

Preparing H-2B Visas to Address Staffing Shortages

By Jessica Feinstein & Brenda J. Oliver

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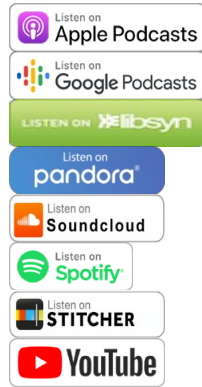
Immigration

Details

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H-2B visas for temporary nonagricultural workers present many challenges for employers seeking to bolster their workforce. As the labor market continues to change as a result of the pandemic, employers should understand the H-2B process and pitfalls with the program.

Jackson Lewis P.C. · Preparing H-2B Visas to Address Staffing Shortages



Takeaways

Preparing H-2B Visas to Address Staffing Shortages

H-2B visas for temporary nonagricultural workers present many challenges for employers seeking to bolster their workforce. As the labor market continues to change as a result of the pandemic, employers should understand the H-2B process and pitfalls with the program.

What Employers Need to Know

- An H-2B visa allows temporary nonagricultural laborers to work in the U.S. for up to nine months.
- There are four ways to demonstrate the temporary nature of an assignment:
 - Seasonal/weather-related
 - Peak load - revenue increases annually can be attributed to a reason or occurrence.
 - One time occurrence
 - Intermittent - a need for employees that you don't normally have.
- Obtaining an H-2B visa is a multi-step process with specific windows of time for filings.
- An employer must first receive a prevailing wage determination from the Department of Labor. From there, the employer can file a labor certification within 75-90 days of the position's start.

- Currently, 66,000 new H-2Bs are allowed each federal fiscal year. Half of those are for jobs in the first six months of the year, the other half for the last six months of the year.
- The number of H-2B visas has dramatically increased, prompting allowances for additional visas to be granted.
- Additionally, calls for returning worker exemptions and other legislative changes to visas are increasing.

Transcript

Alitia (00:00):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted? H-2B visas for temporary non-agricultural workers present many challenges for employers seeking to bolster their workforce. As the labor market continues to change as a result of the pandemic, employers should understand the H-2B process and pitfalls with the program. On this episode of We get work™, we provide an overview of the H-2B visa and discuss whether this is a tool that employers can consider to address the labor shortages they are experiencing.

Our host today are Jesse Feinstein and Brenda Oliver principals, respectively in the Omaha and D.C. Region offices of Jackson Lewis and members of the firm's immigration group. Brenda's maternal family immigrated to the United States from South Korea. So has firsthand knowledge of the complexities governing foreign nationals' abilities to work in the United States as well as more than 25 years experience facilitating the transfers of high level and especially skilled employees to the United States. Immigration is in Jesse's blood. As her parents were also immigration lawyers. With more than 15 years experience, Jesse enjoys working with people to live and work in the US and appreciates the stress and anxiety that can come with it. She strives to provide advice on complex immigration issues with compassion and experience. Jesse and Brenda, the question on everyone's mind today is what is a H-2B visa and how does this impact my business?

Brenda Oliver (02:04):

So thank you for the introduction, Alitia, this should be a really interesting topic and I can't wait to get into this with Jesse today. And what we want to do is kind of introduce the H-2B visa to the listeners. So to set this up really quickly lately, there's been a lot of discussion in the news with COVID being prolonged about there being a laborer shortage in the US. And this has been affecting a variety of industries and employers are looking for solutions, which is where we as business immigration practitioners can help in the form of work visas. So in particular, we want to discuss the H-2B visa. And I'm going to ask this question to Jesse, tell us what an H-2B visa is?

Jessica Feinstein (02:47):

Yeah, thanks, Brenda. So as you said, it's a non-immigrant work visa that allows temporary non-agricultural laborers to come in and work for up to nine months. This visa is only for specific kinds of workers, so it doesn't work for every job that you may be having trouble filling right now. It only works for jobs that are temporary. So the way you can kind of think about this is that there was some external source or reason why you need a certain number of workers above your permanent workforce. So a really great example is a ski resort. More people are required to work at a ski resort when there is snow. So during these peak seasons, they can show that they require additional workers to help run the resort during their peak season.

