



H-2B Temporary Non-Agricultural Visa Program

General Overview and Requirements

U.S. Virgin Islands Labor Compliance Summit
September 10 and 12, 2024

Office of Foreign Labor Certification
Employment and Training Administration
United States Department of Labor

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The *Federal Register* and the *Code of Federal Regulations* remain the official source for regulatory information published by the Department of Labor. We will make every effort to keep this information current and to correct errors brought to our attention.

This presentation will not discuss the roles and responsibilities of other government agencies or summarize any H-2B regulatory provisions prior to the 2015 H-2B Interim Final Rule and Wage Final Rule.

Department of Labor

Overview of the Immigration Process



- ▶ Immigration and Nationality Act (INA) regulates the admission of foreign nationals into the U.S.
- ▶ Secretaries of Homeland Security (DHS) and State (DOS) designated as principal administrators of the INA
- ▶ Several types of employment-based visas require employers to first obtain a labor certification from the Secretary of Labor (DOL)
- ▶ DOL plays a statutory role in certifying to DHS and DOS that:
 1. There are not sufficient qualified U.S. workers who are available for the job; and
 2. Employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed

STEP 1



Obtain a labor certification from **DOL**

- Generally, requires conducting a labor market test with the State Workforce Agency (SWA) where work will be performed

STEP 2



Obtain an approved petition from **DHS** for a specific worker or number of workers in the visa classification

STEP 3



After receiving DHS petition approval, the employer typically engages foreign labor recruiters and the worker(s) apply with a **DOS** embassy or consulate abroad for a visa

STEP 4



After receiving the visa from a DOS consulate, workers arrive at a port of entry where **DHS's Customs and Border Protection** verifies eligibility for admission and length of stay

H-2B Visa Program

Legal Authority



► Statutory and Regulatory Authorities

- INA of 1986 established the H-2B visa permitting nonimmigrant workers to perform “*temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.*”
8 U.S.C. 1101(a)(15)(H)(ii)(b)
- Congress vested DHS with authority to administer the H-2B program and to grant an employer’s petition “*after consultation with appropriate agencies of the Government.*”
8 U.S.C. 1184(c)(1)
- Accordingly, DHS regulations require employers to first obtain a prevailing wage and labor certification from DOL as consultative advice on the availability of qualified U.S. workers. 8 CFR 214.2(h)(6)(iii)(A) and (D)

► DOL Regulatory Authority

- On April 29, 2015, DOL and DHS issued two joint regulations.
 - [Interim Final Rule](#): Temporary Non-Agricultural Employment of H–2B Workers in the United States
 - [Final Rule](#): Wage Methodology for the Temporary Non-Agricultural Employment in the H–2B Program
 - The **current** H-2B regulations are accessible via the electronic Code of Federal Regulations (CFR) at:

[eCFR :: 20 CFR Part 655 Subpart A -- Labor Certification Process for Temporary Non-Agricultural Employment in the United States \(H-2B Workers\)](#)

H-2B Visa Program

Roles and Responsibilities



▶ Virgin Islands Department of Labor ([VIDOL](#))

- Reviews job orders for compliance with program requirements
- Posts approved job orders for active recruitment
- Makes referrals of qualified U.S. workers and may conduct post-certification site visits

▶ DOL Office of Foreign Labor Certification ([OFLC](#))

- Issues prevailing wages for H-2B jobs
- Reviews H-2B applications/job orders for compliance
- Provides instructions to employers for advertising jobs to U.S. workers
- Issues labor certification decisions and may conduct post-certification audit examinations

▶ DOL Wage and Hour Division ([WHD](#))

- Conducts investigations and enforces the terms and conditions of employment in the H-2B certification
- Examines whether the employer conducted the required recruitment for U.S. workers
- Determines whether U.S. workers were offered employment and whether U.S. workers were improperly laid off or displaced

