

Getting Started with the H2A Visa Program

Dan Bremer

AgWorks H2, 2110 Paterson Street, Suite C, Valdosta, GA 31602, USA

dbremer@agworksh2.com

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Summary

The Immigration Reform and Control Act (IRCA) enables agricultural producers to employ foreign, agricultural workers – which is becoming an increasingly important source of employees for the Green/Nursery industries. It is important to develop a plan that includes: housing, transportation,

workers compensation, record keeping, appropriate supervisors, the application process, recruitment of workers, and expenses of participating in the program. A specialized attorney or consultant can be helpful in planning and staying in compliance of regulations.

INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA) created several reforms that employers in the USA use extensively today. The most used item in the law is the requirement that all new hires complete a form called the I-9. These forms are used to determine the identity of all new employees and to determine if they are eligible to work in the USA.

The IRCA also created an opportunity for employers to hire seasonal agricultural workers from foreign countries under the H2A Visa Program. If an agricultural employer is unable to find enough local and domestic workers to do the work, then the employer can apply to the U.S. Department of Labor, the U.S. Department of Homeland Security and the U.S. Department of State to bring workers from other countries. All of these agencies have various rules to follow to actually get the visas needed to come to the USA to do agricultural work.

The H2A Visa Program annually brings over 300,000 workers from foreign countries to do agricultural work. Without this program many family horticultural operations would not be able to continue - because they could not find workers to plant, tend and harvest the seasonal crops grown.

Planning for the h2a program

In order to be ready for workers from other countries to work on your agricultural operation you must have a plan. Usually, this plan starts at least a year in advance and covers many areas and aspects of the operation.

Housing. Housing is one of the most important aspects of this plan. Housing, free of charge, must be provided to workers who

are unable to return to their home every night. This housing can be provided in many different ways, but it must meet federal and state guidelines prior to the workers arrival. Most of these guidelines can be found in the OSHA 1910.142 “Temporary Labor Camps” publication

<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XVII/part-1910/subpart-J/section-1910.142> . Most agricultural employers build barracks type housing that will safely house multiple workers in one building. Some employers use mobile homes or they rent houses for the workers. The use of public accommodations such as hotels and motels will work if the need for the workers is of a short duration.

The main point is that you must have a plan for the kind of housing that anticipates the cost effectiveness of each kind - and the problems with stringent rules that apply to each. AgWorks has many plans available for building housing for H2A visa workers.

Transportation. The H2A rules require the employer to have safe transportation for workers to get from housing to field and to take care of other business the workers may need.

All drivers of vehicles used to transport migrant agricultural workers must have a proper license. If the vehicle is just a normal car or truck with a capacity of 15 or less, a simple driver’s license is all that is needed. If the vehicle will carry more than 15 passengers, a commercial drivers license with a passenger endorsement must be possessed by the driver.

Most vehicles used to transport workers must have a safety inspection done by the state, or, if no state safety inspection

is required, then by a certified mechanic. The driver also must usually have a medical examination done by a doctor, either under a form from the U.S. Department of Labor or the U.S. Department of Transportation.

Workers Compensation. All employers who use the H2A Visa Program must have a worker's compensation policy that covers all workers engaged in the duties that are listed in the application. Many states do not require workers comp for agricultural employers, however, if you are certified under the H2A Visa Program, you *must* have workers comp.

Record Keeping. H2A employers must have specific payroll records for all their employees. There are certain items that must be present in the records such as total hours worked, piece rates, deductions and net pay, etc. Listing of accurate start and stop times are crucial to workers being paid correctly. There are also requirements that workers be given check stubs. The check stubs must include the employer's name, address and the employer identification number, also known as the Federal Employer Identification Number or the Federal Tax Identification Number, (FEIN number).

Supervisors. Most workers who arrive from other countries do not speak English. Therefore, there must be a plan for giving directions and information in a language that can be understood by the workers. Usually a trusted employee already employed by the grower can be used to translate from the grower to the workers. Sometimes a worker from the foreign country speaks enough English to translate the instructions.

