

# H-2A101:

## What Your Business Needs to Know



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## Discussion Points

We will leave ample time for Q&A, but this presentation will cover the following:

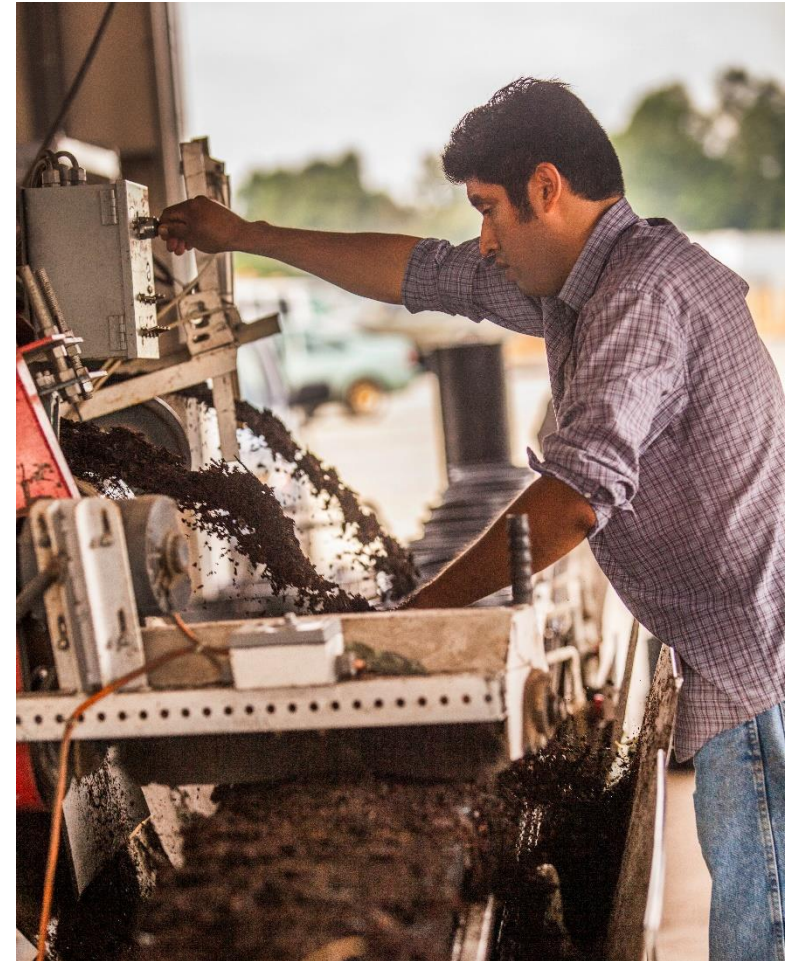
- What your business should consider:
  - Review of H-2A program basics (viability and requirements)
  - H-2A filing process & timeline
- How does this apply to your operation?
  - Potential solutions
  - Key takeaways





## The H-2 Programs

- The Immigration and Nationality Act (INA) created the “H-2” visa classification for all temporary workers. The program was split into two programs in 1986 with the Immigration Reform and Control Act (IRCA).
- The H-2A program was designed for temporary or seasonal **agricultural** labor needs.
- The H-2B program was designed for temporary **non-agricultural** labor needs.



## The H-2 Programs (cont.)

- “Agriculture” is broadly defined for purposes of H-2A eligibility; employers are eligible if the labor need satisfies either the Fair Labor Standards Act (FLSA) definition or the Internal Revenue Code (IRC) definition.
  - “Primary” agriculture – I.e., field preparation, planting, cultivating, and harvesting
  - “Secondary” agriculture – I.e., activities performed by a farmer or on a farm incident to the farming operation (packing, processing, transporting, etc.)
- “Non-agriculture” for purposes of H-2B eligibility is, effectively, everything *but* agriculture, although landscapers are the largest program demographic.



## What about the H-2A Program?

- In H-2A, the agricultural labor need must be “**temporary or seasonal.**” **Seasonal** means that the need is:
  1. Tied to a certain time of year (i.e., recurring)...
  2. ...by an “event or pattern” (e.g., growing season)...
  3. ...requiring labor levels “far above...ongoing operations.”
- Note that the definition of seasonal assumes that there are year-round operations happening. A seasonal need is one above and beyond that – i.e., a need to supplement the year-round workers.
- **Temporary** means the need for temporary workers lasts no longer than 1 year (Reality: DOL won’t certify contract periods longer than 10 months).





## Basic Requirements of H-2A

- **U.S. Recruitment:** Must offer employment to any qualified U.S. worker willing and able to perform the job for the period of need.
  - May only refuse to hire an otherwise qualified U.S. applicant for lawful, job-related reasons.
  - Obligation to hire U.S. applicants continues until 50% point in the H-2A contract period.
  - “Positive Recruitment” – must interview all candidates referred and contact former employees eligible for rehire.



