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NEW YORK
STATE OF
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Department
of Labor

**WHAT EMPLOYERS AND AGENTS NEED TO KNOW IN NYS:
H-2B PROGRAM PROCESS & GUIDANCE**

AGENDA

- What is the H-2B program?
 - One-Time Allotment of Visas
- H-2B Statistics
- H-2B Process:
 - NYS Specific Information: FLCU FL-515
 - Transportation and Housing/Utilities
- Filing Tips from:
 - US Office of Foreign Labor Certification (OFLC)
 - NYS Foreign Labor Certification Unit (FLCU)
- Common Missteps: Violations of NYS Labor Law
- NYS FLCU Contact Information

H-2B PROGRAM FACTS

- A Federal program which allows US employers to hire foreign guest workers on a temporary basis **when there are not sufficient US workers available.**
- The work must be:
 - Non-agricultural,
 - Full-time (35 hours per week or more) and temporary,
 - Seasonal, Intermittent, Peak Load **or** One-Time Occurrence
- H-2B is a **Congressionally capped federal program.** Annually:
 - 33,000 visas released on Oct 1
 - 33,000 visas released on April 1

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H-2B: ONE-TIME ALLOTMENT OF VISAS

For the past few fiscal years, the Department of Homeland Security has been authorized to release additional allotments of H-2B visas.

Who can apply for the one-time allotment of visas from USCIS?

If additional visas are authorized for distribution, the Department of Homeland Security will issue the parameters. This information is published under a Final Rule containing technical guidance to pursue the additional visas.

Can a business rely on the one-time allotment occurring in future years?

No. This increase is based on a time-limited statutory authority. It does not affect the H-2B program in future fiscal years.

H-2B 2017-2018 TOP 10 STATES

State	H-2B Certifications	% Change from 2017
Texas	17,396	14.7%
Colorado	6,837	5.8%
Florida	5,407	4.6%
Pennsylvania	4,721	4%
Virginia	4,439	3.8%
Louisiana	4,383	3.7%
North Carolina	4,230	3.6%
New York	4,062	3.4%
Missouri	4,011	3.4%
Ohio	3,949	3.3%

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H-2B: 2017-2018 TOP OCCUPATIONS

Position Category	H-2B Certifications	% Change from 2017
Landscaping and Grounds-keeping Workers	63,208	53.6%
Maids & Housekeeping Workers	7,227	6.1%
Amusement and Recreation Attendants	6,546	5.5%
Forest & Conservation Workers	5,608	4.8%
Meat, Poultry, and Fish Cutters and Trimmers	4,277	3.6%
Construction Laborers	3,097	2.6%
Laborers, Freight, Stock & Material Movers	1,777	1.5%
Counter Attendants, Cafeteria, Food Concession	1,653	1.4%
Nonfarm Animal Caretaker	1,647	1.4%
Cooks, Restaurant	1,443	1.2%

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H-2B: NYS Trends

Program Year 2018: 516 orders requesting 4,994 workers

Program Year 2017: 484 orders requesting 4,305 workers

Program Year 2016: 461 orders requesting 3,727 workers

Over 3 Program Years in NYS:

An increase of 55 orders and 1,267 requested workers

H-2B PROCESS

Step 1: Establish the work qualifies for the H-2B program:

- Is it a full time (at least 35 hours/week) temporary job?
- If yes, then determine if the need fits the definition of:
 - One-Time,
 - Intermittent,
 - Seasonal, or
 - Peak-Load
- Determine the dates of need to figure out when to start the process.

H-2B PROCESS

SEASONAL, INTERMITTENT, PEAK LOAD or ONE-TIME OCCURANCE (slide 1 of 2)

One-time occurrence: The employer has not employed workers to perform the services or labor in the past, and will not need workers to perform this work in the future; or the employer has an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for temporary workers.

Intermittent need: Employer must establish that “it has not employed permanent or full-time workers to perform the service or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.”

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H-2B PROCESS

SEASONAL, INTERMITTENT, PEAK LOAD or ONE-TIME OCCURANCE (slide 2 of 2)

Seasonal need: A need that is “traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.” A seasonal need may not necessarily be limited to the traditional four seasons (winter, spring, summer, and fall). Seasonal could include legal “seasons” (such as fishing seasons) and “events” tied to a season (such as the Christmas shopping season).

