KEY CONCEPTS OF THE H-2B TEMPORARY VISA PROGRAM

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INTRODUCTION

The H-2B visa category is available to employers seeking to employ temporary, non-agricultural workers. The H-2B program was established by statute and is regulated by two primary federal agencies: United States Citizenship and Immigration Services (USCIS) and the United States Department of Labor (DOL).[1] The program has experienced considerable change over the past several years due to constant litigation and regulatory overhaul.[2]

The purpose of this Practice Advisory is to address current key concepts impacting the H-2B filing process and compliance issues.

The article will address the following aspects of the H-2B Program:

1. The H-2B Process: The Cap and Timing[3]
2. Employer-Provided Prevailing Wage Requests
3. The Concept of "Corresponding Employment"
4. Definition of Temporary Need with an emphasis on Peakload Need;

The H-2B Cap and Timing

The annual 66,000 visa quota for H-2Bs is broken into two 33,000 allocations: October 1 to March 31 and April 1 to September 30.[4] There is no carry-over of unused visas numbers into the succeeding Fiscal Year.

The H-2B visa cap has quickly been reached in the last three consecutive years, therefore timing is everything. (Although, in the unpredictable world of H-2B visas "time" more resembles a Salvador Dali timepiece than the atomic clock.)

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[1] INA Section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); 20 CFR 655, Subpart A, 2015 Joint Interim Final Regulations; 8 CFR 214.2(h)(6); 29 CFR Part 503

[2] For a comprehensive list of the current H-2B regulations and resources, please see Attachment A to this Practice Advisory. We also recommend that practitioners review the AILA Annual Conference 2016 Practice Advisory for a thorough summary of the H-2B program requirements.
"When Can You Use the H-2B and H-2A Visas? Don't Leave Them Out on the Range." https://agora.aila.org/product/detail/3073?sel=description

[3] In 2015, the Department of Labor and Department of Homeland Security published a new wage rule and a new interim final rule that dramatically changed the landscape of the 2008 H-2B regulations. The new wage rule and interim final rule became effective on April 29, 2015. *See* 80 FR 24042 (April 29, 2015) and 80 FR 24146 (April 29, 2015)

[4] FY 2015 and 2016: insert dates where cap was reached. See USCIS, "Cap Count for H-2B Nonimmigrants" (Mar. 26, 2015), *published on* AILA InfoNet at Doc. No. 14101744 (*posted* April 7, 2015)

For example, the joint DHS and DOL regulations state that the temporary labor certification application process cannot be started more than 90 days nor less than 75 days before the workers are needed on site.[5] In a perfect world, with an April 1 start date, the first day to file the application with the DOL would be January 2. For applications with an October 1st start date, the first day to file the H-2B application with the DOL would be July 3, 2017, but that is not always the case![6]

That said, here is how things are *supposed* to work.

The first thing you need to do is to obtain a Prevailing Wage Determination (PWD).[7] You cannot file an Application for Temporary Labor Certification without one. During fiscal year 2017, the processing time for H-2B PWDs was 28-30 days. During fiscal year 2016 the DOL was taking 60 days. There is no way to predict future processing times for PWDs, therefore, best practice dictates that you file your PWDs on July 1, the date that DOL releases its prevailing wages for the upcoming fiscal year. A PWD issued at any time after July 1 is good through June 30 of the following year with the exception that any PWDs issued after March 30 of the fiscal year will remain valid for 90 days. (e.g., a PWD issued on June 1 will remain valid through September 1).

Best practice: Don't wait for your existing H-2B clients to retain you for the following fiscal year. Get their permission to file their PWDs immediately, on July 1 each year so that in the event they do retain you, you will already have their PWD's in hand. Likewise, you have an ethical duty to advise any potential H-2B client, who contacts you after September 1 or December 1 of any fiscal year, that you may not receive the PWD in time to allow you to file their application for temporary labor certification and complete the process before the 1st or 2nd half CAP has been reached.

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[5] 20 CFR 655.15(b)

[6] In fiscal year 2017, the H-2B cap for the first half of the fiscal year was reached on January 10, 2017. As a result, employers who were in the process of obtaining H-2B certifications with March 2017 start dates but who had not finished the process with the DOL or USCIS appeared to be out of luck. The question then was whether such employers were permitted to modify the March start date with the DOL and request an April 1, 2017 start date in order to secure a number from the second half of the fiscal year without having to start the labor certification process over again. The DOL apparently agreed to some modifications of start dates resulting in the issuance of Notices of Acceptance being issued for pending applications that had not yet been certified. As a result, by the first day of February, the DOL already certified over 10,000 positions and by the second week of February, in excess of 20,000 positions. While this is technically legal, in this author's opinion circumventing the clearly stated intent of Congress, to give those employers whose need does not start until the second half of the fiscal year a fair shot at 50% of the available visas is fundamentally unfair because this allowed those employers to circumvent the 90- day rule to the detriment of those employers who played by the rules and waited to file until January 2 for their April 1 start date.