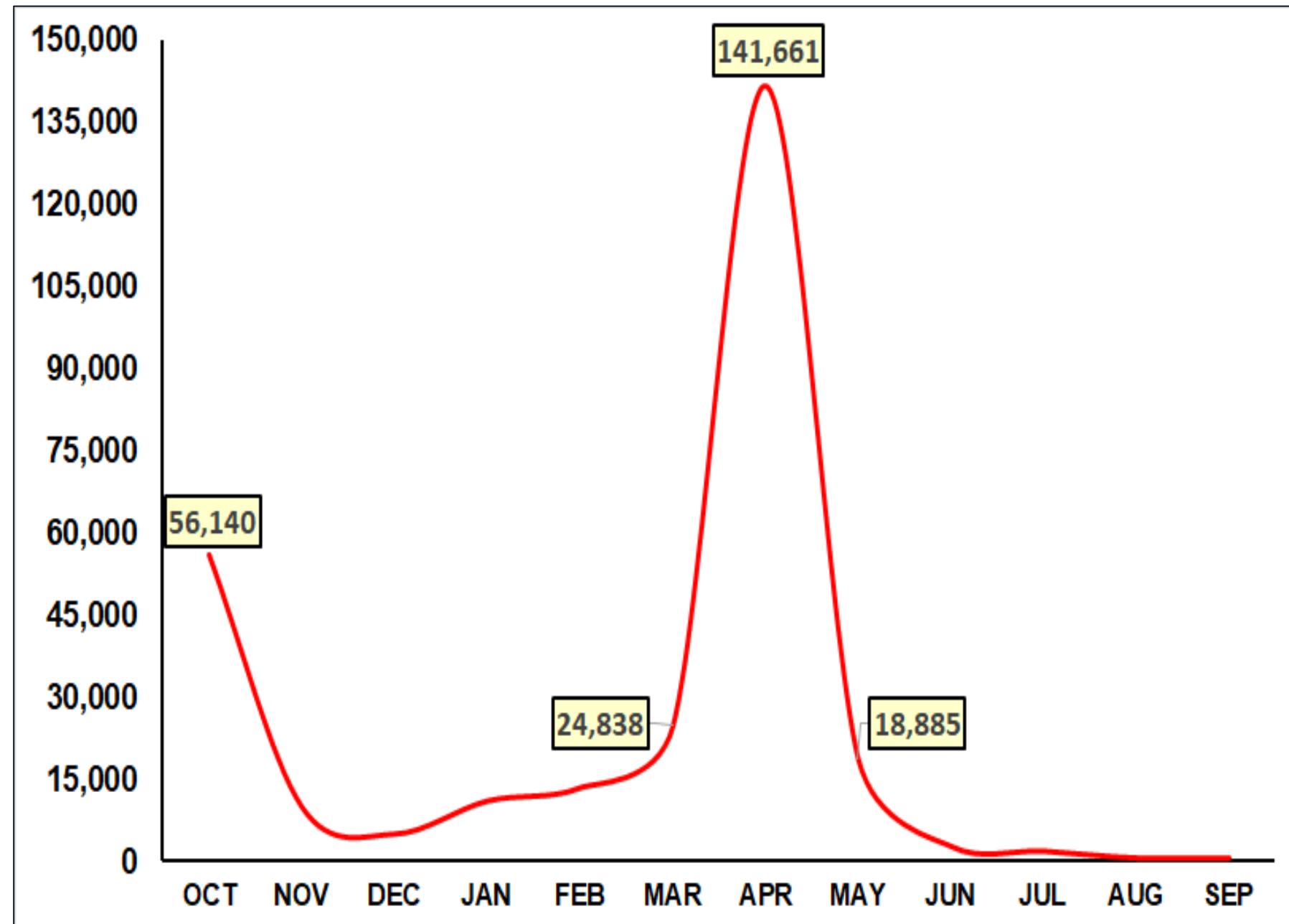
H-2B Visa Program

Visa Cap Summary Compared to U.S. Employer Demand



- ▶ Annual statutory visa cap at 66,000 based on work start date
 - 1st half 33,000 (Oct – Mar)
 - 2nd half 33,000 (Apr – Sept)
- ▶ In FY 2024, DHS authorized an additional **64,716 visas** based on Congressional authority
 - 20,716 1st half Returning Workers
 - 19,000 2nd half (4/1 – 5/14) Returning Workers
 - 5,000 2nd half (5/15 – 9/30) Returning Workers
 - 20,000 All Year El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica
- ▶ DHS administers the visa cap and some statutory exemptions

