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Immigration

USCIS Releases Additional H-2B Visas for Second Half of FY 2022

Legal Update

05.17.2022

USCIS and DOL have released the joint temporary rule implementing the process for employers who have a certified ETA 9142B with an employment start date in the second half of fiscal year (FY) 2022 to apply for the 35,000 additional H-2B visa numbers which will be released on May 18, 2022. Effective May 18, 2022, employers may apply for the 35,000 additional H-2B visa numbers, of which 11,500 will be reserved for nationals of Haiti and the Northern Triangle countries (El Salvador, Guatemala and Honduras).

Below are frequently asked questions regarding the additional H-2B visa numbers for the second half of FY 2022.

Qualifying Workers

Q: Which workers are eligible for these additional visas?

A: There are two categories of workers who are eligible for these additional H-2B visas. First, employers may request workers who have been issued H-2B visas or otherwise granted H-2B status in FY 2019, 2020 or 2021. Second, employers may petition for workers from Northern Central America (El Salvador, Guatemala and Honduras) or Haiti.

Q: How do I prove that I will be seeking workers who qualify for these visas?

A: USCIS requires that an employer certify that it will only be seeking qualified workers for these visas. Employers may provide evidence that they only seek qualified returning workers by keeping evidence on file such as a date-stamped written communication from the employer to its agent(s) and/or recruiter(s) that instructs the agent(s) and/or recruiter(s) to only recruit and provide instruction regarding an application for an H-2B visa to those foreign workers who were previously issued an H-2B visa or granted H-2B status in FY 2019, 2020 or 2021.

Filing Applications with USCIS

Q: If I file for these H-2B visas, am I guaranteed to get them?

A: Not necessarily. If USCIS receives requests for more than the 23,500 additional visas for returning H-2B workers in the first five days of eligibility, USCIS will conduct a lottery to determine which employers are granted the additional visas.

Q: How will USCIS process applications filed for the additional H-2B visa numbers?

A: USCIS will process applications for the additional numbers on a rolling basis (as it receives the applications). It will not process requests for premium processing (which requires USCIS to adjudicate a case within 15 days) for the first five days until it determines whether it will need to conduct a random selection if it receives more than the allotted number of additional visas.

Additional Recruitment

Q: Will I have to conduct new recruitment?

A: Yes, the employer must take certain recruitment actions if the certified employment start date on the certified ETA 9142B is more than 30 days before the filing date of the petition for the additional visa numbers.

Q: What are the additional recruitment steps that must be conducted?

A: No later than one business day after filing the I-129 petition, the employer must place a new job order with the relevant State Workforce Agency (SWA) for at least 15 calendar days. In addition, the employer must conduct the following actions:

- Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers;
- Contact the employer's former U.S. workers, including those the employer furloughed or laid off beginning on January 1, 2020, and until the date the H-2B petition is filed, disclose the terms of the job order and solicit their return to the job;
- Provide written notification of the job opportunity to the bargaining representative for the employer's employees in the occupation and area of employment or post notice of the job opportunity at the anticipated worksite if there is no bargaining representative;
- Hire any qualified U.S. worker who applies or is referred for the job opportunity until the later of either (1) the date on which the last H-2B worker departs for the place of employment, or (2) 30 days after the last date of the SWA job order posting; and
- Where the occupation is traditionally or customarily unionized, provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) office covering the area of intended employment, by providing a copy of the job order and requesting assistance in recruiting qualified U.S. workers for the job opportunity. The list can

be found online here. The most effective means of contacting the nearest AFL-CIO office covering the area of intended employment is to email the job order and request for assistance to: H-2B@aficio.org or contacting the national AFL-CIO by mail at the following address: AFL-CIO

Attn: H-2B
815 Black Lives Matter Plaza NW
Washington, DC 20005

Irreparable Harm

Q: What must an employer document to establish irreparable harm?

A: An employer must complete and submit the correct version of DOL Form **ETA 9142-B-CAA-6** (to be released on Wednesday, May 18), attesting to irreparable harm and that it will only seek returning/Northern Central American workers. Then, the employer will need to keep one of the following types of evidence on file for at least three years:

- Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss due to the inability to meet financial or existing contractual obligations because they were unable to employ H-2B workers, including evidence of contracts, reservations, orders or other business arrangements that have been or would be cancelled, and evidence demonstrating an inability to pay debts/bills;
- Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss, as compared to prior years, such as financial statements (including profit/loss statements) comparing the employer's period of need to prior years; bank statements, tax returns, or other documents showing evidence of current and past financial condition; and relevant tax records, employment records or other similar documents showing hours worked and payroll comparisons from prior years to the current year;
- Evidence showing the number of workers needed in the previous three seasons (FY 2019, 2020 and 2021) to meet the employer's need as compared to those currently employed or expected to be employed at the beginning of the start date of need. Such evidence must indicate the dates of their employment and their hours worked (for example, payroll records) and evidence showing the number of H-2B workers it claims are needed, and the workers' actual dates of employment and hours worked; and/or
- Evidence that the petitioner is reliant on obtaining a certain number of workers to operate, based on the nature and size of the business, such as documentation showing the number of workers it has needed to maintain its operations in the past, or will in the near future need, including but not limited to: a detailed business plan, copies of purchase orders or other requests for goods and services, or other reliable forecasts of an impending need for workers.

H-2B Portability

Q: Will H-2B employees who are transferred to a new employer be able to start employment with the new employer before the H-2B petition is approved?

A: Yes, H-2B portability has been extended until January 24, 2023.

Additional information can be found on the USCIS website.

Please contact Fredrikson's H-2 Immigration Solutions Team with your questions.

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