[7] 20 CFR Section 655.10

The 2nd step is to prepare the job posting for the State Workforce Agency (SWA). In addition to preparing the job posting online (or in case of some SWA's, submission of the job order by email), you need to submit a copy of the posting to the appropriate SWA office for review. It's best to do this before you submit your Application for Temporary Labor Certification, to have it reviewed by the SWA so that when you receive your Notice of Acceptance (NOA) you can simply repost the job notice on the SWA's job posting website in the format that has been preapproved by the SWA.

In a perfect world, the DOL is required to issue an NOA or a Notice of Deficiency (NOD) within 7 days after receiving your Application for Temporary Labor Certification. Enter, once again, Salvador Dali. During the 2nd half of fiscal year 2017 it was taking the DOL up to 6 weeks to issue NOA's and NOD's.

With the NOA, you will receive recruitment instructions telling you to post the job with the SWA and place and advertisement to run on 2 days, one of which must be a Sunday, and you must post a job notice for 15 consecutive *business* days in 2 spots where employee notices are normally posted (one can be the company's website if the company normally posts employee notices on its website). All recruitment steps must be completed within 14 days. The Certifying Officer will tell you how soon you can submit your recruitment results (but *not* until after the expiration of the posted job notice). When you receive the NOA, drop everything, post and place your ads and notices *immediately*.

Best practice: Prepare your ad copy in advance. If you are out of the office while your DOL application is pending, make sure you take your laptop with you and check your email 2 or 3 times a day. Also, make sure your office has the ad copy and instructions for ad placement and posting with the SWA on hand so that the job can be posted and the ad copy placed immediately, in your absence.

Once you have submitted your recruitment report to the DOL, the DOL will take the final step to certify or not certify the application. Unfortunately, neither the law nor the regulations impose any time limit upon DOL to do so. Don't forget, after you receive certification you still have to go through both the visa petition process and the process of having the employer's temporary workers apply for their nonimmigrant visas overseas.

You must continue to recruit up to 21 days before the workers are needed on site and must update your recruitment report and place the updated report in the employer's audit file in the event your client is audited in the future. Remember, even though the budget was cut for auditing of audit

retention file during fiscal year 2016, your client is still required to maintain those files as budgeting may be restored in future years. Your clients must retain these files for a period of 3 years from the end of the period of need.

On one last matter, if unforeseen circumstances arise, for good cause shown, you may ask the DOL to invoke the Emergency Procedures, to allow you to file less than 75 days before the workers are need onsite.[8]

Once you have your temporary labor certification, have the employer sign the original certification immediately. Prepare your I-129 with H-2B supplement and supporting documents and file these along with the original signed copy of the certification to USCIS. You will need to file an I-907 request for expedited processing as well, otherwise you may not receive approval until long after your client's need for the workers begins. Premium processing will take 17 calendar days. *Practice tip:* If you are bringing workers in from multiple countries to fill the same position, make sure you include extra copies of the I-129 as CIS will need to send one approved copy to each US Consulate.

The last step is to have the beneficiary's file for their immigrant visas at the US Consulate overseas. *Practice tip:* It is best to have a nonimmigrant visa applications prepared and ready for submission in advance of receiving the approval notice from USCIS so that when it is received you, or your clients and, will be in a position to file the immigrant visa applications and request a group interview immediately.

One last tip, don't forget to allow for a few days travel to get the workers on site.

DOL Phase: Use of Private Wage Survey for H-2B Prevailing Wages

<u>Using Private Wage Surveys</u>

Employers interested in examining whether the local market wage is less than the national prevailing wage for any singular occupation may consider engaging an entity to conduct a wage survey at least three employers within the MSA. Generally, private executive compensation firms are best suited to assist with market surveys; however, some of the more persuasive surveys have often been conducted by local public colleges or private universities, and state workforce commissions, labor departments, and state agricultural-support agencies.

The use of an employer-provided wage survey is commonly the preferred employer option to challenge the national prevailing wage. However, in each case where the employer submits wage data for consideration, it will be incumbent upon the survey-provider to make a written showing

[8] 20 CFR 655.17

that the survey or other wage data meet the regulatory requirements. The employer must provide the NPWHC with enough information about the survey methodology (e.g., sample size and source, sample selection procedures, survey job descriptions) to allow the NPWHC to determine that—by virtue of the adequacy of the data provided and the validity of the statistical methodology used in conducting the survey—the prevailing wage determination should match the survey wage.

