

# H-2A 101

## Understanding the Nuts and Bolts

*By Tom Bortnyk*

## First, some ground rules:

- I am an attorney. But, I am not *your* attorney. Nothing in this presentation should be construed as legal advice.
- It is also not intended to be exhaustive; the H-2A program has many rabbit holes. Any one slide could be its own separate presentation!
- Sometimes, the “Best Practice” is above and beyond what the law technically requires.



## What is the H-2A Program?

- Non-immigrant, temporary foreign worker visa program for agricultural employers. Employers can hire foreign workers for tough-to-fill seasonal job positions.
- Must demonstrate a temporary or seasonal labor need; year-round labor needs NOT eligible. **Proposed: Limited number of year-round visas for industries currently ineligible (e.g., dairy, mushroom growers).**
- Must demonstrate insufficient U.S. workers able, willing, and qualified to perform the job AND no adverse effect on wages/working conditions of U.S. workers.



## What is the H-2A Program? (cont'd)

- **Temporary:** Employer's need for temporary workers lasts no longer than 1 year (Reality: DOL won't certify contract periods longer than 10 months).
- **Seasonal:** Employment tied to certain time of year by event or pattern and requires labor levels far above those necessary for ongoing operations.
- **Agriculture:** "Farming in all its branches," including secondary agricultural activities "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations..."



## Basic Requirements

- **U.S. Recruitment:** Must offer employment to any qualified U.S. worker willing and able to perform the job for the period of need. Must offer re-employment to any workers employed in the job in the last year.
  - May only refuse to hire an otherwise qualified U.S. applicant for lawful, job-related reasons.
  - Obligation to hire U.S. applicants continues until 50% point in the H-2A contract period. **Proposed:** Recruitment through first 30 days OR up to 120 days if staggering start dates.



## Basic Requirements (cont'd)

- **Corresponding Employment:** You cannot give preferential treatment to foreign workers. U.S. workers performing the same (or substantially similar) job duties entitled to same terms, conditions, benefits, and protections as H-2A workers.
  - Best Practice: Be precise with your H-2A job description. The tasks you list will establish the parameters for corresponding employment. Follow the “Goldilocks” principle.



## Basic Requirements (cont'd)

- **Wages:**

- Employers must pay the *highest* of (1) the Adverse Effect Wage Rate (AEWR); (2) state prevailing wage; (3) collective bargaining wage; OR (4) state/federal minimum wage.
- Current California AEWR: \$17.51 per hour.
- AEWR is the applicable rate in most cases. Updated annually based on NASS survey data (average of all crop and livestock occupations). **Proposed: Disaggregating wages based on occupational classifications, keeping standard AEWR intact for *most* workers.**



## Basic Requirements (cont'd)

- **Housing:** Must provide free housing to all non-local workers. “Non-local” workers are those who live outside normal commuting distance (U.S. and foreign).
  - State must inspect/approve housing for the full number of requested workers.
  - You may use rental/leased housing (incl. public accommodations like motels).
  - Best Practice: Get your housing in order as soon as possible. Housing is the #1 source of delay.



Washington Growers League's Brender Creek farmworker housing in Cashmere, WA.



## Basic Requirements (cont'd)

- **Travel:** Must pay or reimburse non-local workers for inbound and outbound travel costs (transportation, daily subsistence for meals, and reasonable lodging costs). Includes travel from worker's home to U.S. Consulate. **Proposed: No reimbursement for travel to consulate.**
  - If not paid in advance, must reimburse full inbound travel at 50% point in the contract (wait for next slide) Reimburse outbound travel at end of contract.
  - Not responsible for outbound travel if worker abandons the job or is terminated for cause.



Mexican workers typically travel by bus. Workers from countries other than Mexico must travel by air.

## Basic Requirements (cont'd)

- Important note on Fair Labor Standards Act (FLSA) compliance: H-2A regs require full travel reimbursement at 50% point...
  - ...but, DOL treats out-of-pocket inbound travel costs as *de facto* “deductions” from workers’ first paycheck, and the FLSA prohibits deductions that bring earnings below minimum wage.
  - Therefore, you may need to reimburse *some* travel costs in the first workweek (to the extent below minimum wage).
  - **Best Practice:** Spare yourself the complicated accounting and reimburse workers, in full, in the first workweek.

