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H-2B – Best Practices For Filing Practice Advisory

Ashley Foret Dees

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Practice Advisory

Ashley Foret Dees

Ashley Foret Dees is a partner at Berry Appleman & Leiden LLP. Ashley represents employers and individuals through the complex immigration process. A major area of her practice includes many agricultural and seafood processing employers. She represents businesses through the immigration processes including H-2A, H-2B, H-1B, L and PERM/EB. She has served as the Louisiana State Bar's Annual Immigration Law Seminar chair and speaker and is also founder and chair of the Louisiana State Bar Immigration Law Section. She has served on both the AILA National Pro Bono Committee and as a member on the AILA National Dept. of Labor Liaison Committee from 2016 to 2024 and currently serves on the AILA National Business Section Steering Committee.

H-2B Temporary Visa Overview

The H-2B program requires employers and their attorneys to navigate through the following steps to be able to employ H-2B workers. Immigration practitioners must navigate strict deadlines, filing procedures and delays involved in processing the ETA 9141 and ETA 9142B at the Department of Labor, the H-2B Form I-129 with the USCIS and H-2B visa processing, where applicable, at US consulates (Department of State).

- The H-2B employer must obtain a certified ETA 9142B, Temporary Labor Certification from the DOL. Before the employer can file the ETA 9142B, it must obtain a prevailing wage determination from the DOL.
- Once DOL issues a certified ETA 9142B, the employer must file a Form I-129 with USCIS to request the H-2B status or H-2B visa. In order to file the Form I-129, there must be available H-2B visa numbers available or the beneficiary (ies) is not subject to the H-2B visa cap.
- If the beneficiary (ies) is outside of the US, they will need to apply for the H-2B visa at a US consulate to enter the US.

This section provides an overview of the H-2B timelines and processes:

- The timeliness of submission of the Form ETA 9141, Application for Prevailing Wage Request
- The 90 and 75 Day H-2B Filing Deadlines for the ETA 9142B, H-2B Application for Temporary Employment Certification, with the DOL
- Notice of Deficiency – Response Deadline
- Notice of Acceptance – Recruitment Deadlines
- USCIS Timelines for Processing

Timeliness of the ETA 9141 Request for Prevailing Wage Determination

Similar to previous H-2B procedures, the 2015 Interim Final Rule (IFR) requires that the employer request and obtain a Prevailing Wage Determination from the National Prevailing Wage Center for the H-2B position prior to the filing of the H-2B application with the DOL. The 2015 IFR, however, changed the length of validity for a Prevailing Wage Determination to no less than 90 days and up to one year, which plays a factor in the filing

timelines. Under current provisions, employers should expect that the Prevailing Wage Request may be pending for at least 60 days.¹ Upon receipt of the Prevailing Wage Determination, ideally only 60 days later, employers would have time before the 90 day mark before the start date, which is why an employer should be advised that the very *least* amount of time the H-2B procedures may require would be 120 days from the first date of need. Ideally, the attorney would budget an additional 30 to 60 days to that, equating to 150 to 180 days, or 5 to 6 months, to begin preparation on the first steps of an H-2B filing such as finalizing a job description.

Completing the Prevailing Wage Determination Request and ETA-9142B

A. Completing the ETA-9141 Prevailing Wage Determination Request

Under the H-2B Program rules, an employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the National Prevailing Wage Center (NPWC), or the Federal, State or local minimum wage, whichever is highest. An Employer must offer and pay this wage (or higher) to both its H-2B workers and its workers in corresponding employment. The issuance of a PWD does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law. DOL will rely on the median wage identified in the OES survey located at <https://www.fldatacenter.com/oeswizardstart.aspx>. As stated above, it is critical to submit the prevailing wage determination, Form ETA-9141, early enough to meet the employer's intended filing date, typically 150-120 days before the date of need. With the exception of emergency filings filed under 20 CFR 655.17, an employer cannot submit its application without an unexpired prevailing wage determination.

Form ETA-9141 is the same form used for H-1Bs, H-1B1s, E-3s, and PERM prevailing wages and should be completed on the FLAG portal. The form is fairly straight forward in most circumstances. Accurately completing the ETA-9141 is a critical part of the H-2B application process. The substance of the request must match the ETA-9142B in most respects and we have seen deficiencies where the 9142B application differs from the prevailing wage request, especially with regard to job requirements. This is true even where the difference in requirements does not impact the final wage determination.

B. Completing the ETA-9142B and Appendix B

When completing the 9142B, the FLAG system will automatically populate the fields that are also included in the ETA-9141 prevailing wage request; specifically, the job title, job description, and job requirements. The remaining fields in the application seek information related to the number of workers needed, dates of need, itemized deductions, whether the employer will provide housing or assist with housing, whether the employer will assist or provide transportation to H-2B workers in the United States, whether the employer is using a foreign recruiter, and most importantly, information about the employer's temporary need. You are required to upload the draft job order with proof of posting. The content of the job order is expressly defined in the regulations and must be complete and consistent with the 9141 and 9142. Common discrepancies include differences in the work days and work hours, and different job requirements. It is important to carefully review all documentation to ensure consistency.

As stated above, the Employer must upload a detailed statement of temporary need and include a chart or other evidence of seasonality which may include work hours for full-time and temporary workers or production levels for specific months of the year. Employers should also address in its temporary need statement how it

¹ 20 CFR 655.10 Prevailing Wage

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