



Basics of the H-2A Visa: The Temporary Agricultural Visa

Matthew R. Chappell
Extension Horticulturist – Nursery Production

Agricultural employers in Georgia consistently suffer from labor shortages due to many factors that are often out of an employer's control. The seasonal nature of work, the marginal wages that employers are able to pay their workforce and the lack of individuals willing to perform agricultural tasks have led to a small labor pool from which agricultural (horticultural) employers look to fill job vacancies. This has caused many employers to increasingly rely on immigrant workers to fill vacancies. Immigrant workers have been welcomed by many employers who desperately need quality labor at low cost. However, issues surrounding illegal immigrant employment such as civil and criminal penalties must be seriously considered by any employer hiring immigrant workers. The H-2A visa program, offered through the United States Citizenship and Immigration Services office of the Department of Homeland Security, was instituted as a means of overcoming labor shortages in agricultural areas while protecting employers from penalties associated with employing illegal immigrants. The program, instituted as part of the Immigration Reform and Control Act of 1986, gives employers the ability to supplement their local labor pool by using immigrant (non-citizen) workers on a seasonal/temporary basis.

This publication is for owners and managers and serves as an introduction to the H-2A program. Use it as a guide to making an informed decision if you are considering hiring immigrant workers.

Requirements of employers to obtain H-2A workers

Two major requirements must be met by employers who would like to obtain H-2A employees.

First, the employer needs to establish that there are not suitably able, willing, and/or competent U.S. workers available based on the job duties and the location of the business. This includes a vigorous search, including newspaper and/or radio advertising in the local area where the business is located. This must also be an effort independent of, and in addition to, the efforts of the Georgia Department of Labor (148 Andrew Young International Blvd., Atlanta, GA 30303; Phone: 404-232-3875).

Second, the employer must also demonstrate that the employment of immigrant (foreign) workers will not cause a reduction in the wages of the local workforces that historically have been employed in the same field as H-2A workers would fill. This is usually not an issue, as the U.S. Department of Labor (U.S. DOL) has set guidelines on hourly rates of pay for H-2A workers based on median hourly pay rates for specific jobs in specific locations.

Compensation of H-2A workers

Typically, employees in the green industry receive an hourly wage. Likewise, H-2A workers generally receive an hourly wage, with H-2A workers receiving a wage inline with what a United States worker would receive for the same job. The U.S. DOL has interpreted this to mean an H-2A wage must be the higher of the following:

- The industry's prevailing wage in the relevant labor market.
- The state or federal minimum wage.
- The "adverse effect wage rate."

The adverse effect wage rate, or AEWR, is set at the prior year's average hourly wage for horticultural workers as determined by the Department of Agriculture. The Department of Agriculture uses the 'Occupational Information Network' (www.online.onetcenter.org) to determine median wages and calculate the adverse effect wage rate, which varies depending on location. Most horticultural H-2A workers will fall under the category of 'Nursery Workers' or 'Landscaping and Grounds-keeping Workers' and median wage for the two were \$7.95 per hour and \$10.22 per hour, respectively, for 2007. To obtain a specific hourly rate, the employer should submit a 'Prevailing Wage Request Form' to the Georgia Department of Labor. This form can be obtained by calling (404) 232-3875 ext.21262 or at <http://www.dol.state.ga.us/pdf/forms/dol1687.pdf>.

Employee benefits provided by the employer

Because the majority of H-2A employees are immigrants and, as such, do not have access to permanent housing, medical care, transportation, etc., the employer is required to provide a base level of support to H-2A employees. While it may initially appear that the inclusion of the following employee benefits would cause financial strain on an employer, this is not necessarily true. Most of these benefits can be amortized and depreciation used in reducing annual/quarterly taxes. Benefits required by the employer are:

- The employee must be provided with transportation to and from the worker's temporary home to the workplace. Most employers purchase a single vehicle and assist one immigrant worker in obtaining a license. This allows all H-2A workers to carpool to work, medical offices, religious services, grocery stores, shopping malls, etc.
- When the contract period has ended, the employer must provide the worker with transportation home or to his next workplace.
- Employers must provide housing to all H-2A workers who choose not to live in residential communities. The state Department of Labor should inspect housing prior to occupancy and meet mini-mum state and federal standards for "temporary labor camps." Employers can charge employees for utility expenses incurred in housing (deducted from payroll) but cannot charge rent.
- The employer must provide three meals per day (including off days) or meal preparation facilities where the workers can prepare food individually or as a group.
- The employer must provide workers' compensation insurance to H-2A workers.