FY 2024 H-2B Worker Demand, by Work Start Date



H-2B Visa Program

General Overview



► Basic Program Eligibility

- Must be U.S. employer (e.g., fixed-site business or job contractor), but employer associations cannot apply on behalf of their members
- Services or labor must be nonagricultural
- Job opportunity is a bona fide, full-time (35 or more hours per week) temporary position
- The nature of the employer's need for the services to be performed must meet one of the following DHS regulatory standards ([8 CFR 214.2\(h\)\(6\)\(ii\)](#)):
 - One-time occurrence;
 - Seasonal;
 - Peakload; or
 - Intermittent

► Temporary Need

- Employer must establish that its need is temporary in nature, regardless of whether the underlying job is permanent or temporary
- Employer must have a bona fide need for the number of worker positions from the requested work start date through end date
- A **job contractor** will only be permitted to file applications based on a **seasonal need or a one-time occurrence standard**
- By regulation, employment must be 9 months or less, but *Congressional budget riders prohibit DOL from enforcing this provision*

Important Compliance Reminder(s)

Additional DHS guidance on temporary need is at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/guidance-on-temporary-need-in-h-2b-petitions>

H-2B Visa Program

General Overview



► One-Time Occurrence Standard

- Based on program experience, this standard can be viable to help with temporary events such as disaster reconstruction and recovery
- DHS defines one-time occurrence where:
 - The employer has not employed workers to perform the services or labor in the past, and the petitioner will not need workers to perform this in the future; **or**
 - The employer has an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for temporary workers. See [8 CFR 214.2\(h\)\(6\)\(ii\)\(B\)\(1\)](#)
- In the case of a one-time event an employer's period of need could last up to three years.
- In unique circumstances related to disaster recovery projects, the employer will need to demonstrate a bona fide need for the number of workers and the period of employment
- Employers must have bona fide work
- For example, the employer will need to have executed work contracts or work agreements with clear project and labor staffing plan in place

Important Compliance Reminder(s)

For a 3-year period of need, the employer will only receive a Temporary Labor Certification (TLC) in 12 month increments and must re-file annually demonstrating that qualified U.S. workers are still not available in sufficient numbers to fill the job vacancies



H-2B Visa Program

Major Steps in the Labor Certification Process

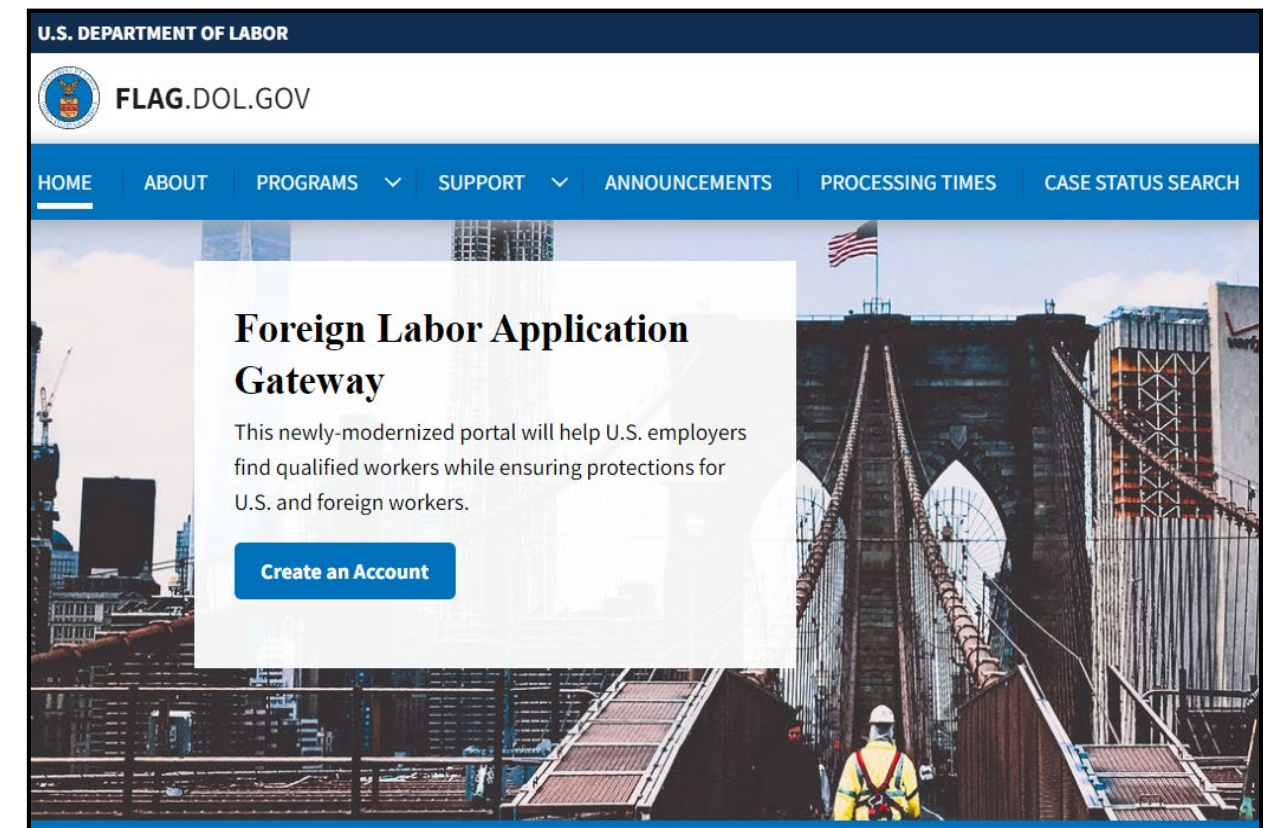
STEP 1: Employer obtains a Prevailing Wage Determination (PWD) for the job and area of intended employment