(1) The survey must be recent. If the employer submits a published survey, that survey must: have been published within 24 months of the date of submission of the prevailing wage request; be the most current edition of the survey; and, be based on data collected within 24 months of the date of the publication of the survey.

(2) The wage data submitted by the employer must reflect the area of intended employment.

(3) The job description applicable to wage data submitted by the employer must be adequate to determine that the data represents workers who are similarly employed. Similarly employed means jobs requiring substantially similar levels of skills.

(4) The wage data must have been collected across industries that employ workers in the occupation.

(5) The prevailing wage determination should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment. If the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, the median wage shall be used as the basis for making a prevailing wage determination.

(6) In all cases where an employer provides the NPWHC with wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample), including its adherence to these standards for the acceptability of employer-provided wage data. It is important to note that a prevailing wage determination based upon the acceptance of employer-provided wage data for the specific job opportunity at issue does not supersede the OES wage rate for subsequent requests for prevailing wage data in that occupation.

In practice, these conditions are met when the survey vendor or state agency requests information from a least three employers in the MSA—that engage workers in the specific occupation; and, at least data from thirty employees is obtained and examined in the survey.

Employer requests for a prevailing wage determination based on a private wage survey submitted on or after December 19, 2015, must be accompanied by the revised Form ETA- 9165. The CO will issue a Request for Information requiring the employer submit the revised Form ETA-9165 for any survey-based request for a prevailing wage determination submitted without the revised Form ETA-9165.

So how does an AILA member ensure that the expense associated with engaging an organization to assist it conduct the survey and prepare a competent report returns real value? Here are the best practices:

- Understand the market wage—if the market wage is at or above the what the NPWHC believes it to be (based upon a three-year-old national survey by-the-way), do NOT engage the vendor;
- Consider adding validation to the private survey by asking a state agency or local industry trade group to review the results and execute a statement in support of the findings;
- Study the market to identify friendly-competitors—particularly competitors that have also used the H-2B program in the past—that would be willing to participate in the survey AND defer the cost associated with process; the results will likely benefit them as much as it does your client; and,
- Prepare the survey well in advance of the date of need—file as early as July 1 every other year; that way, you and the client will have time to challenge the determination of the NPWHC if they conclude the survey does not meet the regulatory framework.

In order to justify the cost, the total labor cost of the H-2B workers during two consecutive H-2B seasons using the private wage survey results PLUS the cost of the survey must be less than the total labor cost of the H-2B workers during two consecutive H-2B seasons at the NPWHC-determined wage. Often, using the private wage survey wage results in SIGNIFICANT labor cost savings for your client.

USCIS Phase: I-129 and Accompanying Evidence of Temporary Need: Peakload

In order for an employer to qualify for obtaining H-2B visas, the employer must now first establish to the satisfaction of the Department of Labor that their need is temporary before being

allowed to move on to any other part of the H-2B visa process.[9] The need by the employer can be a peakload need for supplemental workers that add extra workers to a year-round work force during the busy period of the year or workers who can meet a seasonal need for employers that terminates completely when a particular season ends. A good example of peakload need would be a food processing plant in California hiring extra sanitizing technicians for its busy season that is directly tied to the peak vegetable harvest season each year.

There are four regulatory standards of temporary need defined in the H-2B regulations:
Thus, the current definition of temporary, as established by the DOL and DHS, requires that an employer justify its temporary need through one of the following four (4) regulatory standards:

1. *Seasonal:* The seasonal definition of temporary need requires an employer to establish that their need for labor is traditionally tied to a season of the year by an event or pattern *and* is of a recurring nature and the period(s) of time during each year in which the employer does not need the services or labor. (**Note:** Employment is *not seasonal* if the period of need is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees).
2. *Peakload:* The peakload definition of temporary need requires an employer to 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 demand *and* the temporary additions to staff will not become part of the employer's regular operation.
3. *One-Time Occurrence:* The one-time occurrence definition of temporary requires an employer to establish that it has not employed workers to perform the services or labor in the past and it will not need the 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(s).
4. *Intermittent:* Under this standard, an 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 to perform the services or labor for short periods.