### EXAMPLE

Min. wage = \$7.25 per hour.  
Workweek = 40 hours  
FLSA min. earnings = **\$290.00**

AEWR = \$17.51 per hour  
Workweek = 40 hours  
Gross earnings = **\$700.40**

But, travel costs = \$500.00  
 $\$700.40 - \$500 = \mathbf{\$200.40 \text{ net}}$

**Worker is \$89.60 short of FLSA minimum earnings.**

## Basic Requirements (cont'd)

- **Prohibited Fees:**

- Unlawful to solicit or receive any fees from workers, directly or indirectly, in consideration of employment.
- If workers pay fees, YOU are on the hook for reimbursing them and reporting the violation to CIS.
- If violation reported during consular interview, officers may blanket reject ALL workers on the petition. Willful violations can result in debarment and/or a revocation of the petition.



## Basic Requirements (cont'd)

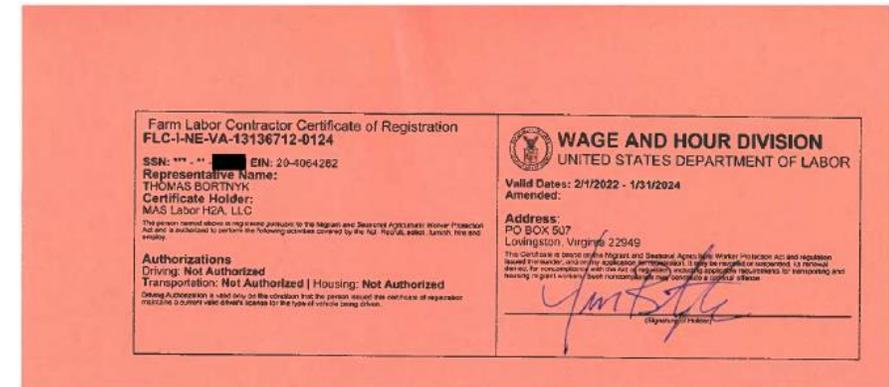
- **Other Items:**
  - Must pay all visa-related costs, including \$190 machine-readable visa (MRV) fee and border crossing fee. Not responsible for passport fees. **Proposed: MRV fee increase to \$310 per visa.**
  - If housing does not have kitchen facilities, must provide three daily meals. May deduct for meal costs up to federal limit (currently \$13.17 per day).
  - Must provide free daily transportation to/from worksite, and weekly transportation to nearest town.



## Basic Requirements (cont'd)

- **FLC Requirements:**

- Must have valid federal FLC license w/ sufficient vehicle capacity for the total number of requested workers. Must have sufficient FLCEs w/ driving authorization to drive the vehicles.
- Must provide copies of contracts with each fixed-site grower (signed by both parties).
- Must provide a surety bond as proof you can satisfy financial obligations (bond amount based on number of workers).



