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New Rules Substantially Change H-2A and H-2B Eligibility and Process for Temporary Workers in Short Supply

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Effective January 18, 2009, the rules for H-2A and H-2B temporary workers will change significantly under regulations just published. The types of jobs that can use H-2B workers have expanded, and the strategic timing of filings for twice-a-year visa numbers has been shifted. Many other changes have been made to the H-2A and H-2B programs, in most cases with similar approaches. On the upside, employers will routinely file less papers with the government, helping to make the H-2B program more workable while potentially increasing employer access to H-2B numbers. Employers should be aware, however, that the process and paperwork requirements are at least as technically complex as before, and violating employers can be barred from a wide range of immigration filings for up to five years. Therefore, though the changes to the H-2B program may be considered improvements as a whole, legal advice and assistance is increasingly important in this area.

Expanded "Peak Load" Use

The longstanding limitation of H-2B use to seasonal work, as a practical matter, has been relaxed to include certain "peak load" work that can last up to three years, now without requiring any showing of "extraordinary circumstances." This will open the program up to jobs involving, for instance, replacement of an injured or re-injured worker, or a shipbuilder fulfilling a contract to build a ship that was over and above its normal workload, but not serial requests for H-2B workers for each ship it built. But employers seeking to take advantage of this new opportunity still must compete for limited numbers, discussed below.

Timing of Numbers Games Shifts

The timing of the numbers game has shifted. Congress' limit to 66,000 new H-2B workers per year remains, as does the split of that cap into two halves of the year, beginning October 1 and April 1. Under prior complex loopholes, employers whose season ("date of need") started a few months before October and April had the best chance of getting the limited numbers. Under the new rules, employers whose seasons start on or immediately after October 1 and April 1 will have the best chances of obtaining the coveted visa numbers. The big losers will be employers whose season starts around December and June, because they cannot misrepresent their season as starting as early as October and April. It would seem that landscapers, who previously "won the game" by stating a season that starts February 1 will now be able to state a delayed date of need of April 1. Congress has not extended the former "returning worker" provisions that had allowed a worker to come back for three years of seasons in a row, but the new regulations leave room to implement those provisions if they become reenacted. Meanwhile, petitions to change a worker's approval from one employer to another *within the U.S.* will continue to be exempt from the numerical limits, so an employer can extend a peak load use to three years, or employers with complementary seasons can continue to trade a worker back and forth for a total of three years. An H-2A worker can start working for a new employer upon the filing of a new petition if the employer uses E-Verify. A worker now needs to be outside the U.S. only three months (formerly six months), and sometimes even less, before returning for what could be another three years in the U.S.

H-2A Visas, on the other hand, are not numerically limited.

Attestations with Audits and Severe Penalties

The old process, in which state workforce agencies supervised recruitment of U.S. workers (to show their unavailability) and reviewed detailed filings about the date and nature of "temporary" need for workers, will give way to an attestation-based filing, with explanation of temporary need and with a recruitment report, to a national Department of Labor office in Chicago. In time the paper application will be changed to electronic filing. State workforce agencies will be taken completely out of the process, even for the required "prevailing wage determinations." DOL may request more information before approval or audit the employer after approval with possible revocation.

In the past, employers could appeal a DOL denial to USCIS by going ahead with the petition, but now DOL *approval* is required to file a USCIS petition. DOL now has its own elaborate administrative appeals and penalties process. Employers caught in a DOL audit or administrative appeals process can expect to be too late in filing a USCIS petition to get one of the limited visa numbers.

Employers who do not carefully follow the complex H-2B rules and maintain important paperwork for DOL audit may become debarred for 1 to 5 years from sponsoring foreign workers in the most important temporary and permanent employment categories. Employers have been surprised at the level of auditing that DOL has undertaken in permanent employment certification cases, and they can expect similarly active enforcement in the H-2B program.

No More Fees from Workers

The new rules prohibit the employer, the employer's agent, recruiter, or similar employment service from collecting any "job placement fee or other compensation (either direct or indirect)" from the foreign worker. Therefore, employers and recruiters may no longer collect recruitment fees from prospective foreign workers as a condition of an H-2B job offer. However, the new rules confirm that expenses associated with housing, transportation and visa applications are not considered primarily for the benefit of the employer and may be incurred by the foreign worker, while labor certification costs, petition costs and associated legal fees must be incurred by the employer. An employer who finds out that a recruiter charged prohibited fees to a worker may avoid debarment by reimbursing the worker or showing reasonable but failed efforts to find the worker. Employers will need to be much more careful in selecting recruiters and managing filings.

Other Practical Requirements

The new rules limit H-2A and H-2B participation to nationals of certain designated countries that have cooperated in receiving their nationals when deported from the U.S. DHS initially designated 28 countries:

- Argentina,
- Australia,
- Belize,
- Brazil,
- Bulgaria,
- Canada,
- Chile,
- Costa Rica,
- Dominican Republic,
- El Salvador,
- Guatemala,
- Honduras,
- Indonesia,
- Israel,
- Jamaica;

- Japan,
- Mexico,
- Moldova,
- New Zealand,
- Peru,
- Philippines,
- Poland,
- Romania,
- South Africa,
- South Korea,
- Turkey,
- Ukraine, and the
- United Kingdom.

If an H-2A or H-2B worker fails to report to work within 5 days of the petition start date, if the work ends more than 30 days before the petition expires, or if the worker's employment is terminated before the work ends, then the employer is required to notify USCIS within two days. H-2A and H-2B workers who enter through a "participating" port of entry must also depart through that port of entry and present designated information such as a designated biometric card that may be issued. DHS will provide more details as it works out the mechanics of this new vision of exit control, which is been a difficult one to realize.

Effective Date

The new regulations, promulgated simultaneously by the Department of Labor and the Department of Homeland Security, take effect on January 18, 2009. Nevertheless, some of the rules will not affect filings that already were made for the April 1 cycle under the old rules. DOL and DHS also published new rules attempting to streamline the H-2A process for agricultural workers, with similar effect. Those rules, which also affect complex requirements about "adverse effect wage rates," are not summarized here.