

GROWERTALKS

Features

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Visa Program Primer

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With businesses across the United States struggling to find reliable labor, let alone in labor-intensive occupations, many are left asking, “What should I do?”

Sure, raising the wage well above \$15 an hour in some occupations is doable, but does it attract reliable labor? Maybe offer incentives like bonuses, medical insurance, paid time off or work-from-home schedules. But those types of incentives don't work in every industry or occupation—you can't really work from home when someone needs to physically be present to care for plants in a greenhouse.

And even if those incentives attract labor, is that labor going to be reliable and last a whole season or two? Sadly, we know the answer to that question is most likely no.

That answer is why many employers turn to the temporary foreign guestworker visa programs like the H-2A and H-2B visa—so much so that we're seeing record numbers of applications. In 2021, the U.S. Department of Labor (DOL) certified 317,619 H-2A temporary agricultural visas and 181,451 H-2B temporary non-agricultural visas. That's up from a DOL certified 200,049 H-2A visas and 133,985 H-2B visas in 2017.

Below are five things you should consider before embarking on this journey of hiring workers under these programs.

1. Do you have a season?

These two visa programs require an employer to have a temporary need or a season. You would think in agricultural production that wouldn't be difficult to prove, but as modern agriculture expands and evolves it's become exceedingly difficult to prove to DOL that your need isn't permanent.

This is especially true in the nursery and greenhouse industry, as DOL sees your ability to produce year-round as a permanent need or your decision not to produce year-round as an economic decision to be able to access the program. In the landscape installation and maintenance industries, it's much easier. In fact, the largest industry user of the H-2B program is the landscape industry.

2. Direct hire or contractor?

This consideration is in large part more of an H-2A concern, as the H-2B program makes it more difficult to hire a contractor. For the H-2A program, though, the decision to be a direct-hire employer or hire a farm labor contractor that also hires H-2A workers (H-2ALC) is important, as it determines how involved you'll be. As a direct-hire employer, you're responsible for all costs of the program (filing fees, transportation, visa and border crossing fees, wages and housing), however, you can ensure that you're doing everything by the letter of the law and have much more control over your use of the program.

If you use an H-2ALC, they take on all the burden. Although that may seem like an ideal situation, you're relying on a third party to follow all the program requirements. If they fail to comply, you could be left without a workforce and potentially liable for their mistakes. But you aren't required to provide housing or transportation.

Another potential issue when using an H-2ALC is their seasonality. If they take on too many clients in your area and file for longer periods of time to accommodate those clients, you could be left without a workforce if DOL questions their seasonal need.

3. Corresponding employment

In both the H-2A and H-2B programs, the regulations require you to offer the same terms and conditions to domestic workers as you do the H-2A or H-2B workers—this is called corresponding employment. The definition of corresponding employment differs for each program, but the general idea is the same: If your domestic workforce is doing the same thing that your H-2A or H-2B workforce is doing then you must pay them the same and offer the same terms and conditions of work. This is more of an issue with the H-2A program right now because Congress has stopped DOL from enforcing corresponding employment in the H-2B program. Although they cannot enforce this provision, it's still in the regulations and required to be followed.

Although some advocates that are against the programs complain about sub-standard wages, you likely would be paying the H-2 workers more than your domestic workforce. This is why the corresponding employment provisions are important to understand, because if you're paying the H-2 worker more, you would have to pay your domestic workers doing the same job the same wage as your H-2 workers.

4. The Adverse Effect Wage Rate or prevailing wage

Both the H-2A and H-2B programs require a specific wage to be paid to the foreign workers and workers in corresponding employment. For the H-2A program, that wage is the Adverse Effect Wage Rate (AEWR) and the national average right now is \$15.92.

For the H-2B program, you pay the prevailing wage, which is determined by DOL based on the job duties. The H-2B wage is the mean wage for the occupation in the area of intended employment, so it's not an entry-level wage. For instance, a landscaping worker in Columbus, Ohio, would be paid \$15.69 an hour right now, while the entry level wage is \$12.53. As mentioned before, this is an important consideration because you're required to pay your workers in corresponding employment the same wage.

For the H-2A program, the AEWR is set by a survey called the Farm Labor Survey (FLS). The FLS surveys farms and ranches across the country for the wages paid to farmworkers. It's then published as a combined field and livestock worker wage. DOL uses this survey to publish the annual AEWR that must be paid in your state. The AEWR has been increasing at nearly 10% each year and in some places is well over \$15.00 an hour.

5. The cost

If the cost of paying higher wages wasn't enough, the programs come with many other costs. First, there are filing fees for both programs. The H-2A program carries a certification fee at DOL of \$100 plus \$10 a worker, not to exceed \$1,000. Then there's the USCIS filing fee of \$460, the Department of State filing fee of \$160 and the border-

crossing fee. On top of all that, many people use an agent to file their application, which typically charges between \$1,000 and \$5,000 to file the application, plus a per-worker fee.

Then there are the other costs of the program—you must provide housing in the H-2A program, transportation to and from the place of recruitment, transportation to and from the housing to the worksite, and either kitchen facilities or three meals a day. This is why many people chose to hire an H-2ALC because they handle all of these costs and you pay an hourly premium for the labor.

The H-2B program, on the other hand, doesn't come with the requirement to provide housing and kitchen facilities or meals. You're still required to pay for transportation from the place of recruitment and return transportation, but not daily transportation to the worksite. There's no certification fee at DOL, but you still pay the USCIS, Department of State and border-crossing fees. You also can opt to pay an additional amount at USCIS for premium processing, meaning they'll process your case within 15 days. That's an additional \$1,500 for premium processing. Like with H-2A, many people use agents to file and the fees are relatively similar.

Conclusion

Both the H-2A and H-2B programs are good and viable options for obtaining much-needed labor relief. They come with a cost, but you get access to a reliable workforce. Additionally, the workers that come in both programs are given a fantastic opportunity that they don't have in their home country. They make a great wage and help their families back home. Many employers that use these programs feel the workers are like family and they come to work year after year.

These are just some of the considerations an employer must consider when deciding to participate in these programs. There are many other things to consider as well since these programs are highly regulated and not using the programs as intended can get you in serious trouble with the Federal government.

The next window to apply for foreign workers is January 2023. Visit dol.gov for more info. **GT**

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