<p>Farm Labor Contractor Certificate of Registration FLC-I-NE-VA-13136712-0124</p> <p>SSN: *** - ** - ■■■■ EIN: 20-4064282</p> <p>Representative Name: THOMAS BORTNYK</p> <p>Certificate Holder: MAS Labor H2A, LLC</p> <p><small>The person named above is registered pursuant to the Migrant and Seasoned Agricultural Worker Protection Act and is authorized to perform the following activities covered by the Act: recruit, select, train, hire and employ.</small></p> <p><b>Authorizations</b> Driving: Not Authorized Transportation: Not Authorized   Housing: Not Authorized</p> <p><small>Driving Authorization is valid only on the condition that the person named on the certificate of registration maintains a current valid driver's license for the type of vehicle being driven.</small></p>	<p><b>WAGE AND HOUR DIVISION</b> UNITED STATES DEPARTMENT OF LABOR</p> <p>Valid Dates: 2/1/2022 - 1/31/2024</p> <p>Amended:</p> <p>Address: PO BOX 507 Lovington, Virginia 22949</p> <p><small>This Certificate is based on the Migrant and Seasoned Agricultural Worker Protection Act and regulation issued thereunder, and on my application for registration, which may be replaced or suspended, its renewal based on correspondence with the Act or regulation, without notice or opportunity for hearing and hearing to grant a hearing upon receipt of a request for a hearing and notice to grant a hearing.</small></p> <p><i>Thomas Bortnyk</i> (Signature of Employer)</p>
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<p>Farm Labor Contractor Employee Certificate of Registration FLCE-I-NE-VA-60136713-0124</p> <p>Employee Name: THOMAS BORTNYK</p> <p>SSN: *** - ** - ■■■■</p> <p><small>This person named above is registered pursuant to the Migrant and Seasoned Agricultural Worker Protection Act and is authorized to perform the following activities covered by the Act: Recruit, select, train, hire and employ.</small></p> <p>FLC Certificate Holder: MAS Labor H2A, LLC Number: FLC-I-NE-VA-13136712-0124</p> <p><b>Authorizations</b> Driving: Not Authorized</p> <p><small>Driving Authorization is valid only on the condition that the person named on the certificate of registration maintains a current valid driver's license for the type of vehicle being driven.</small></p>	<p><b>WAGE AND HOUR DIVISION</b> UNITED STATES DEPARTMENT OF LABOR</p> <p>Valid Dates: 2/1/2022 - 1/31/2024</p> <p>Amended:</p> <p>Address: 435 AF ION POND CT # 232 Charlottesville, Virginia 22902</p> <p><small>This Certificate is based on the Migrant and Seasoned Agricultural Worker Protection Act and regulation issued thereunder, and on my application for registration, which may be replaced or suspended, its renewal based on correspondence with the Act or regulation, without notice or opportunity for hearing and hearing to grant a hearing upon receipt of a request for a hearing and notice to grant a hearing.</small></p> <p><i>Thomas Bortnyk</i> (Signature of Employer)</p>
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## What is the process for applying?

- **State Workforce Agency (SWA):** File Job Order containing all terms and conditions of employment.
- **U.S. Department of Labor (DOL):** Apply for a temporary labor certification.
- **U.S. Citizenship and Immigration Services (CIS):** File a non-immigrant visa petition.
- **U.S. Consulate:** Workers attend visa interview and apply for H-2A visa.



## Pre-Filing

- Decide whether you're going to use an agent/attorney. What are you prepared to handle in-house?
- Get your housing in order. Do you own housing units, or are you leasing? Are the units compliant with the applicable health/safety standards? Do you have a PTO?
- Business validation – is your information current and accurate? Check info on Dun & Bradstreet.
- Decide the exact parameters of the H-2A job position. What tasks will the workers perform? What's required?



## Agents/Attorneys

- May offer a range of services related to the H-2A program. At a minimum, agents/attorneys assist with the government application process.
- May also provide services related to U.S. recruitment obligations, compliance, worker coordination, and logistics.
- **Best Practice:** The H-2A program is more than just paperwork. There are countless pitfalls and potential problems that warrant professional assistance. Self-file at your own risk.

OMB Approval: 1205-0486  
Expiration Date: 05/31/2019

H-2A Application for Temporary Employment Certification  
Form ETA-9142A  
U.S. Department of Labor



E. Attorney or Agent Information (If applicable)

1. Is/are the employer(s) represented by an attorney or agent in the filing of this application (including associations acting as agent under the H-2A program)? If "Yes", complete Section E. *			<input type="checkbox"/> Yes	<input type="checkbox"/> No
2. Attorney or Agent's last (family) name §		3. First (given) name §		4. Middle name
5. Address 1 §				
6. Address 2				
7. City §			8. State	9. Postal code §
10. Country §			11. Province	
12. Telephone number §		13. Extension	14. E-Mail address	
15. Law firm/Business name §			16. Law firm/Business FEIN §	
17. State Bar number (only if attorney) §			18. State of highest court where attorney is in good standing (only if attorney) §	
19. Name of the highest court where attorney is in good standing (only if attorney) §				

