

OUR PRACTICE

Temporary Positions

Especially when the economy is good, the unavailability of skilled and unskilled workers is a critical problem. Upon first glance, the H-2B classification appears useful to employers who cannot find enough qualified workers and who need alien employees more quickly than the permanent labor certification process could make them legal. However, upon further review of the requirements, H-2B usually turns out to be inadequate for the situation, most importantly because the position to be filled must be "temporary." Nevertheless, in some situations H-2B is the best fit and is worth the trouble.

Requirements

A qualified alien may come to work for any U.S. employer to do almost any kind of work who shows, through a complex process, the following things:

1. The position is "temporary." (This is usually the problem).
2. There are insufficient minimally qualified U.S. workers available. (This can be complicated).
3. The alien will be paid the prevailing wage for the job classification in the geographic area involved.
4. The alien is qualified for the position and is coming to the U.S. temporarily.
5. The employer agrees to pay the alien's cost of return travel if the work is terminated before the petition approval expires unless the alien quits or is fired for cause.
6. The semi-annual limit of 33,000 H-2B workers has not been reached or does not apply.

Types of work that do not qualify for H-2B include agricultural workers, loggers, and medical doctors.

Process

The process of getting H-2B status is one of the most complicated of any nonimmigrant classification. The steps include the following:

7. Define the position's duties and requirements (and confirm that any identified alien worker's credentials meet the requirements).
8. Determine the prevailing wage(s) for the position for the work site location(s), usually through a request to the applicable state's workforce agency (SWA), and make sure that at least 95% of that wage is being offered and paid.
9. At least 60 and preferably 120 days before alien workers are needed, file with the state workforce agency (SWA) a "Labor Certification Application" (Form ETA 750 Part A). The Department of Labor's web site contains useful information on this process.
10. Post a notice in the workplace containing required information including job title and wage, or provide the notice to an applicable union (rare).
11. Use advertisements and a SWA job order to recruit U.S. workers.
12. Upon DOL approval or denial, file a petition with the immigration service ("USCIS"). The alien workers need not be identified at this point, but the number needs to be stated and justified by the need.
13. Use the USCIS notice of approval to apply for the worker's visa at a consulate outside the U.S.

Temporary Position

To qualify as sufficiently temporary, the employer must demonstrate that its need for the type of duties requested does not exceed one year (except in extraordinary circumstances) and is either:

- *A one time occurrence*, in that (a) the employer has not employed workers to perform the services in the past and will not need them in the future, or (b) a temporary event of short duration has created the need for a temporary worker for an otherwise permanent position (i.e., a permanent employee's illness or leave of absence);
- *A seasonal need*, in that the services are traditionally and predictably tied to a season of the year by any event or pattern and is of a recurring nature (other than the vacation period of permanent employees);
- *A peak load need*, in that the employer needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand not destined to become part of the employer's regular operation;
- *An intermittent need*, in that the employer needs the services occasionally or intermittently for short periods.

H-2B classification has been used in a wide range of situations and job titles in industries including education, construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services.

Limits on Approval and Intent

H-2B status is granted only for one year at a time, with a total maximum of three years without an intervening stay outside the U.S. of at least 6 months. An H-2B [visa](#) may be obtained for no longer than the validity of the underlying USCIS petition. Steps taken toward permanent residence are deemed inconsistent with H-2B status and will invalidate H-2B status and prevent further approvals or extensions.

Family participation

The "principal alien" H-2B worker's spouse or unmarried children under age 21 may receive H-4 status to accompany the "principal alien" H-1B worker. The H-4 dependent is not allowed to work in the U.S. H-4 visa or status can never be obtained for any longer than the "principal alien" already has H-1B visa or status approved. Other family members or "significant others" may apply for [B visitor status](#) to accompany the H-1B alien.

Annual Cap

There is a maximum of 66,000 approvals that can be granted for new H-2B aliens in a federal fiscal year. After the cap was quickly reached for the first time in 2004, the Save our Seasonal Small Business Act bifurcated that cap into a semi-annual cap of 33,000. The timing of filings with the respective agencies involved is critical to obtaining the limited numbers and is worth careful analysis. A now-expired law allowed a "returning" H-2B worker who was counted against the limit in the last three years not to be counted again. Efforts to renew that law have languished.

How We Can Help

Baker Donelson's Immigration Group is aware of the thin supply of "essential workers" in the U.S., particularly for jobs that have unpleasant aspects. We are familiar with the arcane process of obtaining approval for workers in temporary positions, and we have a good sense of what will work and what will not. Thus, we can avoid useless and costly efforts and focus an employer's attention on obtaining workers for the kinds of jobs for which H-2B status can be obtained. We can organize a plan of attack and move the case through its unavoidable series of steps, setting the all-important strategy about timing, and being ready for each subsequent step before it comes up. We can manage cases for large numbers of workers for a single employer or employer group, coordinating with worker locators and U.S. consulates in sending countries, and with employment services within the U.S.

Important Links

- [USCIS: How do I Hire a Foreign National for Short-Term Employment in the U.S.?](#)
- [State Dept: Temporary Workers](#)
- [USCIS: Current Cap Count for Nonimmigrant Worker Visas](#)