

DHS Aims to Streamline Temporary Worker Visas

In an attempt to discourage short-staffed employers from hiring undocumented workers, the Department of Homeland Security has implemented a new final rule which it hopes will streamline the existing H-2 temporary and agricultural worker program. The H-2 visa program provides for a temporary work visa to foreign nationals who are coming to the United States to perform agricultural work ("H-2A" visa) or work of a "temporary" nature ("H-2B" visa). Temporary work is defined as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need for labor.

Examples of employers that qualify to employ H-2 workers include landscaping businesses, hotels in tourist areas in need of housekeepers, or ski resorts experiencing a shortage of ski instructors (among many others). To obtain the visa, an employer must document that persons capable of performing such services or labor cannot be found in the United States. An H-2 worker is allowed to work in the United States for a period of 1 year, which can be extended in 1-year increments for a total of 3 years. After the maximum 3-year period is reached, the worker must depart the United States and wait several months before returning.

The new regulation reduces the amount of time the H-2 worker must wait outside the United States from 6 months to 2 months. The new rule also automatically tacks on a grace period of 30 days to an H-2 worker's authorized period of stay in the United States to allow the worker to gather their affairs prior to departing (previously this period was only 10 days).

Another benefit of the new rule is that H-2 workers who wish to switch U.S. employers will now be allowed to work while their petition with the new employer is pending provided that the new employer has registered to verify its I-9 forms using E-Verify, the government's on-line social security verification system. Previously, workers had to await adjudication of such petitions before starting to work, which often took several months.

The new rule, however, does impose certain limitations on the H-2 program that did not previously exist. For instance, it limits eligibility for the H-2B program to 28 countries, whereas previously a national of any country was eligible as long as he or she met the visa requirements. DHS states it selected those countries which have been the most cooperative in repatriating their nationals and had the least amount of nationals who were removed (deported) from the United States.

The rule also prohibits the H-2 worker from paying fees or other compensation to an employer or other agent used to obtain the visa. Additionally, the rule imposes fines and reporting requirements on employers whose H-2 workers abscond from the worksite. Another new requirement is that certain H-2 workers will be able to depart the U.S. only in designated areas that have the capacity to register their departure via a special exit program.

In light of these new restrictions, the recent rule may prove to present H-2 employers with more difficulties than before. If you have questions about the new H-2 program rule, or would like to evaluate your business to determine if you may be eligible to employ an H-2 worker, do not hesitate to contact me.

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