## State Workforce Agency (SWA)

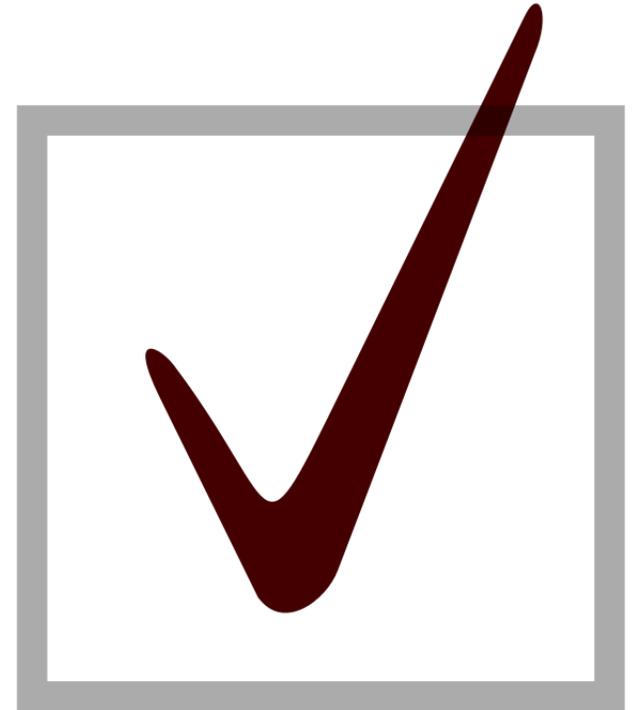
- **What to File:** ETA Form 790 (“Job Order”) containing all terms and conditions of employment.
- **When to File:** No earlier than 75 days and no later than 60 days before your start date of need.
  - **Best Practice:** File as early as possible. Data shows that filing after the 65<sup>th</sup> day substantially increases likelihood of delay and late worker arrival.
- **How to File:** Submit to SWA via the Foreign Labor Application Gateway (FLAG) system.



California Department of  
**Housing and Community  
Development**

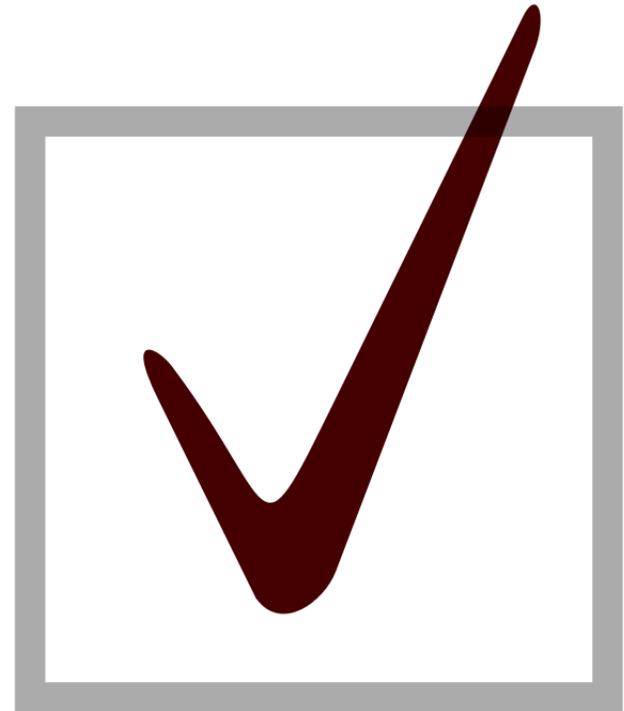
## State Workforce Agency (SWA) (cont'd)

- SWA evaluates Job Order for compliance with H-2A regulations and state law.
- Must list all tasks you need workers to perform. If you don't list it, H-2A workers can't do it.
- Must identify minimum job requirements (e.g., experience, licensing/certifications, etc.).
  - Best Practice: You should require at least 3 months prior experience to help prevent high turnover.



## State Workforce Agency (SWA) (cont'd)

- SWA acceptance opens *intrastate* recruitment period.
- During recruitment period, you must offer employment to any qualified U.S. applicant willing and able to perform the job for the period of need.
- Must contact/interview U.S. applicants from all sources (walk-ins, SWA referrals, etc.), and document hiring outcome.
- Must contact former U.S. employees eligible for rehire and offer them the H-2A contract.



