

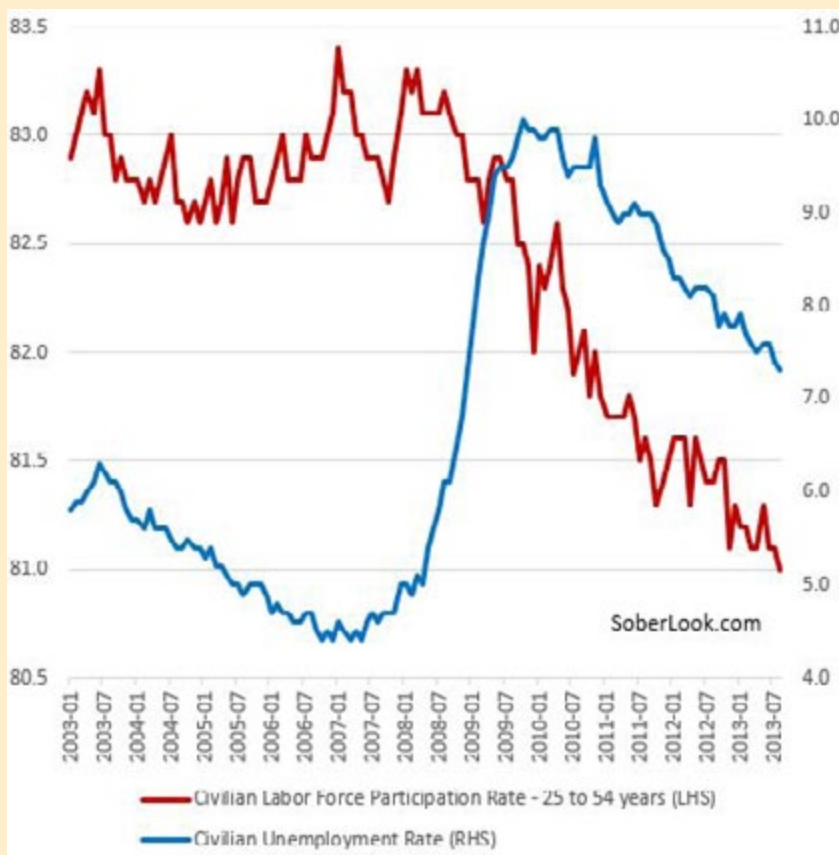
H2B Program,

Just the facts Jack!

Compiled from US Government Wage and Hour Division

Overview

The H-2B nonimmigrant program permits employers to temporarily hire nonimmigrants to perform nonagricultural labor or services in the United States. The employment must be of a temporary nature for a limited period of time such as a one-time occurrence, seasonal need, peakload need or intermittent need. The H-2B program requires the employer to attest to the Department of Labor that it will offer a wage that equals or exceeds the highest of the prevailing wage, applicable Federal minimum wage, the State minimum wage, or local minimum wage to the H-2B nonimmigrant worker for the occupation in the area of intended employment during the entire period of the approved H-2B labor certification. The H-2B program also establishes certain recruitment and displacement standards in order to



protect similarly employed U.S. workers.

The Wage and Hour Division has been delegated enforcement responsibility by the Department of Homeland Security effective January 18, 2009, to ensure H-2B workers are employed in compliance with H-2B labor certification requirements. The Wage and Hour Division may impose administrative remedies such as wage payments and civil money penalties

against employers who violate certain H-2B provisions.

Who May Qualify for H-2B Classification?

To qualify for H-2B nonimmigrant classification, the petitioner must establish that:

- There are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work.
- The employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.
- Its need for the prospective worker's services or labor is temporary, regardless of whether the underlying job can be described as temporary. The employer's need is considered temporary if it is a(n):
 - o one-time occurrence – A petitioner claiming a one-time occurrence must show that it has:
 - o Not employed workers to perform the service or labor in the past, and will not need workers to perform the services or labor in the future; or
 - o An employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

or

- o seasonal need – A petitioner claiming a seasonal need must show that the service or labor for which it seeks workers is:
 - o Traditionally tied to a season of the year by an event or pattern; and
 - o Of a recurring nature.

Note: Employment is not seasonal if the period during which the service or labor is needed is:

- o Unpredictable;
- o Subject to change; or
- o Considered a vacation period for the employer's permanent employees.

or

- peakload need – A petitioner claiming a peakload need must show that it:

- o Regularly employs permanent workers to perform the services or labor at the place of employment;
- o Needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand; and
- o The temporary additions to staff will not become part of the employer's regular operation.

or

- intermittent need – A petitioner claiming an intermittent need must show that it:
 - o Has not employed permanent or full-time workers to perform the services or labor; and
 - o Occasionally or intermittently needs temporary workers to perform services or labor for short periods.