There are actually four ways to prove temporariness and they are seasonal, which is somewhat self-explanatory. Somehow the weather is the reason. The second is peak load. So this is where for other reasons your revenue or your business increases annually for a reason, another one is one-time occurrence, which is again, kind of self-explanatory. And the last one is intermittent. So it could be where you don't normally employ workers at all in this position. And for some intermittent needs, you need some workers to do some non-agricultural labor for you.

Brenda Oliver (04:13):

Do you see employers going with one more than the other or is it just really a mix of all four?

Jessica Feinstein (04:19):

It is not a mix of all four. The most common are the seasonal and the peak load. In my practice, almost all of them are peak load. Some of them feel like seasonal and peak load. Again, this ski resort as an example kind of is tied to winter, but we still use that peak load more often than anything else.

Brenda Oliver (04:40):

Can employers do this at any time during the year I heard there's a quota? Can you get more into that?

Jessica Feinstein (04:47):

Yeah. So the process of the H-2B visa can be very overwhelming. It involves three different government agencies. So the first thing we have to do is file a labor certification with the department of labor. And this process has a lot of timelines. You need to have a prevailing wage from the department of labor before you file. There are windows of filing. So you can't file more than between 90 and 75 days before your date of need. So if you have an April 1st start date, that is the beginning of your season where you need more workers. Then the first date you can file is January 1st. That is that 90 days.

Brenda Oliver (05:25):

That seems really specific, which is why you would say employers need

immigration attorneys. I mean, this is not anything that an employer would do themselves, or do you see that happening?

Jessica Feinstein (05:36):

No, we don't see employers trying to do this themselves. Part of it is, as you said, Brenda, it's lots of things you have to keep track of. There's a lot of timelines, a lot of quick turnarounds, especially with the department of labor. The other thing that when we're talking about employers doing it and how complex it is I talked about that timing. So if you're thinking I need workers and you call a lawyer and you need them in a month, you're four months behind.

And that's because we have to get this prevailing wage, which takes a month. Then we have to file 90 days before our date of need. So you're really looking at 120 days before you need these workers, having everything prepared. How many workers do you need? Which occupations are you interested in? What locations do you need them at? So there's lots of things to have to coordinate at the beginning and using an attorney is helpful because then they will be able to ask you the questions you may not know to ask, highly regulated, very compliant driven with the H-2B. So I think there is that comfort of knowing an expert is helping you through this process.

Brenda Oliver (06:39):

I agree with that, Jesse. And you did mention the prevailing wage and we've hear that term in other immigration context with other visas, is this something that an employer can come to you and say, "Hey, I know this to be the prevailing wage for our industry." Or is there a different way that you have to go about collecting that prevailing wage information?

Jessica Feinstein (07:00):

Yeah, so the prevailing wage is something we see in business immigration. Obviously, you see these all over the place. So it's a way for the department of labor to protect the US labor market, to ensure that US companies don't underpay their foreign workers to the detriment of a US worker who may want a higher wage. So the department of labor with H-2Bs sets the wage, the exception would be if you have a collective bargaining agreement, but other than that, H-2Bs really do have this prevailing wage that you have to meet. You apply through the department of labor on a form, and they issue you with the wage that is appropriate for the job and the location where the work is performed.

Brenda Oliver (07:40):

Are there times where the employer can disagree with the prevailing wage?

Jessica Feinstein (07:43):

Not with H-2Bs. No.

Brenda Oliver (07:45):

Okay.

Jessica Feinstein (07:46):

It is an average. So in other areas of immigration law, we kind of have some ranges with wages. With an H-2B, it is one hourly rate, it's usually hourly, but it's that hourly rate that they would have to be the minimum. And what's important for employers to remember too, is that this is a wage that must be paid at a minimum for anybody in this position, including US workers who are unrelated to the H-2B process. So let's just throw my ski resort example. Let's say a resort normally employs 50 housekeepers and they pay them \$15 an hour. And then they decide that they need 50 additional housekeepers during their busy season. And the prevailing wage is \$17 an hour. They now have to pay all workers, \$17 an hour, who are housekeepers. So that's something that can sometimes get employers caught up because they don't understand that the H-2B process does impact sometimes their current workforce and vice versa. So if the opposite is true, if housekeepers in real life are making \$17 and the H-2B wage is \$15, then you have to pay your H-2B workers \$17.

