork. If they do not see any issues, they will grant you an Approval Notice.

If you are trying to hire workers who are outside of the country, the USCIS sends the visa petitions to the applicable consulate. The workers then go to the consulate and undergo an interview. If the consulate is satisfied that the workers can legally work in America and will not attempt to immigrate illegally, they grant each worker a visa. The workers then schedule flights, with the help of our recruiters, and come to America.

On the other hand, if the worker you would like to hire is already here on an H-2A visa, the USCIS will send the worker an Approval Notice confirming that his or her status has been extended and that the worker can legally work for you.

Timeframes

In general, the whole process, from application to worker arrival, takes about 90 days. However, various issues can cause delays. For example, the consulate often gets backed up in the spring because the number of visa applicants increases to a level that the consulates do not have the manpower to adequately handle.

When Should You Apply?

H-2A regulations only allow employers to submit Applications for Temporary Labor Certification 60-75 days before the date on which they need workers to arrive. However, in cases with extenuating circumstances, employers can sometimes submit an Application 45 days before the start date.

We recommend that you complete an application in our database and provide us with all the required information and documentation at least 90 days before you want workers to arrive. This will give us enough time to process your information, create your Application for Temporary Labor Certification, and submit everything to the government 75 days before you want workers to arrive.

Selecting Start and End Dates

With the H-2A Program, you can hire workers for specific, temporary needs. The regulations allow you to hire H-2A workers at any time of the year as long as your need for workers is temporary and, in most cases, lasts no longer than 10 months.

During the application process, you will choose a start and end date (your Period of Need) for the workers. These dates should reflect your need for workers as accurately as possible. For instance, if you generally plant crops in early March and generally

finish harvesting them near the end of November, you might request a start date of March 1st and an end date of November 30th.

Of course, there are many variables that can affect a period of need, and most of them are impossible to foresee 90 days in advance, but you should give your best good-faith estimate of when you will need workers to start and when they will be done working.

Employers should never request dates that either start earlier or end later than they genuinely expect to need workers. These dates are scrutinized by the U.S. Department of Labor both during the application process and in the event of an audit, and if they suspect that you have not been honest about your period of need, you could run into some major issues.

How Many Workers Should You Request?

As with your period of need, the number of workers you request certification to hire must accurately reflect your actual needs. Employers should never request more workers than they expect they will need. Rather, they should always base the number on their best good-faith estimate of how many workers they would need under normal conditions.

If You Need Workers at Different Times of the Year

If You Need Workers at Different Times of the Year, you may be able to submit multiple applications and obtain certification to hire workers during each period.

If the two or more periods are related but do not, together, cover more than 10 months of the year, you can usually submit multiple applications—one for each period. For example, if you want to hire one worker to help you with spring planting and work through the harvest, and you also want to hire two additional workers later to help with just the harvest, you should submit one application for the first worker and then a separate

application for the other two workers. You may not simply submit one application for three workers and then hire one worker at the start and the other two at the end. Under the current regulations, staggered entry is not allowed.

On the other hand, if the multiple periods, together, would involve employing H-2A workers for more than 10 months of the year, you may submit multiple applications, but only if the needs for workers are separate and distinct from each other in terms of all three of the following:

- the needs for the work to be done,
- the job duties involved, and
- the worker requirements.

For example, if you need some workers to perform crop-farming duties from March through November and also need different workers to help with calving in the winter, you may be able to submit one application for crop farm workers and one application for livestock workers.

Again, this is only allowed if the different needs are for workers with different skills and requirements to perform different duties. If the jobs are similar or require similarly skilled workers, the separate needs will be seen as a single, combined need lasting longer than 10 months. As a result, none of the needs will qualify for the H-2A Program.

Furthermore, each need for workers must be genuine. H-2A regulations forbid employers from fabricating needs just to keep workers around throughout the year.

Employer Obligations

H-2A regulations require employers to fulfill certain obligations towards workers. Failure to follow these regulations could result in heavy fines from the Department of Labor (often around

\$1,900 or more per violation, per worker). The following list is by no means exhaustive, but it covers the most common issues.

