

H-2B Process

- ❖ The employer must apply for temporary labor certification with the U.S. Department of Labor (DOL) prior to filing a petition with U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security to certify an H-2B worker.
- ❖ The temporary labor certification is advisory from the Secretary of Labor to USCIS on whether or not U.S. workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers. The USCIS is not bound by DOL's certification or notice that certification cannot be made.
- ❖ DOL, through the appropriate Regional Administrator of the Employment and Training Administration, will issue a temporary labor certification if it finds that qualified persons in the U.S. are not available and that the terms of employment will not adversely affect the wages and working conditions of similarly employed workers in the U.S.
- ❖ In making its findings, DOL considers such matters as the employer's attempts to recruit U.S. workers and the appropriateness of the wages and working conditions offered, and the policies for the U.S. Employment Service.
- ❖ If the employer is filing for a one-time occurrence, the employer must establish: (1) that it has not employed workers to perform the services or labor in the past; and (2) that it will not need workers to perform the services or labor in the future, or 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.
- ❖ If the employer is filing for a seasonal need, the employer must establish that the service or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.
- ❖ The employer must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period, during which the services or labor is needed is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees.
- ❖ If the employer is filing for a peakload need, the employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term errand with temporary employees who will not become a part of the regular operation.
- ❖ If the employer is filing for an intermittent need, the employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers for short period.

- ❖ In order to file for an H-2B worker, an employer must file a temporary labor certification application with the State Employment Security Agency (SESA) serving the area of employment.
- ❖ Every temporary application shall include:
 - ❖ An original and one copy of Form ET 750, Part A, the offer of employment portion of the Application for Alien Employment Certification form signed by the employer.
 - ❖ The ETA-570 form contains the following items to be completed by the employer:
 - **Part A, Offer of Employment.**
 - **Item 1.** Name of Foreign Worker.
 - **Item 2.** Present Address of Foreign Worker.
 - **Item 3.** Type of Visa.
 - **Item 4.** Name of Employer.
 - **Item 5.** Telephone Number.
 - **Item 6.** Address of Employer.
 - **Item 7.** Address Where Foreign Worker will work.
 - **Item 8.** Nature of Employer's Business.
 - **Item 9.** Name of Job Title.
 - **Item 10.** Total Hours Per Week.
 - **Item 11.** Daily Work Schedule.
 - **Item 12.** Rate of Pay.
 - **Item 13.** Job Duties.
 - **Item 14.** Minimum Education, Training and Experience Required to Perform the Job.
 - **Item 15.** Other Special Requirements.
 - **Item 16.** Occupational Title of Person Who Will Supervise Foreign Worker.
 - **Item 17.** Number of Employees Foreign Worker Will Supervise.
 - **Item 18a.** Number of Openings to be filled by Foreign Worker s Under Job Offer.
 - **Item 19a, b, c.** If the Job is Unionized.
 - **Item 20.** Statement for Live-at-Work Job Offers.
 - **Item 21.** Recruitment Efforts.
 - **Item 22.** Documentation of recruitment of U.S. workers.
 - **Item 23.** Employer Certifications.
 - **Item 24.** Employer Declarations.
 - **Authorization of Agent.**
 - **Documentation of any efforts to recruit U.S. workers the employer may have made before filing the application.**
 - **A statement explaining why the job opportunity is temporary and why the employers need for the work too be done meets the standard of either a one time occurrence, a seasonal need, a peakload need, or an intermittent need.**
- ❖ The SESA advises employers to file requests for temporary labor certification at least 60 days before the labor certification is needed.