H-2B petitioners must also provide a single valid temporary labor certification from the U.S. Department of Labor (DOL)

H-2B Program Process

- Step 1: Petitioner submits temporary labor certification application to DOL. Before requesting H-2B classification from USCIS, the employer must apply for and receive a temporary labor certification for H-2B workers with the U.S. Department of Labor (or Guam DOL if the employment will be in Guam).^{*} For further information regarding the temporary labor certification application requirements and process, see the “Foreign Labor Certification, Department of Labor” and “Foreign Labor Certification, Guam Department of Labor” pages.
- Step 2: Petitioner submits Form I-129 to USCIS. After receiving a temporary labor certification for H-2B employment from either DOL or Guam DOL (if applicable), the employer should file Form I-129 with USCIS. With limited exceptions, the original temporary labor certification must be submitted with Form I-129. (See the instructions to Form I-129 for additional filing requirements.)
- Step 3: Prospective workers outside the United States apply for visa

and/or admission. After USCIS approved Form I-129, prospective H-2B workers who are outside the United States must:

- o Apply for an H-2B visa with the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad, then seek admission to the United States with U.S. Customs and Border Protection (CBP) at a U.S. port of entry; or
- o Directly seek admission to the United States in H-2B classification with CBP at a U.S. port of entry.

* Note: Employers requesting employment in a position that is exempt from the U.S. Department of Labor's temporary labor certification application filing requirement may skip step 1 in the H-2B process.

How do I notify USCIS?

Notification should be made via email or mail to the USCIS Service Center that approved the I-129 petition. Although not required, email notifica-



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tion is strongly recommended to ensure timely notification.

Fee-Related Notifications to USCIS

A petitioner, agent, facilitator, recruiter, or similar employment service is prohibited from collecting a job placement fee or other compensation (either direct or indirect) at any time from an alien H-2B worker as a condition of employment.

Petitioners may avoid denial or revocation of their H-2B petitions if they notify USCIS that they obtained information concerning the beneficiary's payment (or agreement to pay) a prohibited fee or compensation to any agent, facilitator, recruiter, or similar employment service only after they filed their H-2B petition. This narrow exception does not apply, however, where a petitioner knew or should have known at the time of the filing of its H-2B petition that the prospective worker had paid (or agreed to pay) such recruitment-related fees to any such persons or entities.

Petitioners must notify USCIS of an H-2A worker's payment or agreement to pay prohibited fees to a recruiter, facilitator, or similar employment service within 2 workdays of gaining knowledge of such payment or agreement.

Petitioners must include the following information in the fee-related notification:

1. **The** reason for the notification;
2. The USCIS receipt number of the approved H-2B petition;
3. The petitioner's information
 - o Name:
 - o Address
 - o Phone number
4. The employer's information (if different from that of the petitioner):
 - o Name
 - o Address
 - o Phone number

5. Information about the recruiter, facilitator, or placement service to which the beneficiaries paid or agreed to pay the prohibited fees:

- o Name
- o Address

Fees not prohibited are:

- The lesser of the fair market value or actual costs of transportation; and
- Any government-mandated passport, visa, or inspection fees to the extent that the payment of such costs and fees by the H-2B worker is not prohibited by statute or other laws. This includes, but is not limited to, the FLSA, DOL regulations, case law, and DOL interpretations of the FLSA and other relevant labor laws.



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Requirements to Participate in the H-2B Program

The H-2B provisions of the Immigration and Nationality Act (INA) provide for the admission of nonimmigrants to the U.S. to perform temporary non-agricultural labor or services. [8 U.S.C. 1101(a)(15)(H)(ii)(b)]

The Wage and Hour Division (WHD) of the U.S. Department of Labor (Department) has been delegated enforcement responsibility to ensure H-2B workers are employed in compliance with H-2B labor certification requirements. This enforcement authority has been delegated by the Department of Homeland Security (DHS) pursuant to 8 U.S.C. 1184(c)(14)(B) and 8 U.S.C. 1103(a)(6). The Department's regulations implementing this authority became effective on January 18, 2009, and are applicable to applications for certifications filed on or after that date pursuant to 20 C.F.R. Part 655.