STEP 2: Employer submits a job order to State Workforce Agency (SWA) serving the area of intended employment

STEP 3: Employer concurrently submits the H-2B application, and supporting documentation to OFLC for processing

STEP 4: OFLC reviews H-2B application and, where requirements are met, authorizes recruitment for U.S. workers

STEP 5: OFLC issues a TLC to grant or deny labor certification



Important Resource

OFLC offers electronic processing services through the Foreign Labor Application Gateway (FLAG) system at <https://flag.dol.gov>



H-2B Visa Program

Step 1: Obtain a PWD for the Job Opportunity

► Wage Requirements

- Employer must offer, advertise in recruitment, and pay workers at least the **highest of**:
 1. Prevailing Wage;
 2. Federal, State, or Local Minimum Wage
- The prevailing wage for the job and area of intended employment is determined as follows:
 - Collective bargaining agreement (CBA) covering the job opportunity; or
 - The arithmetic mean of wages under the DOL Bureau of Labor Statistics Occupational Employment and Wage Statistics (OEWS) Survey for the occupation; or
 - A wage based on an employer-provided survey in limited circumstances that meets regulatory standards under [20 CFR 655.10\(f\)](#)

► OFLC National Prevailing Wage Center (NPWC)

- Employer electronically requests (using Form ETA-9141) a PWD from the OFLC NPWC
- The NPWC will process the request and issue an electronic PWD, indicating the wage source, to the employer
- The PWD will specify the validity period, which will be no more than 365 days and no less than 90 days from the date the NPWC issued the PWD
- If there are multiple worksites within an area of intended employment, the PWD will be the wage that is the highest wage among all the worksites

Important Filing Tip:

A valid PWD is needed to start Step 2 (Submit a Job Order to VIDOL), so ***plan to submit a PWD request at least 60 calendar days before starting Step 2.***



H-2B Visa Program

Step 2: Submit a Job Order to the SWA

► Program Requirements

- An employer submits a job order using a form administered by the SWA covering the area of intended employment
- Must submit job order ***no more than 90 days and no less than 75 days before work start date (regulatory)***
- Employer informs the SWA that the job order will be used in connection with an H-2B application it will file concurrently with OFLC
- Job order must meet minimum regulatory terms and conditions at [20 CFR 655.18](#) and any state-specific requirements
- SWA reviews job order and notifies employer of any deficiencies ***within 6 business days***
- An Employer must ...
 - Offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers
 - Not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2B workers
 - Offer job requirements that are bona fide and consistent with the normal and accepted qualifications and requirements imposed by employers that DO NOT use H-2B workers in the same occupation and area

Important Compliance Reminder(s)

For work on the U.S. Virgin Islands, employers must register and file job orders through the Virgin Islands Electronic Workforce System ([VIEWS](#))



H-2B Visa Program

Step 3: Submit H-2B Application to OFLC

► Program Requirements

- An employer or its authorized attorney or agent may file the H-2B application with OFLC using the FLAG system
- An association or other organization of employers cannot file master applications on behalf of its employer-members
- Only one H-2B application may be filed for worksite(s) within one area of intended employment with an employer for each period of employment
- Multiple positions may be requested under one application provided all workers are performing the same services . . .
 - Under the same terms and conditions;
 - In the same occupation and area of intended employment; **and**
 - During the same period of employment