- Provide workers (H-2A and American) with work contracts or copies of the Approved Job Order (ETA Form 790).
- Reimburse workers for their transportation and subsistence expenses within the first pay period, including:
 - the Consulate Fee of \$190,
 - the round-trip plane tickets, and
 - subsistence costs, including food, lodging, and fuel costs (view the required amount on the DOL website).
- Help the workers get everything they need upon arrival, including:
 - a driver's license/CDL (if required for the job),
 - a Social Security Card, and
 - a bank account.
- Give the workers what they need for the job, including:
 - free housing that meets OSHA or ETA standards, depending on when it was built,
 - free transportation to and from the worksite every day and to the grocery store once a week, and
 - any required tools, safety gear, including a means of two-way communication (e.g., a cell phone).
- Ensure all H-2A workers are covered by Worker's Compensation at all worksites for the entire contract period.
- Pay workers, at a minimum, the state minimum wage, the federal minimum wage, the prevailing wage, or your state's Adverse Effect Wage Rate (as published by the Department of Labor), **whichever is the highest.**
- Pay workers **at least twice per month.** You can pay workers weekly, bi-weekly, or semi-monthly. Your chosen pay schedule must be specified in advance.
- Provide each worker with a pay slip at the end of every pay period. You can find a pay slip template with all the required fields on our database. If you use a different template, be sure your pay slips include:
 - the worker's first and last name,

- the worker's permanent, **foreign** address,
- your Federal Employer Identification Number,
- the dates of that pay slip's pay period,
- the number of hours of work offered each day,
- the total number of hours actually worked each day,
- start and end times for each day,
- the total number of hours worked during the pay period,
- the total amount paid for the pay period, and
- the date of payment.
- If your state requires it, pay workers the time-and-a-half rate for overtime. In most states, H-2A workers are exempt from overtime. However, some states, like California and Minnesota, require employers to pay the overtime rate if workers work more than a set number of hours.
- Never take deductions from a worker's paycheck, except as required by law (e.g., taxes, if applicable) or as specified on your Application for Temporary Labor Certification.
- If you have American workers performing the same duties as H-2A workers, pay them at least the same wage rate and offer them the same benefits.

Meal Arrangements

Employers are partially responsible for worker meals. Employers must choose and adhere to one of the following options for the duration of the work period:

- Option 1: You provide three meals a day for each worker. In this case, you may charge each worker (or deduct from their pay) the daily rate set by the Department of Labor for the provided food. This rate changes periodically. You can find the current rate on the DOL's website or by contacting us.
- Option 2: You furnish free and convenient cooking and kitchen facilities for workers to prepare their own meals and provide them with free transportation once a week to purchase groceries.

Work Limitations

H-2A workers may only perform the job duties listed on your application. Those are the only job duties they have received approval for. Similarly, H-2A workers may only work for you and only on approved worksites. Be sure to list all the applicable job duties and worksites on your application.

Workers' Compensation Policy

Every employer that participates in the H-2A program must obtain a workers' compensation policy to cover the workers in each state where they will be working. If you plan on hiring workers to perform job duties in multiple states, be sure that your workers' compensation policy covers work done in those states.

Domestic Workers

The H-2A Program was set up with rules to make sure that Americans are not put at a disadvantage in the job market. If a qualified, willing, able, and available American worker expresses an interest in your job opportunity, **you must offer the job to that worker**. This rule applies up until the half-way point in the contract period. You are required to offer the job to qualified, willing, able, and available domestic workers who apply even if you have already hired a full crew of foreign workers. In that case, you will be required to let one of the foreign workers go so that the American can have the job. Failure to offer the job to a qualified, willing, able, and available American applicant may result in heavy fines, debarment from the program, and a lawsuit from the worker.

Never Charge Workers Fees of Any Kind

In the H-2A Program, recruiters, agents, and employers are all prohibited from charging workers fees of any kind or passing along expenses to them. Workers must never be charged fees of any kind, nor can they be asked to cover the expenses associated with the use of the H-2A Program. We **never** charge workers any

fees of any kind, and we require all the recruiters in our network to follow this rule as well.

H-2A Workers and Taxes

Taxes are, ultimately, the worker's responsibility. H-2A workers are generally required to pay federal income taxes. Some states also require workers to pay state taxes. However, H-2A workers are exempt from Medicare, Social Security, and Unemployment tax.

Workers may ask you to withhold their taxes, and you can do so if they complete a W4.

You are required to provide every worker with a W2 at the appropriate time each year.

Be sure to help each worker get a Social Security Number. Then, keep those numbers for your records. If you do not have a worker's Social Security number, you could be required to pay his or her income taxes.

