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Immigration

USCIS Will Accept Requests for Additional FY2021 H-2B Visa Numbers

Legal Update

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On May 21, 2021, USCIS and DOL announced they will issue a joint temporary final rule on May 25, 2021, making available 22,000 additional H-2B visas for certain foreign national workers and U.S. businesses. 16,000 visas will be reserved for returning workers who were granted H-2B status within the last three fiscal years (2018, 2019 or 2020). The remaining 6,000 will be reserved for nationals of Honduras, Guatemala and El Salvador (the Northern Triangle). To qualify for the additional H-2B visas, employers must attest that they will likely suffer irreparable harm without the ability to employ all of the requested H-2B workers in their petition and conduct a test of the labor market if the certified start date of the H-2B petition is 45 days or more before May 25, 2021.

To assist you in determining whether you qualify or would like to apply for the additional H-2B visa numbers, below are frequently asked questions (FAQs) regarding the release of the additional H-2B visa numbers.

Additional H-2B FAQs

Who can file an I-129 Non-Immigrant Petition for the additional 22,000 H-2B visa numbers?

Any employer who has a certified H-2B ETA 9142B with a start date between April 1, 2021, through September 30, 2021, and meets the following requirements:

- Establish its business will likely suffer irreparable harm if it cannot employ the requested H-2B workers before the end of the fiscal year, September 30, 2021;
- Post a job order with the State Workforce Agency (SWA) for at least 15 days no later than one business day after filing the I-129 Nonimmigrant Petition and conduct other recruitment during the SWA posting period if the application is filed 45 days or more from the certified start date of the ETA 9142B; and,
- Agree to comply with all applicable labor and employment laws, including health and safety laws pertaining to COVID-19 such as rights to time off or paid time off to obtain COVID-19 vaccinations. The employer must notify the workers in a

language understood by the worker, as necessary or reasonable, of equal access to COVID-19 vaccines and vaccination distribution sites.

When can an employer file its I-129 H-2B Nonimmigrant Petition seeking the additional 16,000 H-2B visas or the 6,000 H-2B visa numbers reserved for nationals of the Northern Triangle countries?

USCIS will start accepting the I-129 H-2B petition seeking the additional H-2B visa numbers on May 25, 2021, and it will process petitions as received.

Will USCIS conduct a lottery if it receives petitions within the first five business days of filing seeking more than 16,000 visa numbers?

Yes, USCIS may conduct a lottery if it feels it is warranted. USCIS will not begin processing the H-2B petitions filed, including issuing receipt notices or starting the 15-day premium processing clock, until it determines whether it will need to conduct a lottery for those petitions received in the first five business days of filing and any such selection process has been completed.

What will an employer have to attest to in the ETA-9142-B-CAA-4 Attestation?

The employer must attest under penalty of perjury that:

- The employer will likely face irreparable harm if unable to employ the requested H-2B workers;
- If the H-2B workers are not from the Northern Triangle allotment, that the workers are returning H-2B workers (the workers previously held H-2B status in 2018, 2019 or 2020);
- The employer meets all other eligibility criteria for the available visas;
- The employer will comply with all assurances, obligations and conditions of employment, including current requirements surrounding the notice of and opportunity to access COVID-19 vaccines;
- The employer engaged in all additionally required recruitment; and
- The employer will document and retain evidence of compliance with each of the above attestation.

What recruitment is required if the petition is filed 45 or more days after the certified start date of work on the TLC?

The employer must conduct the following recruitment:

- Place a new job order with the relevant SWA for at least 15 calendar days no later than one business day after filing the petition;
- Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers within the SWA posting period;
- Contact the employer's former U.S. workers (including those furloughed or laid off starting on January 1, 2019) and disclose the terms of the job and solicit their return within the SWA posting period;
- Provide written notification of the job opportunity to the bargaining representative or, if none, post the notice of the anticipated job opportunity at the worksite within the SWA posting period; and
- Hire any qualified U.S. worker who applies or is referred for the job opportunity until the later of either the date on which the last H-2B worker departs for the place of employment or 30 days after the last date of the SWA job order posting.

Documentation of compliance with recruitment requirements is necessary and must be provided if audited.

What is the last date an employer can request the additional H-2B visas?

An employer may request the 16,000 H-2B visa numbers until there are no longer any numbers or until September 15, 2021, whichever is earlier. An employer must request an H-2B visa for citizens of the Triangle Countries by July 8, 2021.

Visit the USCIS website for additional information.