## Basic Requirements (cont'd)

- **Corresponding Employment:** You cannot give preferential treatment to foreign workers. U.S. workers performing the same (or substantially similar) job duties entitled to same terms, conditions, benefits, and protections as H-2A workers.
  - Best Practice: Be precise with your H-2A job description. The tasks you list will establish the parameters for corresponding employment. Follow the “Goldilocks” principle.



## Basic Requirements (cont'd)

- **Employers must pay specific wages:**
  - Employers must pay the *highest* of (1) the AEWR; (2) state prevailing wage; (3) collective bargaining wage; OR (4) state/federal minimum wage.
  - Adverse Effect Wage Rate (AEWR): DOL-mandated wage rate for each state; updated annually. In most cases, this is the applicable wage rate for H-2A and corresponding U.S. workers.
  - Delaware: \$16.55 (up \$1.01 over 2022)
  - Lowest: 2022 \$11.99/hr. (AL, FL, GA, SC); 2023 *Proposed \$13.67*  
Highest: 2022 \$17.51/hr. (CA); 2023 *Proposed \$18.65*





## Basic Requirements (cont'd)

- **Housing:** Must provide free housing to all non-local workers. “Non-local” workers are those who live outside reasonable commuting distance (U.S. and foreign).
  - SWA must inspect/approve housing for the full number of requested workers.
  - You may use rental/leased housing (incl. public accommodations like motels).
  - Best Practice: Get your housing in order as soon as possible. Housing is the #1 source of delay.



Washington Growers League's Brender Creek farmworker housing in Cashmere, WA.

## Basic Requirements (cont'd)

- **Travel:** Must pay or reimburse non-local workers for inbound and outbound travel costs (transportation, daily subsistence for meals, and reasonable lodging costs). Includes travel from worker's home to U.S. Consulate.
  - If not paid in advance, must reimburse full inbound travel at 50% point in the contract (but may need to be paid sooner due to FLSA regulations).
  - Best Practice: Spare yourself the complicated accounting and reimburse workers, in full, in the first workweek.
  - Reimburse outbound travel at end of contract.
  - Not responsible for outbound travel if worker abandons the job or is terminated for cause.



Mexican workers typically travel by bus. Workers from countries other than Mexico must travel by air.

## Basic Requirements (cont'd)

- **Prohibited Fees:**

- Unlawful to solicit or receive any fees from workers, directly or indirectly, in consideration of employment.
- If workers pay fees, YOU are on the hook for reimbursing them and reporting the violation to CIS.
- If violation reported during consular interview, officers may blanket reject ALL workers on the petition. Willful violations can result in debarment and/or a revocation of the petition.





## Basic Requirements (cont'd)

- **Other Items:**
  - Must pay all visa-related costs, including \$190 machine-readable visa (MRV) fee and border crossing fee. Not responsible for passport fees.
  - If housing does not have kitchen facilities, must provide three daily meals. May deduct for meal costs up to federal limit (currently \$14 per day).
  - Must provide free daily transportation to/from worksite, and weekly transportation to nearest town.



## Filing Process & Timeline:



## State Workforce Agency (SWA)

- **What to File:** ETA Form 790 (“Job Order”) containing all terms and conditions of employment.
- **When to File:** No earlier than 75 days and no later than 60 days before your start date of need
  - Best Practice: File as early as possible. Data shows that filing after the 65<sup>th</sup> day substantially increases likelihood of delay and late worker arrival.
- **How to File:** Submit via email to SWA foreign labor program coordinator along with relevant attachments
- This opens your *intrastate* recruiting period.





## U.S. Department of Labor (DOL)

- **What to File:** ETA Form 9142 along with copy of approved Job Order and supporting documents.
- **When to File:** No later than 45 days before your start date of need. May file immediately upon SWA acceptance.
- **How to File:** Online via FLAG System
- DOL acceptance opens *interstate* recruitment period. DOL provides instructions on positive recruitment obligations (advertising instructions).



## U.S. Citizenship and Immigration Services (CIS)

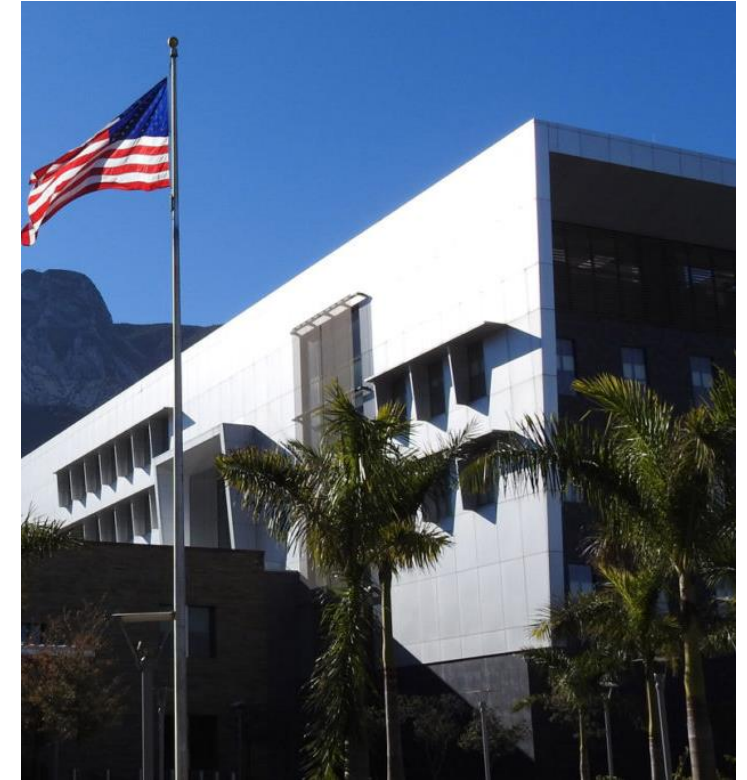
- **What to File:** Form I-129 (“visa petition) along with original labor certification & supporting documents.
- **When to File:** Immediately upon receipt of labor certification from DOL.
- **How to File:** Paper filing submitted to the California Service Center in Laguna Niguel, CA.
- CIS validates your business information and confirms your basic program eligibility. Labor certification is primary evidence (but isn’t determinative!).
  - Most H-2A petitions are unnamed – i.e. do not identify specific workers. Transfers, extensions must be named.