Three-Quarter Rule

The Three-Quarter rule requires you to guarantee a worker employment and payment for at least $\frac{3}{4}$ of the work hours in the contract period. If the worker is not offered at least $\frac{3}{4}$ of the work hours in the contract period, you could be required to pay the worker as if he or she had worked at least $\frac{3}{4}$ of the contract period. The following are some conditions that may apply:

- The contract period starts on the worker's first day of work.
- If you let a worker go and the DOL determines that the worker was unfairly dismissed, the $\frac{3}{4}$ rule may be enforced.
- If you run out of work, you could be required to fulfill the guarantee.
- If a catastrophe occurs (e.g., a flood that ruins crops) we can notify the Department of Labor. If they conclude that the catastrophe caused a contract impossibility, the three-

quarter rule will only apply for the period between when the workers started and when the catastrophe happened.

- If a qualified American worker applies after you have already hired H-2A workers, you must let one of the H-2A workers go to make room for the American worker. If that happens, this rule **does not** apply to the H-2A worker who was let go.

If You are a Farm Labor Contractor or Custom Harvester

Farm Labor Contractors and Custom Harvesters may also hire H-2A workers to perform agricultural services on the farms of third-party, fixed-site farmers if the work is temporary/seasonal in nature and if all the work occurs on actual farms. There are some extra steps that must be taken and some additional requirements, however. Farm Labor Contractors are required to obtain a Farm Labor Contractor Certificate of Registration, and both Farm Labor Contractors and Custom Harvesters are required to provide itineraries and original, unique surety bonds. The exact details of these requirements vary depending on your circumstances. One of our team members will provide you with more information.

Audits

The DOL occasionally audits employers of H-2A workers to ensure compliance with all the applicable regulations. Audits can happen to anyone at any time. You should always be prepared by diligently following the H-2A Program's regulations and by keeping thorough records. All records must be kept for at least three years.

There are two kinds of audits: Email Audits and Field Investigations. Email Audits are conducted by email at random. Field Investigations, on the other hand, are conducted in-person by investigators. Field Investigations can happen for a number of reasons, but investigators generally do not disclose why they are auditing an employer. These are much more serious. We recommend that employers speak with legal counsel as soon as they learn that they are being audited.

Of the two, Email Audits have historically been more common. Fortunately, they are also easier to deal with. If you are audited, the DOL will send you a notice asking for a set of documents from a previous season—usually from last year. They usually ask for some or all of the following:

- proof of any required recruitment steps (if applicable),
- a report with results of recruitment efforts,
- earnings records for foreign & domestic temporary workers,
- work contracts for each temporary worker (if applicable),
- proof of worker transportation expense reimbursement,
- proof of workers' compensation coverage, and
- proof of worksite ownership.

Field Investigations, on the other hand, are less straightforward. The investigator will give you a list of requested documents, depending on what the investigator is looking for. When an investigator contacts you for a Field Investigation, you may, if you'd like, tell him or her that you will be handling the audit with the help of a lawyer and that you would like to speak with that lawyer first.

Again, we want to reiterate that the best thing you can do to avoid penalties during an audit is to diligently follow the rules of the H-2A program beforehand and keep earnings records that include the required information.

USA Farm Labor, Inc. has years of experience with audits and will be glad to assist you if you feel it is necessary.

How to Get More Information

If you have any questions about the H-2A Program or need any additional information, please feel free to contact us. One of our Program Specialists will be happy to help!

In addition, as part of our commitment to helping employers get the most out of the H-2A Program, we provide each customer

with access to the latest edition of our acclaimed *USA Farm Labor, Inc. Guide to the H-2A Program*. In this useful book, you'll find a more in-depth look at the topics covered here, as well as a glossary of terms, answers to frequently asked questions, useful forms, and much, much more.

Thank you again for your interest in USA Farm Labor, Inc. and the H-2A Program!

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THE QUICK GUIDE TO THE H-2A PROGRAM WITHOUT THE COMPLICATED LEGAL JARGON

Across America, farmers are struggling to find qualified workers for seasonal jobs. Between low rural unemployment and a shift in the American workforce away from agriculture, it's more difficult than ever to find reliable farm workers.

To solve this problem, thousands of American farmers rely on **The H-2A Program**.

In this handy guide, we provide critical information that all employers should know beforehand to help them get the most out of the H-2A Program, including:

- Which employers qualify for the H-2A Program
- Employer obligations towards H-2A workers
- Common pitfalls in the H-2A Program and how to avoid them

USA FARM LABOR, INC. has spent over 18 years serving the American agricultural community. We provide assistance with the H-2A Program's paperwork and connect farmers of all types and sizes to a network of workers who have a variety of skills. Our dedication to helping employers in every phase of the H-2A Program has earned us a reputation for integrity, dependability, and excellent customer service.



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