Peakload need: Employer must “establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis *due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.*”

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H-2B PROCESS: APPLY

Step 2: Obtain a Prevailing Wage Determination (PWD)

- This is usually done through a website called the iCert Portal.
- The employer requests a Prevailing Wage Determination from the US DOL, no less than 60 calendar days before it is needed.
- To request the Prevailing Wage, the employer will need a comprehensive description of the job duties(s) and areas where work will be performed. Job sites within the same Area of Intended Employment may be put on one PWD request. Different Areas of Intended Employment require separate PWD requests.
- The employer will then receive the Prevailing Wage Determination from the US DOL.
 - The applicable wage to be stated on the job order, per H-2B regulations must be the highest of: the Prevailing Wage Determination, the Federal, State, or local minimum wage.

Step 3: Applying for Certification of a Job Order

- Applications must be submitted to the US DOL 75-90 (calendar) days prior to your date of need (again through the portal).
- Employers must also submit a job order application to the NYS DOL (usually email).
- From the date we are contacted by the US DOL with a case number for the application, we have 6 business days to perform a compliance review and process the application to create a job order.
- The review by US and NYS DOLs; sometimes results in a Notice of Deficiency (NOD).

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H-2B PROCESS: NYS FOREIGN LABOR CERTIFICATION UNIT'S H-2B JOB ORDER FORM

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SWA Job Order #: _____

Division of Immigrant Policies & Affairs: Foreign Labor Certification Unit: H-2B SWA Job Order Form

Submit this form to H2B@labor.ny.gov or fax it to (716) 541-9615. Call (585) 258-8858 or (716) 851-2609 with questions.

Did you receive a Prevailing Wage Determination for this H-2B job order? No Yes

Employer Information:

Employer/Business name: _____

FEIN: _____ County of Business: _____ Type of business: _____

If applicable, Doing Business As (DBA): _____

Business address: _____ City: _____ State: _____ Zip code: _____

Mailing address, if different: _____ City: _____ State: _____ Zip code: _____

Contact person: _____ Title: _____

E-Mail address: _____ Phone: _____ Fax: _____

Job Order Information:

Job is full time, temporary and (check one): peak load seasonal one-time occurrence intermittent

Dates of Need: From: _____ To: _____ Title of job opening: _____

Number of openings: _____ Worksite, if different from business address: _____

Daily travel to/from worksite provided: No Yes: If yes, designated pickup location: _____

Education required: _____ Will on-the-job training (OJT) be provided? No Yes

Experience required: _____ Months Years Will you accept a trainee? No Yes

Will you accept related experience? No Yes: If yes, please specify: _____

Work days: Sun Mon Tues Wed Thurs Fri Sat Varies

Work hours: From: _____ To: _____ Total hours per week: _____

Salary range: From: \$ _____ To: \$ _____ Per _____ Overtime offered? No Yes: If yes, at what rate? _____

Pay day: _____ Frequency of pay: Weekly Bi-weekly¹

Driver's License required: No Yes: If yes, Class: _____ Drug testing: No Yes

Benefits, Deductions & Allowances: All deductions from the worker's paycheck required by law will be made.

Applicable NYS Wage Order: Hospitality Industry Miscellaneous Industry N/A, no additional deductions/allowances

Employer Provided Housing: No Yes: If yes, utilities paid by employer: No Yes

Weekly deduction for housing/utilities, if applicable: _____ Employer Provided Meals: No Yes

If yes, number/frequency of meals: _____ per _____ If yes, deduction: _____ per meal day week

Employer Provided Uniforms: No Yes: If yes: Streetwear or Company Specific²: Maintenance Amount: _____/week

Any other employer provided benefits: _____

Any other intended deductions: _____

¹Section 191 of the NYS Labor Law requires manual workers be paid no later than seven calendar days after the end of the week in which wages were earned.

²Per Section 193 of the NYS Labor Law, workers may not be charged for any company-specific uniform. Per the NYS Miscellaneous and Hospitality Minimum Wage Orders, if workers are required to maintain company specific uniforms, they must be provided with the applicable weekly maintenance amount.