- ❖ The SESA reviews the job offer for completeness. The SESA may require the employer to modify the application before commencing the recruitment for workers.
- ❖ If the SESA is satisfied, it will prepare a job order, using the information on the application, and place its statewide job bank system for 10 days. During this period, the SESA will refer qualified applicants who walk-in and those in its active files.
- ❖ Current regulations require that the employer shall advertise the job opportunity after filing the application in a newspaper of general circulation for 3 consecutive days or in a professional, trade or ethnic publication, whichever is most appropriate for the occupation and most likely to bring responses from U.S. workers. The advertisement shall:
 - Identify the employer's name and direct applicants to report or send resumes to the SESA for referral to the employer.
 - Include a SESA identification number and the complete name and address of the SESA.
 - Describe the job opportunity with particularity, including the duration of the employment.
 - State the rate of pay, which shall be below prevailing wage for the occupation.
 - Offer prevailing working conditions.
 - State the employer's minimum job requirements.
 - Offer wages, terms, and conditions of employment which are not less favorable than those offered to the H-2B worker and are consistent with the nature of the occupation, activity, and industry.
- ❖ The employer must document that unions and other recruitment sources, appropriate for the occupation and customary in the industry, were unable to refer qualified U.S. workers.
- ❖ The employer must provide the SESA the "tearsheets" (for each day the advertisement was published) from a publication in which the advertisement appeared and written results of all recruitment which must:
 - Identify each recruitment source by name.
 - State the name, address, and telephone number and provide resumes (if submitted to the employer) of each U.S. worker who applied for the job.
 - Explain the lawful job-related reasons for not hiring each U.S. worker.
- ❖ After the recruitment period, the SESA sends the application, results of recruitment, prevailing wage findings, and other appropriate information to the regional certifying officer.
- ❖ The certifying officer determines whether to grant the temporary labor certification, or to issue a notice that such certification cannot be made based on whether or not U.S. workers are available for the temporary employment opportunity.
- ❖ In judging if a U.S. worker is available for the temporary employment opportunity, the certifying officer determines from documented results of the employers and SESA's

recruitment efforts, if there are other appropriate sources of workers where the employer should have recruited or may recruit U.S. workers. If further recruitment is required, the application will be returned to the SESA with specific instructions for the additional recruitment.

- ❖ To determine if a U.S. worker is available, the certifying officer will consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employers expense, if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses.
- ❖ The certifying officer will also consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, can perform the duties involved in the occupation as customarily performed by other U.S. workers similarly employed ,and is willing to accept the specific job opportunity.
- ❖ To determine if the H-2B worker will adversely affect wages and working conditions of U.S. workers similarly employed, the certifying officer considers such things as labor market information, special circumstances of the industry, organization, and/or occupation, the prevailing wage rate for the occupation in the area of intended employment, and prevailing working conditions, such as hours of work.
- ❖ If the certifying officer issues a notice that a certification cannot be made, the notice contains detailed reasons why certification cannot be made, the address the availability of U.S. workers in the occupation, and the prevailing wages and working conditions of U.S. workers in the occupation and the specific DOL policies which were to be followed.
- ❖ If the certifying officer issues a temporary labor certification, the certifying officer notifies the employer, in writing, of the determination.
- ❖ If the labor certification is granted, the certifying officer sends the certified application containing the official temporary labor certification stamp, supporting documents, and completed Temporary Determination Form to the employer or the employer's agent or attorney which indicates that the employer should submit all documents together with the employer's petition to USCIS.
- ❖ If a notice is issued that certification cannot be made, the certifying officer will return one copy of the Application for Alien Employment Certification form, supporting documents, and completed Temporary Determination Form to the employer or to the employer's agent or attorney. The Temporary Determination Form indicates the bases on which the decision was made not to issue a temporary labor certification, and shall advise the employer of the right to appeal to the USCIS.
- ❖ Because the DOL decision is only an advisory to USCIS, there is no appeal process within the DOL for denial for H-2B applications. Such appeals must be filed with the USCIS.

- ❖ Upon satisfactory completion of the application process above, the application for H-2B workers is then sent by DOL to USCIS for its processing and certification.
- ❖ If certified by USCIS, the application is then forwarded by USCIS to the U.S. Department of State which, in turn, sends the application to the appropriate consulate for visa processing.
- ❖ A candidate outside the U.S. must apply for a visa at the U.S. Consulate must provide copies of the above forms to the local USCIS center.
- ❖ If the employer satisfies all the foregoing criteria and successfully recruits a qualified H-2B worker who is approved by the U.S. government, that employer often pays for that worker's travel to the place of employment and that worker's lodging while employed.