Important Compliance Reminder(s)

An employer, or its authorized attorney/agent, must file the H-2B application ***no more than 90 days and no less than 75 days before work start date (regulatory)***



H-2B Visa Program

Step 3: Submit H-2B Application to OFLC

► General Filing Requirements

- Form ETA-9142B (including valid PWD number)
 - Appendix A – additional worksite locations (if applicable)
 - Appendix B – signed and dated copy of the original (required)
 - Appendix C – foreign labor recruiter information (if applicable)
- Copy of the job order concurrently submitted to the SWA
- Agent agreement/documentation demonstrating authority to represent the employer (if applicable)
- Copies of all contracts/agreements with any agent and/or recruiter engaged in international recruitment of H-2B workers (if applicable)
- Copy of Migrant and Seasonal Agricultural Worker Protection Act (MSPA) registration for the employer or agent (if applicable)

► Additional Documents for Job Contractors

- Appendix D – identifying the one employer-client associated with the job opportunity
- Appendix B – signed and dated copy of original for the employer-client
- A **separate** statement of temporary need for the employer-client on the Form ETA-9142B Section B.8 (include only one attachment)
- Copy of an executed contract between the job contractor and employer-client

Important Compliance Reminder(s)

- Provide certified translations of any contracts or agreements which are not in English
- Each employer is responsible for the accuracy of representations made and for all assurances and obligations under the H-2B program



H-2B Visa Program

Step 3: Submit H-2B Application to OFLC

► Major Work Guarantees and Employer Assurances

- Provide tools, supplies, and equipment at no cost
- Provide board or lodging, including fringe benefits, or assist workers to secure such facilities.
- Provide daily transportation to and from the worksites (as applicable)
- Pay or reimburse workers for inbound-outbound transportation and subsistence
- Pay workers “free-and-clear” at least every 2 weeks and disclose all deductions from worker pay
- Reimburse all visa processing, border crossing, and other related fees
- Provide workers with a copy of the work contract in a language understood by the worker at the time of visa application or the job offer is made
- No strike or lockout at the worksite(s)
- No discriminatory hiring practices or unfair treatment of workers
- No U.S. worker layoffs starting 120 days before work start date through end of work contract
- Must notify H-2B workers of their duty to depart the U.S. after work is completed
- Prohibition on charging workers any costs for activities related to obtaining certification
- Maintain a poster of workers’ rights in English and in any other language understood by the worker

Important Compliance Reminder(s)

Refer to [20 CFR 655.20](#) to read and understand all of the regulatory assurances and obligations of H-2B employers

H-2B Visa Program

Step 4: OFLC Application Review Process



► Program Requirements

- OFLC review applications for completeness, obvious errors or inaccuracies, and compliance with program requirements
- Issue a Notice of Deficiency (NOD) or a Notice of Acceptance (NOA) ***within 7 business days of receipt (regulatory)***
- If accepted, the NOA identifies positive recruitment steps the employer must initiate within 14 days and complete before labor certification decision is issued.
- Additionally, the NOA specifies a date on which an initial recruitment report must be submitted and any additional documentation to grant a TLC

► Positive Recruitment of U.S. Workers

- OFLC posts approved job on national job registry <https://seasonaljobs.dol.gov> in “active” status until 21 days before the certified work contract period begins
- Employer contacts former U.S. workers employed during the previous year and solicits their return to the job
- Employer contacts bargaining representative or, if not applicable, posts or circulates a copy of the job order to all employees for 15 consecutive business days
- OFLC may require additional recruitment requirements depending on the job (e.g., job search websites)



H-2B Visa Program

Step 4: OFLC Application Review Process

► Submission of Recruitment Report

- Recruitment report **cannot** be submitted until the employer has completed all recruitment steps.
- Employer (**not the attorney or agent**) must prepare, sign, and date a written recruitment report
- Any qualified U.S. worker who applies for the job and may reside on the Virgin Islands or anywhere within the continental United States or other territories (e.g., Puerto Rico) must be considered for hire.

Important Compliance Reminder

No Preferential Treatment! An employer must offer U.S. workers terms and working conditions at least as favorable as those offered or provided to H-2B workers.