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H-2B PROCESS: NOTICE OF ACCEPTANCE: DOMESTIC APPLICANTS

Step 4: Notice of Acceptance: Recruitment of Domestic Applicants

- The US DOL issues a Notice of Acceptance (NOA). After receiving the NOA, the employer must begin local recruitment.
- The NOA will detail the employer's required next steps, including the timeframe and content for newspaper advertisements. It will also direct the NYS DOL to open the job order to search for qualified domestic applicants.
- The employer is responsible for giving every domestic applicant a fair chance at the position. This requires interviewing every applicant to ensure all qualified local workers are given priority before H-2B visas are issued.

H-2B PROCESS: NOTICE OF ACCEPTANCE: DOMESTIC APPLICANTS

- Employers must interview and hire all able, willing, and qualified U.S. workers who apply or are referred by the NYS DOL to the job opportunity.
- Domestic workers who are hired and do not live within a commutable distance must be compensated for travel and subsistence from the place of recruitment.
- The NOA will state when the recruitment period is over and direct the employer to prepare and submit a Recruitment Report to the USDOL.
- The Recruitment Report reflects advertising and communications with domestic applicants.
- Certification of the job order is contingent on the US DOL's satisfaction with the information detailed in the Recruitment Report.

H-2B PROCESS: CERTIFICATION OF THE JOB ORDER AND VISA PROCESSING

Step 5: Job Order Certification from the US DOL

- The US DOL will notify the employer and the NYS DOL when the job order is certified.
- US DOL approval is not necessarily determinative of an approval from USCIS!

Step 6: Visas: US Citizenship & Immigration Services (USCIS)

- As soon as certification is granted by the US DOL, an employer should apply (Form I-129) for the visas from USCIS.

Step 7: Consulate Processing and Travel to the Work Site

- Recruit foreign guest workers: They should visit the consulate in their home countries for paperwork and to receive the visas.
- They may then travel to your worksite (either travel paid for and arranged by the employer OR reimbursed after).

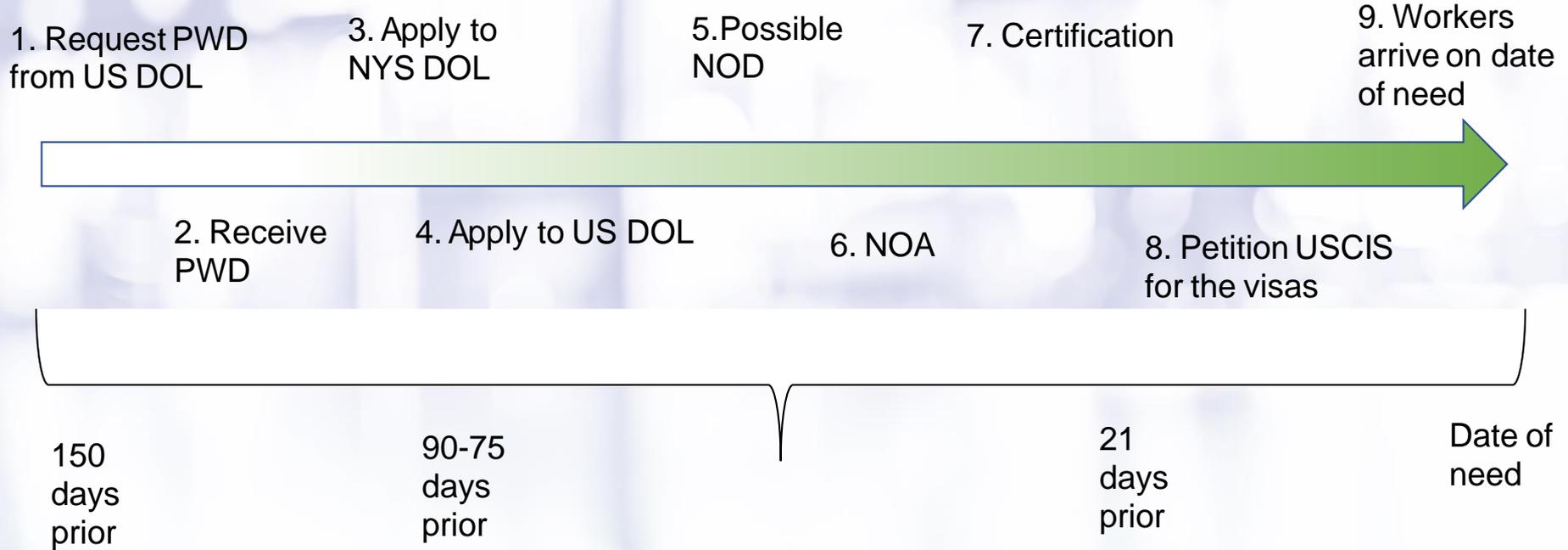
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H-2B: TRANSPORTATION and HOUSING