Application process for H-2A workers

The process by which employers apply for and manage H-2A employees recently was converted from a paper-based system to an online system that can be accessed at http://www.h2a.doleta.gov/eta_start.cfm?actiontype=home&CFID=446829&CFTOKEN=77977910. The system is administered by the Foreign Labor Certification Office of the U.S. Department of Labor. It includes a comprehensive 'online help' section that guides users through account setup and specific submission forms. The online system helps employers through the registration process followed by completion of forms ETA 750 and ETA 790, the required application for H-2A certification. Once these forms have been completed, they must be printed and one copy of each form submitted to the following two agencies:

**U.S. Department of Labor
Employment and Training Administration**
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, Georgia 30303
Phone: (404) 893-0101

Georgia Department of Labor
Attn: S. Wilson (H-2A), Room 450
148 Andrew Young International Blvd.
Atlanta, GA 30303
Phone: (404) 232-3500

Submit the application a minimum of 60 days before the temporary workers are needed to allow for housing inspection and application processing, including any modifications that need to be made to the application. Additionally, the U.S. DOL and Georgia Department of Labor must approve the application 20 days prior to the starting work date. If the application is approved, the employer pays, to the U.S. DOL, a base fee of \$100 plus \$10 for each position certified, up to a maximum of \$1,000.

Recruitment of H-2A workers

The U.S. DOL manages the recruitment process for all H-2A positions. There are three avenues the U.S. DOL takes in its recruitment efforts: the state employment service agency can refer candidates to the employer; the employer can independently recruit workers and inform the U.S. DOL and Georgia Department of Labor of candidates; recruitment can be conducted directly by the U.S. DOL after the U.S. DOL certifies the applications. Most referrals come from the Georgia Department of Labor, based on a statewide database of job candidates.

Issues with H-2A certification

Despite the fact that the federal statute on H-2A workers requires employers to diligently recruit U.S. workers prior to applying for H-2A certification, U.S. DOL regulations do not strictly enforce this requirement. For this reason, some employers heavily recruit for more H-2A workers while virtually ignoring available U.S. workers. However, after the recruitment period, the U.S. DOL makes a decision on certification and can reject an application for

lack of diligence in recruiting U.S. workers. Once recruitment of U.S. workers is complete, the U.S. DOL will subtract the number of U.S. workers who were successfully referred from the number of H-2A workers requested and certify the remaining job openings. Certification will not be issued if the U.S. DOL determines that U.S. workers have filled all the job openings, or if it finds that the potential H-2A workers have been offered better working conditions than those offered to U.S. workers. Also, certification will not be granted if the employer has committed a substantial violation of the H-2A program within the previous two years, if the employer fails to demonstrate that H-2A workers will be covered by workers' compensation, or if the employer fails to comply with recruitment requirements.

Registering H-2A workers with U.S. Immigration Services

If the certification is granted, an I-129 petition is then filed with the INS and returned to the U.S. Citizenship and Immigration Services California Services Center at:

**U.S. Citizenship and Immigration Services
California Service Center**
ATTN: H-2A Processing Unit
P.O. BOX 10140
Laguna Niguel, CA 92607-1040

INS form I-129 and supplemental materials can be accessed at the 'Immigration Forms' section of the United States Citizenship and Immigration Services web site (<http://www.uscis.gov/portal/site/uscis>). Form I-129 may be filed for multiple workers, and the workers may be unnamed on the application. The employer must provide the INS with their names as they become available. If the INS approves the petition, notification is forwarded to the appropriate consulate where the workers apply for visas. An H-2A visa is valid for a maximum of one year. Extensions of up to one year are possible, with a maximum of three years. Once an alien has spent three years in the United States as an H-2A worker, he or she must leave for six months before being able to resume H-2A employment. During this time the alien can reenter the United States in any status that is not based on the performance of agricultural work.

References

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Federal Register, v. 65, no. 219, November 13, 2000, p. 67628. See also §104 of P.L. 106-1033.

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<http://www.foreignlaborcert.doleta.gov/h-2a.cfm>

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