► Content of Recruitment Report

- Recruitment report must include . .
 - Identification of each recruitment activity or source by name
 - Name/contact information of each U.S. worker who applied for the job **and** the disposition of each worker
 - Clearly indicate, for each worker, whether the job was offered and whether the worker accepted or declined
 - Explanation of the lawful job-related reason(s) for not hiring each U.S. worker (if applicable)

H-2B Visa Program

Step 5: Issuance of TLC Determination



► TLC Determination Process

- After receipt of the initial recruitment report, OFLC will perform a final review of the application and issue a TLC determination
- A decision to **deny or partially certify** the TLC request will . . .
 - State the reason(s) full certification is denied and cite the relevant regulatory standards;
 - Provide notice of the employer's right to request administrative review (i.e., appeal) in writing **within 10 business days** from the TLC determination date; and
 - Provide notice that the TLC determination is the final decision of the Secretary if the employer does not request administrative review

► Conditions of the Certified TLC

- When granted, the TLC (Form ETA-9142B and all appendices) is valid only for . . .
 - the period of employment;
 - number of H-2B workers;
 - area of intended employment;
 - job classification and specific services or labor to be performed; **and**
 - the named employer(s) certified by OFLC
- The TLC cannot be transferred to another employer, except where the other employer is a successor in interest
- The TLC expires on the last day of authorized employment, or any approved extension by OFLC

H-2B Visa Program

Step 5: Issuance of TLC Determination



► TLC Documents Issued to Employer

- A determination to **certify** the TLC request will include ...
 - An electronic notice of certification; and
 - Form ETA-9142B *Final Determination: H-2B Temporary Labor Certification Approval*
- Employer will submit a copy of the Form ETA-9142B to DHS with the I-129 petition package
- For more information the DHS petition process, see the United States Citizenship and Immigration Services (USCIS) website at

<https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers>

OFFICE OF THE ATTORNEY GENERAL
Department of Labor

H-2B Application for Temporary Employment Certification
Form ETA-9142A - Final Determination: H-2B Temporary Labor Certification Approval
U.S. Department of Labor

APPROVAL OF H-2B TEMPORARY LABOR CERTIFICATION

Pursuant to the provisions of Sections 101(a)(15)(B)(i)(I), 214(c), and 218 of the Immigration and Nationality Act, as amended, 8 U.S.C. §§ 1101(a)(15)(B)(i)(I), 1184(c), and 1188, the Department hereby certifies that there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to fill the job opportunities for which certification is sought, and the employment of the H-2B temporary worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Therefore, by virtue of the signature below, the Department hereby acknowledges granting certification for the following H-2B Application for Temporary Employment Certification (Form ETA-9142A and Form ETA-790790A):

1. DOL Case Number H-305-16249-020738	2. Case Status Partial Certification	3. Determination Date 06/05/2019
4. Employer Legal Business Name(s) (PERM) Hospitality And More 12-1234567		
5. Job Title Status Check Job		
6. SOC Code 35-3041.00	7. SOC Occupation Title Food Servers, Nonrestaurant	
8. Worker Positions Certified 1	9. Employment Begin Date 11/12/2019	10. Employment End Date 3/11/2020
11. Department of Labor Office of Foreign Labor Certification (attach signature)		<i>Carrying Officer</i>

Pursuant to 20 CFR 655, subpart B, the aforementioned temporary labor certification is valid only for the period of employment, number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer(s) specified on these approved Forms ETA-9142A and ETA-790790A, including any approved modifications.

Each employer covered by this approved H-2B Application for Temporary Employment Certification has declared under penalty of perjury that it has read and reviewed every page of these approved Forms ETA-9142A and ETA-790790A, including all appendices and addendums, and takes full responsibility for the accuracy of all information contained therein and all documentation supporting this approved H-2B Application for Temporary Employment Certification, including any representations made by the employer's authorized agent or attorney as applicable. Each employer covered by this approved H-2B Application for Temporary Employment Certification has attested that it has read, understands, and will abide by all terms, assurances, and obligations as a condition for receiving this approved H-2B Application for Temporary Employment Certification from the Department.

