

## **Overview of H-2B Visa Process**

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The process for obtaining an H-2B visa for a temporary seasonal worker involves 3 basic steps. First, an employer must obtain a “labor certification” from the Department of Labor (“DOL”). This is a certification that there are no Americans available for the job. The next step is to use the approved labor certification to file a visa petition with the United States Citizenship and Immigration Services (“USCIS”). After approval is obtained from USCIS, the final step is the foreign workers obtaining their actual visa from the U.S. Consulate in their home. At that point they are free to travel to the United States and work for the period specified in the visa.

An H-2B visa is good for a specific period of time corresponding to a specific period of employment. There will be a specific start date and a specific end date tied to the individual employer’s actual demonstrated period of need.

### **Qualifying Need**

H-2Bs are only available upon a showing of a temporary or peak load need. (While demonstrating a lack of available American workers is part of the application process, a labor shortage alone is not sufficient to qualify for H-2B visas). Employers must demonstrate by a preponderance of the evidence that their temporary need is based on one of the following: a one-time occurrence, a seasonal need, or a peakload need.

- **One-time occurrence:** The law requires an employer to show one of the following to establish a temporary need based on a “one-time occurrence”:
  - The employer has not employed workers to perform the services or labor in the past, and the employer 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.
- **Seasonal need:** The law defines a “seasonal need” as a need that is “traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer shall 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 not needed is unpredictable or subject to change or is considered a vacation period for the employer's permanent employees.”
  - A seasonal need may not necessarily be limited to the traditional four seasons (winter, spring, summer, and fall). Seasonal could include legal “seasons” (such as

fishing seasons) and “events” tied to a season (such as the Christmas shopping season) as described by the definition.

- **Peakload need:** To establish a peakload need, the law requires an employer to “establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the employer’s regular operation.”

Most H-2B visas are obtained based on a showing of a seasonal need. To support a claim of a seasonal need, generally the employer submits monthly financial revenue data for 2 to 3 years showing a regular pattern of variation in business levels corresponding to the claimed season of need. This variation will also be used to justify the specific start and end dates for the employment which should correspond to the seasonal need. As a general rule, the period of seasonal need must be less than 10 months.

### **Annual Visa Cap**

There is an annual cap of 66,000 H-2B visas that can be issued in any given year. In recent years Congress has made a series of one time annual increases in this number but has resisted a permanent increase. The 66,000 cap has been reached each of the past several years.

### **Labor Certification**

The labor certification process is run by the United States Department of Labor (DOL). The process is intended to assure the available jobs are offered to Americans first, at the local prevailing wage and that all requirements and conditions are disclosed. The process begins by obtaining a “prevailing wage determination” from the Department of Labor. This is the DOL’s determination of what the prevailing wage is for the particular position in the intended area of employment. The next step is for the employer to file the labor certification application setting forth the terms of the job offer and basis for the employer’s temporary need. Once the application is vetted and accepted by the DOL, the employer undertakes recruiting to test the labor market to see whether or not there are any Americans available for the employment opportunity. There are specific requirements for the recruiting. The employer posts the job with their State’s on line job service system. The job offer must state that the wage is at least equal to if not greater than the prevailing wage. The DOL will simultaneously post the job on their own seasonal jobs website. [Newspaper advertisements are no longer required]. Applicants who meet the minimum qualifications of the position must be interviewed and considered for employment and generally may only be rejected if they do not meet the minimum requirements of the job. After the recruiting period has ended, the employer submits a “recruiting report” to the DOL and the labor certification is issued.

There are time limits governing when the labor certification application can be filed. A labor certification application for an H-2B visa cannot be filed more than 90 days before the date of need. Also, the prevailing wage determination must be in hand at the time of the time of filing and that takes approximately 30 days so one needs to begin the process 4 to 5 months before the date of need.

### **Visa Petition**

The next step in the process is the visa petition. The actual visa petition cannot be filed until the approved labor certification is in hand. The visa petition is filed with the United States Citizenship and Immigration Service (USCIS). The basic filing fee per petition is currently \$610. USCIS offers a “premium processing” program for H-2B visas. Employers may pay an additional fee (currently \$1,500 on top of the basic filing fee) to elect premium processing. If premium processing is used, the USCIS promises they will act upon the visa petition within 15 days of the time they receive it. Given the time constraints which H-2B visas are subject to, it is highly recommended that the premium processing option be used.

### **Consular Processing**

The final step in the process is for the individual worker or workers to obtain their actual visas from the U.S. Consulate in their home country. The process is fairly straightforward. However, the time it takes varies greatly from country to country. Some countries are basically a walk-up system where an appointment can be made and a visa can be obtained within a few days. Other countries have long backlogs and it can take several weeks to get an appointment. Also, different consulates apply different levels of scrutiny to the alien workers applying for H-2B visas.

Not all countries are eligible for H-2Bs. The list of eligible countries is extensive but changes annually. If you are considering workers who are not coming from Jamaica or Mexico (where the majority of H-2Bs come from) you should consult the list before beginning the process.

### **Costs**

There is no filing fee for the labor certification. There is a filing fee for the visa petition. The basic filing fee is currently \$610.00. The premium processing fee of \$1500 is technically optional but as a practical matter it is usually required in order to get a timely decision.

There are also costs associated with the consular visa processing and transportation of the workers.

### **Attorney Fees**

If retained, I would handle the labor certification and visa petition part of the process (and possibly the consular visa processing although that is normally handled by a separate labor recruiter retained by the employer). My fees are in addition to the costs noted above and any fees paid to a labor recruiter. I would be happy to discuss my specific fee estimate with you based on your specific situation.