## U.S. Department of Labor (DOL)

- **What to File:** ETA Form 9142 along with copy of approved Job Order and supporting documents.
- **When to File:** No later than 45 days before your start date of need. May file immediately upon SWA acceptance.
- **How to File:** Online via FLAG system.



## U.S. Department of Labor (DOL) (cont'd)

- DOL evaluates Job Order and application for compliance with H-2A regulations.
- DOL acceptance opens *interstate* recruitment period. DOL provides instructions on positive recruitment obligations (advertising instructions).
- Must provide DOL with the initial recruitment results; your recruitment report documents compliance with positive recruitment obligations and contact with applicants.



## U.S. Citizenship & Immigration Services (CIS)

- **What to File:** Form I-129 (“visa petition) along with original labor certification & supporting documents.
- **When to File:** Immediately upon receipt of electronic labor certification from DOL.
- **How to File:** Paper filing submitted to the California Service Center in Laguna Niguel, CA.



U.S. Citizenship  
and Immigration  
Services

## **U.S. Citizenship & Immigration Services (CIS)** (cont'd)

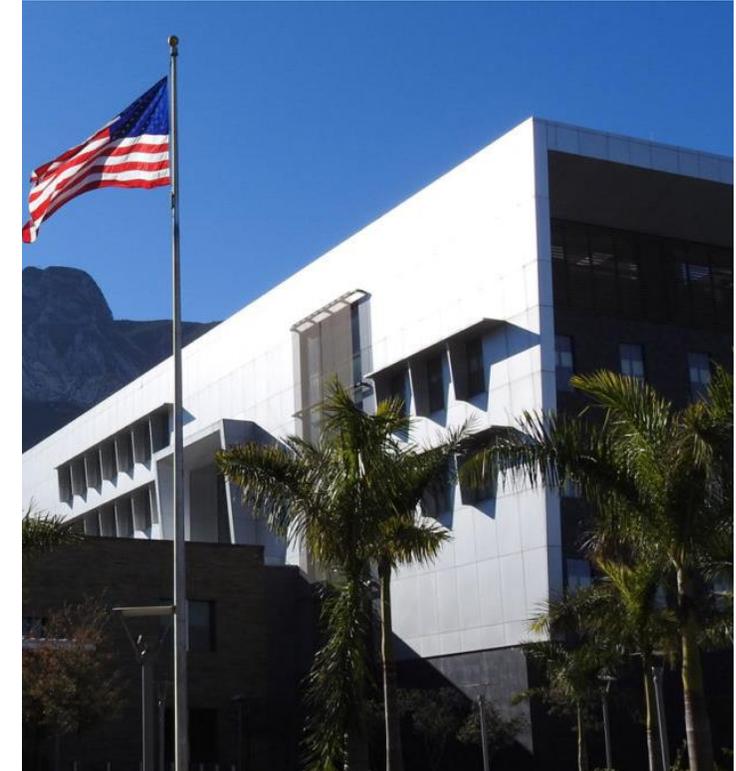
- CIS validates your business information (refer back to Dun & Bradstreet discussion).
- Confirms your basic program eligibility. Labor certification is primary evidence (but isn't determinative).
- Most H-2A petitions are unnamed – i.e. do not identify specific workers. Transfers, extensions must be named. Named petitions subject to additional scrutiny.



California Service Center in Laguna Niguel, CA.

## U.S. Consulate

- After petition approval, schedule visa interview appointments at a U.S. consulate or embassy in the workers' home country.
- Exact process varies by country and consulate. If handling worker coordination on your own, verify the local requirements and procedures.
- Best Practice: Do not assume workers can navigate the process on their own. There are countless complexities and we strongly advise that you use a professional worker facilitator or agent to assist.



U.S. Consulate in Monterrey, Mexico.

## Worker Facilitators

- Professionals who provide worker coordination services. May recruit workers, provide assistance with consular interview process, and/or arrange travel.
- Should identify facilitator(s) on visa petition. Facilitators must be contractually prohibited from collecting fees.
- Best Practice: Only use reputable, established facilitators with a track record of compliance. U.S. government agencies will hold YOU responsible for their violations.



## Questions or Comments? Please ask.

Or follow up with me directly:

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