The employer(s) will provide a copy of the work contract, which may be the approved Forms ETA-9142A and ETA-790790A, in a language understood by the worker to each worker in accordance with the timing requirements of 20 CFR 655.122(c), including any approved modifications. This approved H-2B Application for Temporary Employment Certification expires on the last day of authorized employment, including any approved extensions, and may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

FOR DEPARTMENT OF LABOR USE ONLY

H-2B Visa Program

Important Post-Certification Obligations



► Recruitment of U.S. Workers

- Employer must continue to cooperate with the SWA to recruit for the job opportunity and provide employment to any qualified U.S. worker who applies ***until 21 days before the start date of need.***
- Employer must continue to update the recruitment report through the entire recruitment period.

► Cooperate with DOL Audits or Investigations

- Retain and be prepared to submit all required documentation supporting the TLC in the event of an OFLC audit or WHD investigation.
- Cooperate fully with a SWA “site visit” or OFLC audit examination or WHD investigation

► Timely Report Worker Separations

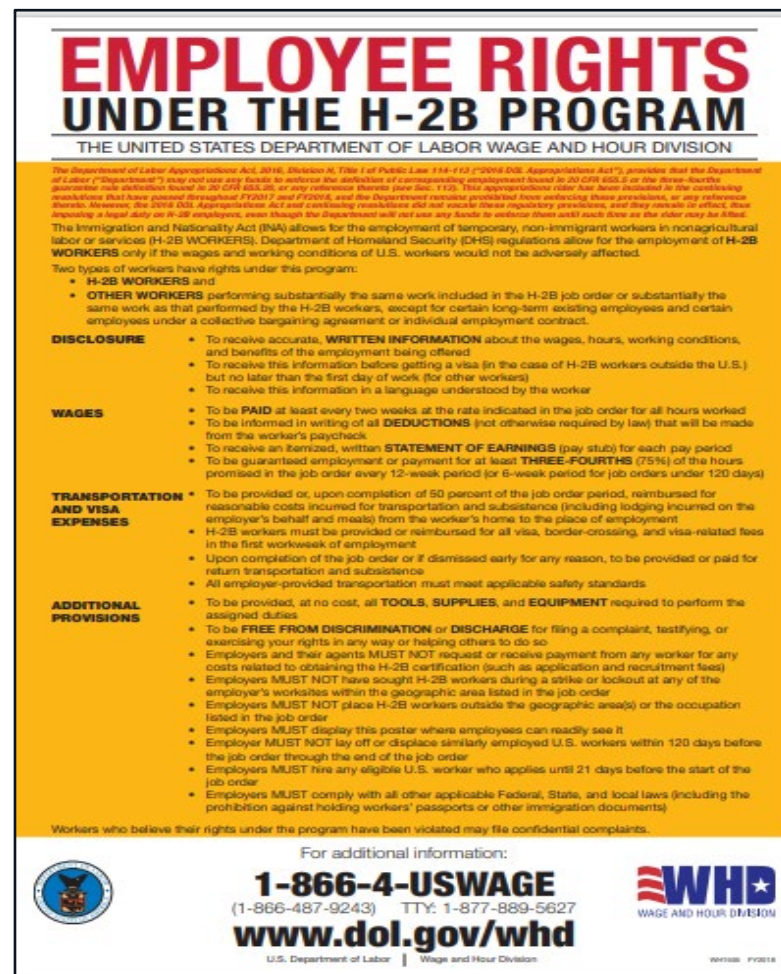
- Employer must notify the OFLC and DHS in writing of the separation ***no later than 2 working days after the separation is discovered by the employer.***
- Separations include:
 - “No shows” within 5 workdays of work start date;
 - Abscondment where worker leaves without notice and fails to report for work for a period of 5 consecutive workdays without the consent of the employer; or
 - Terminations for cause during work contract period.
- To report worker abandonment and termination to OFLC, send an email to tlc.chicago@dol.gov