Brenda Oliver (08:52):

I think that's a great way to do it, Jesse. And it keeps the employers honest. And if the department of labor is trying to ensure that US jobs are secure and not undercut, that's a good way to do it. Is there a quota for H-2Bs?

Jessica Feinstein (09:08):

There is. Currently, the statute allows for 66,000 new H-2Bs every year, that is then broken up into two pieces of the year. So the first half, which is going to sound weird because it's October to March, the federal government goes on an October fiscal year calendar. So their beginning of the year is October through March. So there are 33,000 for jobs that need the workers to start working at some point between October and March. There is then the second half, which is April 1 through September 30th. So, anybody who needs these workers during April to September, they get the second 33,000. Now this is probably the most charged piece of the H-2B program because especially during this labor shortage, this is a wholly insufficient number of H-2B visas.

Brenda Oliver (10:04):

Okay.

Jessica Feinstein (10:06):

As I talked about that 90 day window. So in January, the government received 136,000 applications for workers for those 33,000 spots.

Brenda Oliver (10:18):

Wow.

Jessica Feinstein (10:19):

So it's becoming cumbersome. I think probably 10 years ago, this program was great. There were employers that utilized it every year. It was kind of something

they could rely on. And now I have employers that year to year, do not know if they're going to meet the quota if they're going to get in time if are going to be able to get through the process fast enough. And so the quota is a really hot button, lots and lots of activity in Congress. So you see a lot of you've heard in the news, Brenda, I'm sure that they issued more visas for the first time in the winter months.

Brenda Oliver (10:19):

Right.

Jessica Feinstein (10:53):

And so there have been times where the government has issued more visas. So last summer they issued an additional 16,000. Again, not even close to what they needed, but it did provide some relief for employers that did not make it into the first 33,000 numbers. I had a couple of clients that were able to get in and that second half and it was great. But again, not enough. We were hopeful that when president Trump became in office that he was going to increase it because we know his properties have used them in the past.

Brenda Oliver (11:24):

Right.

Jessica Feinstein (11:24):

But he didn't, I was really hopeful. I was like, come on. So right now there is probably last year, they gave out 85,000 instead of 66,000.

Brenda Oliver (11:35):

Okay. But Jesse, that's still from what you said, that's not enough. And I can imagine just from other context, other visas and using that context, that there are employers who are just up in arms about what they can do really, because if it's 66,000 a year, give or take an additional 20,000 or 40,000 that the government may or may not give, what are employers supposed to do?

Jessica Feinstein (12:01):

I mean, that's a really, really good question. And it kind of falls back to trying to be more creative with US recruitment. I mean, you and I hear calls all day about how we just can't find the talent in the United States across all kinds of industries. And that's where we have such a great job is we get to hopefully solve these problems for our clients by finding foreign talent.

The H-2B program is or can be a really great tool. This is what I tell clients who've never done it before. I said, when it works, it's amazing. The workers come in, they work hard, they show up every day and you can kind of get a group of people that come back every year and they start to become part of your employment family. But when you don't know year to year, if they're going to come in, you do have to be more creative. I know that I've had clients, who've worked with staffing agencies in Puerto Rico since they are also US citizens workers. They can come in

without any kind of special immigration work for me, J-1s are used by a lot of my H-2B employers as kind of another visa. That's an exchange visitor visa. We're not going to get into it right now, but it does allow people to kind of come in and perform some of these more unskilled labor jobs for a short period of time.

Brenda Oliver (13:20):

I mean, if they're coming in year after year, and that would be great because I'm sure employers, Jesse, start to rely on, like you said, the good workers they become part of their family, but is there a time where a time limit where they can't come in? For example, in H-1B category, we're not going to get into that, but it's a six-year time limit, right? For individuals to be on that visa, is there a time limit for H-2Bs?