- **H-2B employers have to pay for inbound and outbound transportation** for all foreign guest workers (and domestic workers from outside of the normal commuting distance), **as well as daily subsistence during travel.**
 - The inbound and outbound transportation is only required to be the **most economical, common carrier** available.
 - The subsistence rates change annually.
- H-2B employers do not have to provide housing/utilities, daily transportation to and from work sites, or other incidental transportation, such as to grocery stores.
- If employers decide to provide transportation, they may not charge workers.
- If employers choose to provide housing/utilities, they may deduct the allowable amount, per the applicable NYS Wage Order.
 - Hospitality Wage Order
 - Miscellaneous Wage Order

AGENCIES AND GENERAL TIMELINE



FILING TIPS FROM THE OFFICE OF FOREIGN LABOR CERTIFICATION (OFLC) slide 1/2

- Employer must **choose only one method** of applying: Either electronically on the iCert portal OR via mail.
- Remember to first obtain a Prevailing Wage Determination for the **occupation in the area of intended employment**.
- If filing electronically, be certain to upload all supporting documents before submitting your ETA 9142.
- After the NOA is issued, employers must publish 2 print ads (one of which must be on a Sunday) during the period of time the job order is open and available for recruitment (minimum of 10 days).

FILING TIPS FROM THE OFFICE OF FOREIGN LABOR CERTIFICATION (OFLC) slide 2/2

- Be certain to interview and hire all able, willing, and qualified U.S. workers who apply or are referred to the job opportunity.
- Make sure the employer prepares, signs, and dates the recruitment report, not the agent or attorney.
- Retain all pre-filing recruitment documentation for a period of no less than 3 years from the date of certification.
- Submit the Recruitment Report and any other required documentation prescribed in the Notice of Acceptance.
- Respond within the required timeframes to Request(s) for Further Information, Notice of Deficiency, and Notice(s) of Audit Examination.

TIPS FOR FILING H-2B JOB ORDERS IN NYS

- Employers: Make time for the process (or pay an agent)!
- For application tracking purposes, we prefer one job order application per email.
- Identify the employer(s) and job title(s) in the email to our office.
- Submit the job order request to the FLCU prior to 90 days from the date of need!
- Review the applicable NYS Wage Order so you are aware of NYS requirements:
 - Hospitality Wage Order
 - Miscellaneous Wage Order
- Check your email and voicemails: Respond in a timely fashion to the involved agencies.
- Call or email us with your questions related to the job order.

COMMON H-2B MISSTEPS: VIOLATIONS OF NYS LABOR LAW

- Costs or deductions for employer provided housing/utilities and/or meals cannot exceed amounts detailed in the applicable NYS Wage Order.
- Workers may not be charged for damage to housing.
- Workers may not be charged for spoilage, breakage or uniforms.
- Workers may not be charged for damaged, broken or missing tools/equipment.
- Workers must be paid weekly or bi-weekly (only if paid up to date).

KEY TAKEAWAYS

- The process takes time: Employers ought to determine their date of need and begin the process accordingly: At least 60 days for the PWD + application submitted 90 days prior = an approximate start date of 150 days prior to the date of need.
- There is no one set rate of pay for H-2B workers. The prevailing wage determination is based on both the job duties AND the location of the work sites.
- H-2B employers have to consider domestic applicants until certification (approximately 21 days prior to certification).
- H-2B employers have to pay for inbound and outbound transportation, as well as subsistence. They do not have to provide housing/utilities, daily transportation to and from work sites, or weekly convenience travel.
- If employers choose to provide housing, they may deduct the allowable amount, per the applicable NYS Wage Order.

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LEARN MORE: <https://labor.ny.gov/immigrants/foreign-labor-certification-unit/h-2b.shtm>

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