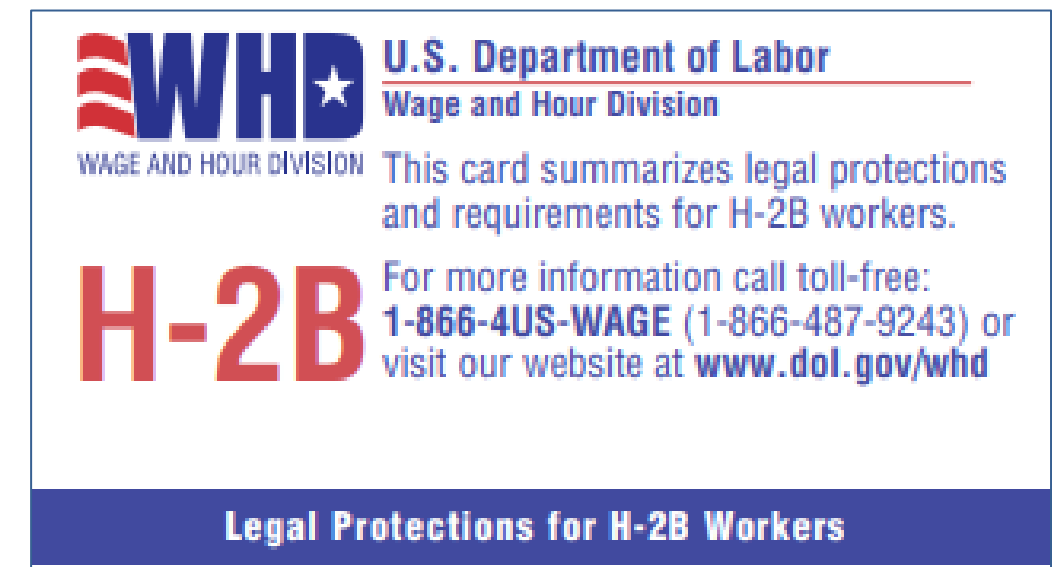
H-2B Visa Program

Protecting Workers and Program Integrity

► Worker Rights Posters



► Worker Rights' Cards



Available in [English](#) and [Spanish](#)

- H-2B available in English and Spanish at:
<https://www.dol.gov/agencies/whd/immigration/h2b>



H-2B Visa Program

Protecting Workers and Program Integrity, continued

▶ Reporting Violations of H-2 Labor Certifications

- File a complaint with the DOL Wage and Hour Division (WHD) by calling the toll-free helpline at **1-866-4US-WAGE (1-866-487-9243)**.
- Visit the WHD for more information at <http://www.dol.gov/agencies/whd>

▶ Reporting Violations of Discrimination Based on Immigration Status or Citizenship

- For questions about the anti-discrimination provisions of the INA, call the DOJ Immigrant and Employee Rights (IER) section using the toll-free helpline at **1-800-255-8155**.
- Visit the DOJ-IER to file a charge at <https://www.justice.gov/crt/filing-charge>

▶ Reporting Human Trafficking

- File a report with the National Human Trafficking Hotline (NHTH) by calling the toll-free helpline at **1-888-373-7888**.
- Visit the NHTH for more information at <https://humantraffickinghotline.org/>

▶ Reporting DOL Immigration Fraud or Program Abuse

- File a report with the DOL Office of Inspector General (OIG) by calling the helpline at **1-202-693-6999** or toll-free at **1-800-347-3756**.
- Visit the DOL-OIG to file a report at <https://www.oig.dol.gov/hotlinecontact.htm>



How Can We Help You?

► Training and Compliance Materials

- **FLAG System:** Additional resources available at <https://flag.dol.gov>, where users can get help, access videos and tutorials, set up an account, and report technical problems
- **H-2B Program Video Tutorial:** A more complete video tutorial on OFLC H-2B program is available on YouTube at <https://www.youtube.com/watch?v=XJ-B3sJ5-Ww>
- **Labor Law Compliance Assistance:**
 - Outreach materials, including fact sheets, workers' rights cards, FAQs, and posters, are available on the WHD website at <https://www.dol.gov/agencies/whd>
 - DOL Wage and Hour Division (WHD) toll-free information and help line is available 8am-5pm in your time zone at **1-866-4US-WAGE** (1-866-487-9243)





How Can We Help You?

► FLAG System Contacts

- Contact Login.gov at <https://www.login.gov> for technical issues with account creation, signing in, or changing Login.gov settings.
- Contact DOL FLAG Helpdesk for any technical problems filing applications at <https://flag.dol.gov/support/contact>

► H-2B Program Contacts

- Contact OFLC NPWC Helpdesk for any questions related to processing prevailing wage requests at flc.pwd@dol.gov
- Contact the OFLC Program Helpdesk for any questions related to the processing of H-2B applications at tlc.chicago@dol.gov

► OFLC Website

- “Subscribe” to receive program updates via e-mail at <https://www.dol.gov/agencies/eta/foreign-labor>