Neither the statutory language nor the regulations are very helpful in further detailing what exactly qualifies under one of the standards listed above. USCIS will most often cite *Matter of Artee Corporation*, 18 I&N Dec 366 (Comm. 1982) for the definition of temporary need. USCIS either directly cites or paraphrases the *Artee* holding that "it is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position." Beyond

[9] 8 CFR 214.2(h)(6)(iv)

citing or paraphrasing this holding phrase, though, USCIS offers little in the way of further analysis as to the meaning of *Artee*. In *Artee,* the petitioner was an employment agency that provided temporary employee leasing services on a continuous basis. The employer in the controversy aimed to carry a permanent cadre of skilled employees that could be farmed out to other employers so as to meet the temporary needs of those other employers. To this point, Artee held that "the test of the true nature of the temporary need for the position lies in its examination of the temporary need of the temporary help service, not its customers." The BIA concluded that the employment service's need was permanent since it must have a permanent "cadre' of employees to refer to its customers, even if the assigned job itself was temporary in nature and duration. Thus, the current definition of temporary, as established by DHS and adopted by DOL, requires that an employer justify its temporary need through one of the above enumerated four (4) regulatory standards.[10]

Presently, the issue of peakload need is drawing the most controversy, specifically in the USCIS part of the process. Despite an employer's submission of significant evidence of a temporary peakload need during the DOL phase of the process, the USCIS is readjudicating temporary need in the I-129 context. It has issued substantial denials on the misguided conclusion that peakload workers become a permanent part of the employer's regular operations where the employer files for temporary peakload workers year after year. AILA has been monitoring the denials on this basis and the issue has been brought to the attention of the USCIS during liaison and though the USCIS Ombudsman's office. As of the date of this writing, we understand that the denial rate has substantially dissipated but reports of some denials on this basis continue. AILA members are encouraged to continue to report on H-2B denials for this reason.[11]

Compliance and Corresponding Employment

The 2015 IFR contains a new concept called "corresponding employment". This concept has been contained in the H-2A regulations for many, many years but was only incorporated into the H-2B regulations in 2015. The definition of "corresponding employment" and its application to H-2B compliance is probably one of the most important terms in the regulations. It essentially means that in connection with an employer's terms and conditions of employment, including wages, an H-2B employer must treat certain of its existing domestic workers the same as its H-2B workers.

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[10] For job contractors, under the 2015 Interim Final Rule, temporary need is based on the job contractor's own temporary need and not the need of its end-client and its need must be either seasonal or a one-time need. *See* 20 CFR 655.6 (c).

[11] Please send reports of denials through reports@aila.org

Specifically, the regulations define corresponding employment as follows:

> *Corresponding employment* means: (1) The employment of workers who are not H–2B workers by an employer that has a certified H–2B *Application for Temporary Employment Certification w*hen those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H–2B workers, except that workers in the following two categories are not included in corresponding employment: (i) Incumbent employees continuously employed by the H–2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H–2B workers during the 52 weeks prior to the period of employment certified on the *Application for Temporary Employment Certification* and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer's payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or (ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H–2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause. (2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.[12]

The purpose of this provision is to ensure that domestic workers similarly employed by an H-2B employer are provided the same benefits including wages, ¾ guarantee of work hours, disclosure of the work contract as well as the other major H-2B program benefits. This ensures that "the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6)(iv)."[13] Although the 2016 Appropriations Bill and accompanying continuing resolutions defunded enforcement authority for this provision, it remains in effect as of the date of submission of this article and employers must comply with this requirement.

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[12] 20 CFR 655.5

[13] 80 FR 24042, 24053 (April 29, 2015)

The key question then is when should an employer consider a domestic worker to be a corresponding employee?

1. Domestic workers are not corresponding employees when performing work outside the time frames as defined in the H-2B application. [14]
2. Certain year-round "incumbent" workers are not corresponding employees
3. Certain workers protected by collective bargaining agreements are not corresponding employees
4. Certain workers who are working at different locations not included in the job order should not be considered as corresponding employees
5. Domestic workers who are not performing substantially the same job duties should not be considered as corresponding employees. [15]

As practitioners, it is critical that employers understand the concept of corresponding employment. To start, employers must thoroughly describe the job duties in the job order so that they understand which employees are preforming the same job. Payroll records must also be analyzed to determine whether the exceptions apply. Documentation of corresponding employment should be maintained in case of an audit or Wage & Hour investigation.

Conclusion

The authors of this article strongly urge practitioners to become thoroughly familiar with the H-2B regulations as well as current trends in the H-2B process before practicing in this area of immigration law. Of the many nonimmigrant visa categories available, the H-2B visa classification is clearly one of the most complex and problematic; this has never been more apparent than over the last few years. The timing and accuracy of the new filing system, the existence of the H-2B cap, the ever-increasing H-2B compliance enforcement by the DOL, and increasing litigation all create barriers to program use. However, with careful education of clientele and preparation in the nuances, these barriers can be overcome resulting in significant benefits to industry users of the H-2B program.

[14] 20 CFR 655.5(2) and 29 CFR 503.4(2); 80 FR 24042, 24052-24054 (April 29, 2015)

[15] Neither the regulations nor the preamble discuss when the job duties may be considered as "substantially" the same.