H-2B OR NOT TO BE

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History of the H-2B Visa

The term "guest worker" has typically been applied to foreign low-skilled laborers, who often are employed on a temporary basis as agricultural or other seasonal workers. In the past, guest worker programs have been established in the United States to address worker shortages during times of war. During World War I, for example, tens of thousands of Mexican workers performed mainly agricultural labor as part of a temporary worker program. The Bracero Program, which began during World War II and lasted until 1964, brought several million Mexican agricultural workers into the United States. At its peak in the late 1950s, the Bracero Program employed more than 400,000 Mexican workers annually.

The Immigration and Nationality Act (INA) of 1952, as originally enacted, authorized a temporary foreign worker program known as the H-2 Program. The program covered both agricultural and nonagricultural workers who were coming to the United States for a limited time to perform temporary services (other than services of an exceptional nature requiring distinguished merit and ability) or labor. Aliens who are admitted to the United States for a temporary period of time and a specific purpose are known as nonimmigrants. The 1986 Immigration Reform and Control Act (IRCA) amended the INA to subdivide the H-2 Program into the current H-2A and H-2B Programs and to detail the admissions process for workers holding H-2A visas. The H-2A and H-2B visas are subcategories of the larger "H" nonimmigrant visa category for temporary workers. Andorra Bruno, "Immigration: Policy Considerations Related to Guest Worker Programs," Congressional Research Service Report

for Congress, updated Jan. 26, 2006.

Each year the Department of Homeland Security (DHS) awards up to 66,000 H-2B visas to unskilled temporary nonagricultural workers. Because these visas are issued to fill temporary needs, the terms of the visas cannot exceed 10 months. Most of these visas go to workers in the hospitality, farming, landscaping, and construction industries. Of the total H-2B visas issued, 33,000 are allotted for a start date after October 1, and the other 33,000 are allotted for a start date subsequent to April 1. If this were not the case, companies whose temporary needs started on October 1 (the start of the government's fiscal year) would have an unfair advantage in obtaining H-2B visas. For the past several years the full allotment of visas has been awarded soon after they become available. The paucity of H-2B visas available each year is one factor that contributes to the high rate of alien workers entering the United States illegally each year. If more H-2B visas were available, fewer people would be tempted to enter illegally.

Prior to Jan. 18, 2009, the application procedure for H-2B visas involved filing an ETA 750 form with the state workforce agency, then filing an I-129 form with the DHS. If both forms were approved, the visa was issued for the requested period of time—not to exceed 10 months. This year the DHS and the Department of Labor (DOL) revised their regulations in a way that more clearly defines the process for obtaining an H-2B visa on behalf of a temporary worker. The new regulations went into effect on Jan. 18, 2009. Transition rules that apply to H-2B visa petitions for start dates prior to Oct. 1, 2009, are included in the new regulations. Relatively few petitions will be affected by the transition rules, because the semiannual cap of 33,000 H-2B visas was reached on Jan. 7, 2009. Therefore, only applications for extensions for persons already holding H-2B visas will use the transition rules. Most H-2B visa petitions will be for new applicants with start dates subsequent to Oct. 1, 2009. The new regulations will govern all the new applications.

The New Regulations

Many items in the regulations—such as the definition of temporary need—remain the same. An H-2B visa may be used to fill an employer's temporary need only if no unemployed U.S. workers capable of performing the work can be found. Temporary needs come in four varieties:

- a one-time occurrence, which exists when an employer demonstrates no past or future need for the labor or service but only a need at the present time;
- a seasonal need, which exists when an employer establishes that the service or labor is a recurring need that is traditionally tied to a season of the year (such as a ski resort's needs); in this situation, the company usually shuts down completely in the off-season;
- a peakload need, which exists when the employer needs to supplement permanent staff on a temporary basis because of a short-term demand; the employer's business never completely shuts down but requires additional workers only during a certain time of the year; and
- an intermittent need, which exists when the employer demonstrates occasional or intermittent needs for temporary workers to provide services or perform labor for short periods.

The process of applying for an H-2B visa involves both the DHS and the DOL, and the new regulations affect the procedures of both departments.

Changes Involving the Department of Labor's Process

The first step in the new process is to obtain a prevailing wage determination from the Chicago National Processing Center. The request for a prevailing wage determination is filed on the new ETA 9141 form, which cannot be filed more than 90 days prior to beginning recruitment for the job. After the prevailing wage has been determined, the employer must conduct a recruitment campaign, which includes posting a job order with the state workforce agency for 10 days and running two print ads, one of which must be run on a Sunday. The ads must contain the information stipulated in 20 CFR § 655.17—including the employer's name and appropriate contact information, the geographical area (if the employer will provide transportation to the job site, the ad must indicate this), job duties, minimum education and experience requirements and whether or not on-the-job training will be available, the workhours and workdays and whether or not overtime will be available, expected start and end dates of employment, the wage offered, a statement that the position is temporary, and an indication of the number of job openings the employer intends to fill. If the workplace has a union, the bargaining representative must be notified in the same manner as the current regulations require. The recruitment cannot begin more than 120 days prior to the date of the need; for Oct. 1, 2009, start dates, the first date recruitment can begin is June 3, 2009.