**U.S. Citizenship  
and Immigration  
Services**

## U.S. Consulate

- After petition approval, schedule visa interview appointments at a U.S. consulate or embassy in the workers' home country.
- Exact process varies by country and consulate. If handling worker coordination on your own, verify the local requirements and procedures.
- Best Practice: Do not assume workers can navigate the process on their own. There are countless complexities, and we strongly advise that you use a professional worker facilitator or agent to assist.



U.S. Consulate in Monterrey, Mexico.



## Workplace Scenarios (cont.)

- Apple orchard (and diversified fruits) in Delaware:
  - Needs help with pruning, planting, hand harvest, cleaning and packing\*
  - Skills needed include ag equipment operation, pruning experience, ladder and lifting requirements
  - Who comes?
  - \*Does the operation do cider pressing? Does the operation pack outside product?



## Workplace Scenarios (cont.)

- Free-range/pastured poultry\* operation in California
  - Needs help with moving chickens, egg production, farm maintenance
    - Skills needed include basic animal care, farm maintenance, tractor driving, basic construction
    - Who comes?
    - \*Does the operation process the chickens?



## Workplace Scenarios:

- Grain/row crop farm in Nebraska (wheat, soybeans, corn)
  - Needs help with planting, self- harvest\*, and maintenance
    - Skills needed include combine driving, irrigation pivot knowledge, general maintenance
    - Who comes?
    - \*Does the operation do any custom work?





## Key Takeaways:

- The H-2A program is a multi-stage, multi-government agency process— adherence to compliance and regulations are key.
- It is important to weigh the administrative costs against any potential liability.
- In peeling back the disclosure data further, denial rates should also play into your decision:
  - Denial rates in 2022\*:
    - Agents - 0.82%
    - Attorneys - 2.10
    - Self-Filers - 5.72%



\*via 2022 DOL Disclosure Data

**Questions? Please ask.**

Or follow up with me directly:

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## másLabor AT A GLANCE

### másLabor makes it easy by:

- Using proprietary systems that streamline the process, reducing your paperwork burden.
- Developing H-2A filings tailored to your precise business needs; no “one size fits all” approach.
- Interfacing with the state and federal government agencies so you can focus on *running your business*.

We combine superior, best-available expertise with friendly, personalized service, regardless of your operation’s size or number of workers needed.

	másLabor	Other Providers
Obtaining government approvals	✓	✓
Assisting with U.S. Applicants/referrals	✓	✓
Coordinating foreign recruitment	✓	✓
Developing custom-tailored applications	✓	✗
Verifying worker experience and skills	✓	✗
Scheduling consular Appointments	✓	✗
Providing ongoing compliance support	✓	✗
Assisting with audits and appeals	✓	✗

## What do growers say about másLabor?

- “While our team had done a great job, bringing in an expert like másLabor allowed us to better understand all of the rules and confusing compliance-based items like the area of intended employment.”
- “Having access to the ‘real’ knowledge of the program, and advocates in our corner who we know will push back on our behalf has been invaluable.”
- “The feeling of confidence in bringing in a third party for accuracy in our filings is a huge help— an extra set of eyes on any potential language that might be out of compliance or keeping us on our toes from a timeline perspective. We love this additional step to ensure compliance, timeliness, and accuracy.”
- “Our team loves the great industry updates we receive on how the program is working, changing, and evolving. We stay confident in our strategies because of this.”





## Considering Worker Facilitation

- If you are using H-2A for the first time, or do not have workers comfortable with navigating the consular process, **Worker-facilitators** are professionals who provide worker coordination services. They may recruit workers, provide assistance with consular interview process, and/or arrange travel.
- **Important to note:**
  - Always identify facilitator(s) on your visa petition. Facilitators must be contractually prohibited from collecting fees.
  - Be sure and only use reputable, established facilitators with a track record of compliance. U.S. government agencies will hold YOU responsible for their violations.