Can I Afford This? There are many costs associated with the H2A Visa Program. One of these is the Adverse Effect Wage Rate that is set by the U.S. Department of

Agriculture. This rate is set so that the use of foreign workers does not suppress local wages. For example, in Georgia, the rate is \$11.99 per hour. This rate becomes the minimum wage that must be paid to any worker who does any of the duties listed on the H2A application. It usually goes up every year by a percentage of what other workers in the area are being paid.

The wages are only some of the costs of the program. The employer must pay the transportation for the worker to come from their hometown in the foreign country to the work location here in the USA. The cost of the visa purchase from the U.S. Department of State is now \$190 per person. There are costs that are charged by other government agencies like the U.S. Department of Labor and the U.S. Department of Homeland Security. The average cost is around \$1,000 per worker - to travel from their home country to the USA and back, and for U.S. Government fees.

Application Process. There are many decisions to be made before the application is sent to the government. For example, the number of workers needed is a critical decision. If you request too few, the work may not get done. If you request too many, there may not be enough work for each worker to comply with the three-quarter work guarantee. That guarantee says that during the duration of the contract period, each worker must average at least three quarters of the hours you told the government you were going to work. If you put down 40 hours per week in your application, then the workers, all workers, must average at least 30 hours per week.

The time of year and the crops being worked must also be in the application. H2A visa workers can only be employed for

10 months or less in the USA, in your operation. These workers may not work year around on your locations. Many employers need the workers on a year around basis but the H2A visa workers can only be at your location for 10 months or less. The question is what 10 months are the most optimal for you?

Recruitment of Workers. The employer who has a H2A certification must hire all qualified local and domestic workers that apply. There are certain requirements that can be integrated into the application to eliminate workers who could not do the work. These rules must apply to both domestic workers and H2A visa holding workers. Your job must be listed on the government's recruitment site. The hiring of all U.S. workers who may be qualified is a critical part of the H2A visa program. If you do not hire qualified U.S. workers, the government has severe penalties - and they could remove you from eligibility to participate in the H2A Visa Program.

Since you are bringing workers from a foreign country, a decision must be made on how to find these workers. Some employers may have a current worker or supervisor that may know some workers in that foreign country. There are also recruitment companies that find workers for you. Whoever does the recruiting, the recruiter must sign a document that says they will not charge workers any fees for anything. The employer must pay all fees and costs of the program. The workers are not allowed to pay fees to be recruited.

Alternative Ways to Use the H2A Visa Program. Individual employers working solely for their own operations are eligible to use the program. However, there are other ways to have H2A workers do your

work. A Farm Labor Contractor could have multiple growers and work locations on a single application. Different growers could be on one master application and could share the workers. If only one grower asks for the H2A workers, then that grower may not share the workers with any other employer. The use of a Farm Labor Contractor or a group application is the only way to share workers with other employers. In an application for an association, many growers would form a legal entity that is the actual employer of the workers. This must be for agricultural work. The definition of agricultural work is sometimes very complicated.

Potential scrutiny from the U.S. Dept of Labor - Wage and Hour Division. As a participant in the H2A Visa Program, you become a bigger target for enforcement efforts by the U.S. Department of Labor, Wage and Hour Division. The Wage and Hour Division is the agency that makes sure you are complying with the things you promised in your application.

It is important that you know what rules apply and how to make sure you are doing everything in compliance with the law. To do that you need someone or some-way to ask questions and evaluate your compliance posture. An employment attorney may be able to help you, but most are not familiar with the H2A Visa Program. A specialized attorney or consultant is usually necessary to help you.

The Future. The H2A Visa Program has not really changed from its beginning in 1986. The wages have risen dramatically and the use of the program has increased exponentially. But there are some changes being proposed now that could change things.

The U.S. Department of Labor is trying to change the way growers can participate in group applications by limiting the fulltime employment in these applications. They are also trying to force the various states to do their own surveys to determine wages and practices applicable to agricultural workers. The Occupational Safety and Health Administration (OSHA) has a new heat safety program that growers need to be aware of - especially in hot climates.

There are even proposed programs that give amnesty to undocumented workers who have been working in agriculture for several years. So far, not much has changed in the H2A Visa Program. It is a viable program that works very well for thousands of agricultural employers.