Requirements for following up on responses to the recruitment campaign remain the same. The employer must prepare and maintain a recruitment report for three years subsequent to the campaign. The recruitment report must list the names of the persons who applied for the position, and, if they were not hired, the report must include a valid nondiscriminatory reason that the person was not qualified for the position. A copy of the recruitment report must be submitted along with the application for temporary employment certification, which the employer may submit to the DOL on new ETA 9142 form after the recruitment has been completed.

As part of H-2B application process, the employer must include a lengthy list of attestations as stipulated in 20 CFR §§ 655.21 and 655.22; some of these are new and some remain from the previous regulations. If the DOL denies the application, it cannot be appealed to the DHS; the denial can be appealed only to the Board of Alien Labor Certification Appeals.

Changes Involving the Department of Homeland Security's Process

Changes to DHS processes focus primarily on the applicant's home country as well as length of stay. Employers may apply for visas for unnamed workers if the petition is

for a new worker and if the worker is processed at a consulate located outside the United States. In addition, only nationals of the following countries are eligible for H-2B visas: Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Japan, Mexico, Moldova, New Zealand, Peru, Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine, and United Kingdom. Countries may be added or removed from the list at the discretion of the DHS.

If applying for a new visa, an H-2B visa holder must remain outside the United States for three months before he or she is eligible for a new H-2B visa. An H-2B visa for a one-time occurrence can be granted for more than the traditional 10 months. If the employer can prove that the temporary one-time occurrence will last for the time requested—for example, construction of a large office building that may take more than 10 months to complete—the visa can be granted for up to the full three years allowed under the program. Finally, the start date or "date of need" on the I-129 form must be the same as the start date given on the DOL's certification document (the new ETA 9142 form).

Other Changes

The employer is required to notify the Department of Labor if any of the following occur:

- the employee is terminated,
- the work is completed more than 30 days prior to the scheduled completion date,
- the employee does not show up for work, or
- the worker absconds and is missing for more than five consecutive workdays.

The DHS was granted permission to establish a land-border exit system pilot program whereby any H-2B workers admitted at a port of entry participating in the program must depart through a port of entry participating in the program and must present designated biographica and/or biometric information upon departure at the conclusion of the authorized period of stay. The Department of Labor's Wage and Hour Division is responsible for enforcing the H-2B regulations.

H-2B: What It Should Be

The number of H-2B visas issued each year—66,000—does not fill the need for temporary unskilled laborers in the United States; in fact, some studies show that the number does not even fill one-tenth of the need. The economy of the United States would benefit by allowing the market to control the flow of unskilled laborers into the country. Furthermore, imposing a false ceiling of 66,000 visas is counterproductive. When the demand for unskilled laborers is not met by the number of visas available, foreign workers have an incentive to enter the United States without permission in order to fill the need for laborers.

Increasing the number of H-2B visas would not displace U.S. workers; rather, doing so would strengthen the economy and provide more jobs for skilled U.S. workers. The Bureau of Labor Statistics has estimated that, from 2004 to 2014, there will be about 25 million job openings (new jobs plus job turnover) for workers with a high school diploma or a lower level of education. At the same time, the number of unskilled workers in the United States is dropping and the native population is becoming more educated. The percentage of young unskilled workers in the U.S. workforce dropped from 23 percent in 1990 to 11 percent in 2006. The inability to find suitable unskilled workers puts a strain on U.S. employers and may cause businesses to cease operations. On the other hand, if unskilled workers are available, businesses can flourish and more jobs can be created for skilled workers. In short, the economy grows if employers can find suitable unskilled laborers to meet their needs.

Wage rates are not depressed by an increase in legal immigration. When workers enter the United States with proper visas, it is easier for the U.S. government to control their wages and working conditions. Therefore, it is likely that wages of unskilled workers will remain the same. Workers with lower-level skills increase the productivity—and therefore the wages—of U.S. workers who have the higher-level skills.

There are many other reasons to increase the number of H-2B visas. For example, legal workers will pay more taxes in the United States than the current crop of undocumented workers. Also, crime rates are lowest in states that have the the highest rates of immigration growth: between 1999 and 2006, the total crime rate in the 19 states that had the highest rate of immigration declined by 13.6 percent, compared with a 7.1 percent decline in the other 32 states. In fact, incarceration rates among young men are lowest for immigrants—even those who are least educated—and this statistic holds especially true for the Mexicans, Salvadorans, and Guatemalans who make up the bulk of the undocumented population in the United States.

Guest workers have been a part of the U.S. economy for our entire history. New regulations provide a solid, workable framework for businesses to employ temporary unskilled workers in many necessary industries. The demand for foreign unskilled workers is greater than 66,000 workers per year. Increasing that total or alleviating the cap completely will allow the market to determine the number of unskilled workers necessary. The proper number of unskilled workers will contribute to a healthy economy and will allow American workers with higher skills to fill better jobs that pay higher salaries. Increasing the number of H-2B visas granted will also result in more taxes paid by the legal temporary workers in the United States. **TFL**

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