As part of the application process an employer seeking authorization to employ H-2B workers must attest that it:

Job Opportunity

1. Will offer terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, which are no less favorable than those offered to H-2B workers. [20 C.F.R. § 655.22(a)]
2. Will offer a job opportunity to H-2B workers that is a bona fide, full-time temporary position with qualifications that are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. [20 C.F.R. § 655.22(h)]
3. Will truly and accurately state the dates of temporary need, reason for temporary need, and number of positions being requested for labor certification. [20 C.F.R. § 655.22(n)]

Strike/Lockout

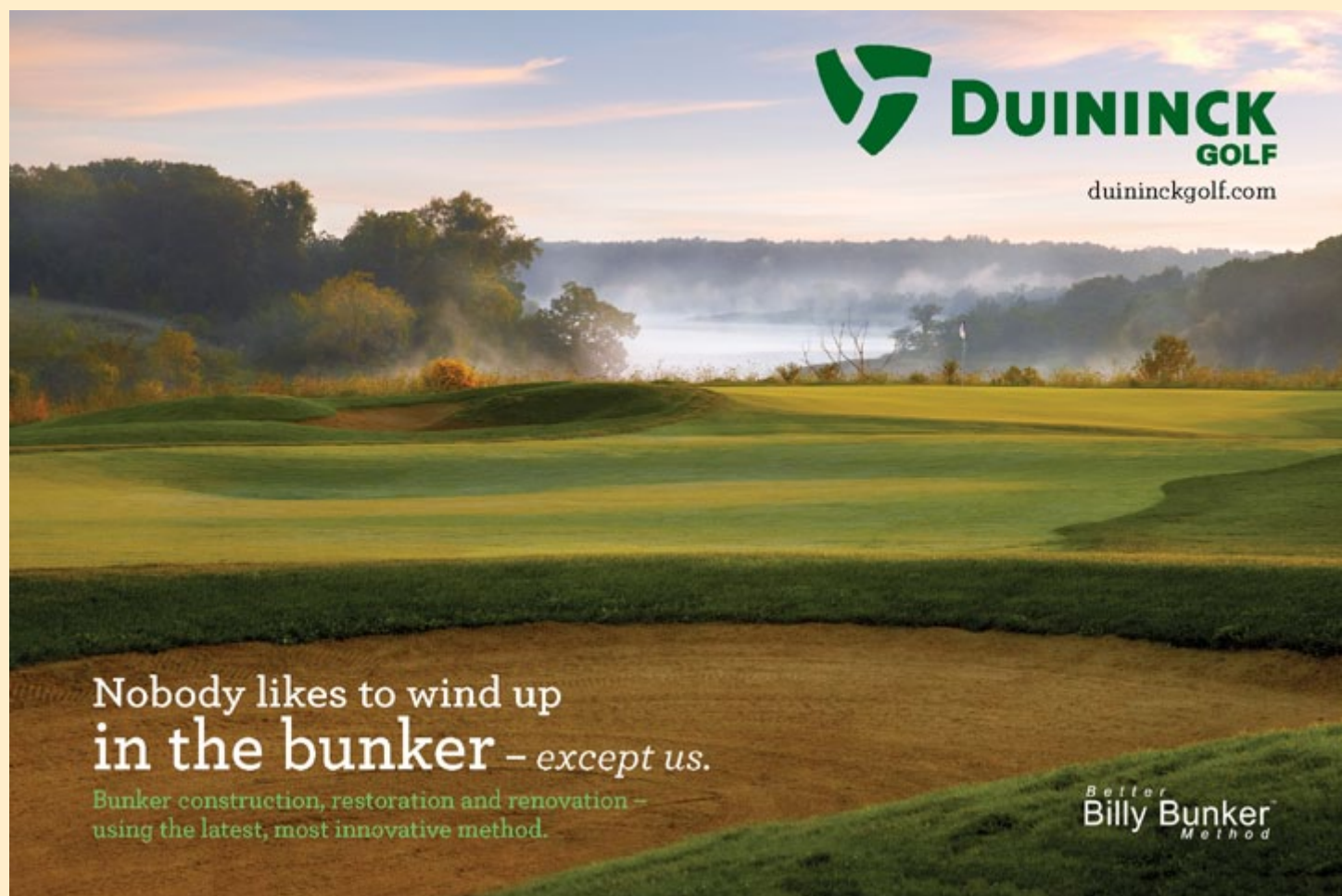
Must not seek H-2B certification for a specific job opportunity that is vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage. [20 C.F.R. §

655.22(b)]

Recruiting

Has met recruiting requirements found in 20 C.F.R. § 655.15(d), which require the employer to:

- A. Obtain a prevailing wage determination from the National Processing Center;
- B. Submit a job order to the State Workforce Agency (SWA) serving the area of intended employment;
- C. Publish advertisements in compliance with 20 C.F.R. § 655.15(f);
- D. Contact the local union as a recruitment source if the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application.



The advertisement features a scenic view of a golf course at dawn or dusk, with mist rising over a lake in the background. The sky is a mix of soft pinks, oranges, and blues. In the foreground, there is a well-maintained green fairway and a brown sand bunker.

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U.S. Applicants

1. Will not reject U.S. applicants for the job opportunity for which the labor certification is sought for reasons other than lawful, job-related reasons. [20 C.F.R. § 655.22(c)]
2. Will retain records of all rejections of U.S. worker applicants for the job opportunity for which labor certification is sought. [20 C.F.R. § 655.22(c)]
3. Has not been successful in locating sufficient numbers of qualified U.S. applicants for the open job opportunity. [20 C.F.R. § 655.22(c)]

Other Laws

Will comply with applicable Federal, State, and local employment-related laws, including health and safety laws. [20 C.F.R. § 655.22(d)]

Wage Payments

1. Will offer and pay the H-2B worker no less than the highest of the prevailing wage, applicable Federal minimum wage, State minimum wage, or local minimum wage during the entire period of the approved H-2B labor certification [20 C.F.R. § 655.22(e)] which:

A. Is not based on commissions, bonuses or other incentives unless guaranteed and paid by the employer on a weekly, bi-weekly, or monthly basis; and

B. Does not include any deductions that would violate the Fair Labor Standards Act (FLSA) for an employer covered by the FLSA. [20 C.F.R. § 655.22(g)(1)]

2. Will make all deductions from the workers' paychecks that are required by law. [20 C.F.R. § 655.22(g)(1)]

3. Has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees except as provid-

ed at 8 C.F.R. § 214.2(h)(5)(xi)(A) or as reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees. [20 C.F.R. § 655.22(g)(2)]

4. Has not, whether directly or through its attorney or agent, sought or received payment of any kind for an activity related to obtaining the labor certification, including payment of the employer's attorney's or agent's fees, H-2B application, or recruitment costs. [20 C.F.R. § 655.22(j)]

Layoffs

1. Has not laid off and will not lay off any similarly employed U.S. worker in the occupation for which the labor certification is sought:

A. In the area of intended employment within the period from 120 calendar days before the date of need through 120 calendar days after the date of need;

B. Except where the employer has offered the job opportunity for which the labor certification is sought to laid-off U.S. workers and such workers either refused the job opportunity or were rejected only for lawful, job-related reasons. [20 C.F.R. § 655.22(i)]

2. Will not place, if a job contractor, any H-2B worker with any other employer or at another employer's worksite unless:

A. The employer first makes a bona fide written inquiry as to whether the other employer has displaced or intends to displace any similarly employed U.S. workers within the area of intended employment within the period beginning 120 calendar days before through 120 calendar days after the date of need; and

B. The other employer provides written confirmation that it has not so displaced and does not intend to displace U.S. workers; and

C. All worksites are listed on the H-2B certification, including amendments or modifications. [20 C.F.R. § 655.22(k)]

Relocating

Will not place any H-2B worker outside the area of intended employment listed on the H-2B certification unless the employer has obtained a new

temporary labor certification from the Department. [20 C.F.R. § 655.22(1)]

Notice

1. Will notify the Department and DHS in writing of the separation from employment of an H-2B worker, not later than two work days after such separation is discovered by the employer, if such separation occurs prior to the end date of the employment specified in the H-2B application. [20C.F.R. § 655.22(f)]

2. Will notify the H-2B workers:

A. Of the requirement that they leave the U.S. at the end of the authorized period of stay provided by DHS or separation from the employer, whichever is earlier, absent any extension or change of such workers' status or grace period pursuant to DHS regulations; and

B. That the employer is liable for return transportation of the workers if the workers are dismissed before the end of the authorized period of stay. [20 C.F.R. § 655.22(m)]

Failure to meet any of these obligations may result in the assessment of civil money penalties, a recommendation that the employer be disqualified from approval from future petitions (debarment), reinstatement of displaced U.S. workers, payment of back wages owed to H-2B workers, and other legal or equitable remedies as the Administrator of the WHD determines to be appropriate.

The requirement listed above can be found in the Immigration and Nationality Act § 241, 8 U.S.C. § 1184, and 20 C.F.R. Part 655 Subpart A.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).