Jessica Feinstein (13:45):

There is. So they can't remain in the United States for more than three full continuous years. And so the program itself only allows employers to bring in H-2B workers for up to nine months. So that's an important again, restriction of this program is that it is only nine months at a time. So not only can you not rely on it because of the quota. Now you have to do it every year. And so this is where it kind of gets into this, it's becoming less helpful, I think. So they can come in for three years at a time, but if they leave at the end of nine months and spend three months abroad, it starts the clock over again.

So it kind of depends on the individual employee. I have H-2B workers that go home to their home countries three months a year kind of it's a big vacation. And then they come in and they work for nine months and they do that. I also have people who continually extend stay in the United States, going from H-2B employer, to H-2B employer potentially from a summer resort to a winter resort, kind of those things. But after three years, they do have to leave for three months to get another three years to come back.

Brenda Oliver (14:52):

So for those employees who leave, who are on the nine, three month increment, are they counted against the quota again the following year?

Jessica Feinstein (15:01):

Yes.

Brenda Oliver (15:02):

Wow. So this is really kind of cumbersome for employers to navigate and to think about yearly, Jesse, because it seems like once this process is done, then they have to consider, they're always thinking in the future, right? They're always thinking what's the next time or the next tranche of individuals that I have to get into the US.

Jessica Feinstein (15:28):

Yes.

Brenda Oliver (15:28):

I can see it really wearing. Is there any solution, or have we heard anything, any changes?

Jessica Feinstein (15:35):

I mean, there has always been kind of talk of changes. Last year, and maybe the year before there was a returning worker exemption to your point, these employees that have come in, they've been approved before they've left, they haven't violated their status in any way. Those employers could bring them in outside of the quota. But again, that was a special provision given the huge amount of need in this country for these positions to be filled, it's not a part of the law. So returning worker exemptions is something that we are focusing on getting more numbers, just generally I know there a number of senators and congressmen whose states really rely on these kinds of non-agricultural workers. And so they're very interested in getting it done. I know I have an employer in Missouri and they have a very, very active lobbying group that helps specifically towards H-2Bs every year, really keeping in contact with their congressmen and senators, letting them know this is important.

Having their top industries of the state coming in and saying we have 150 open positions. We can't have this, we're going to have to start moving things out of the country in order to continue with operations. So it is something that our Congress needs to deal with as you know our immigration act has not really been changed since the mid '90s.

Brenda Oliver (15:35):

Yeah.

Jessica Feinstein (17:01):

And a lot has changed in the world since then. So I always say, write your congressman, pay attention, these kinds of things sometimes aren't as sexy as the illegal immigration stuff and the wall, but it's very impactful to our country. And so that's kind of how I feel about it as far as trying to make change. It has to come from the government.

Brenda Oliver (17:26):

Yeah. That makes sense. And the impact, like you said, all of this, regardless of whether it's sexy and the hot topic in the news, it definitely impacts the economy, whether it's the labor shortage or the economy inflation, or do we have enough manufacturing going on and would there be enough bread or meat in the supermarkets for people to buy? And so it does affect us as citizens on a daily basis. And so I think that is something that's certainly important for Congress to get behind and employers to definitely notify their congressman about or their congressperson.

Jessica Feinstein (18:04):

Yes. And I mean, I've heard terrible stories of one of the things that's just a general

shortage. And I think it's been this way for a while, are truck drivers. And they're hard to prove H-2Bs from a temporary standpoint, it has been really hard to find truck drivers. And if you can't find truck drivers, sometimes you have to just throw the food away. Like if you can't get milk or something on a truck you have to throw it away. It's terrible.

Brenda Oliver (18:32):

There's so much going on with child, food shortages. And I hate to hear Jesse that industries are throwing away food.

Jessica Feinstein (18:32):

I know.

Brenda Oliver (18:41):

Especially because they can't get the right people, the workers, the laborers, to be able to drive it across from one state to the next or two states away. And then even to just, I guess, get it through the production plant too. Right? Are there specific industries in addition to truck drivers that you know utilize this visa category?

Jessica Feinstein (19:06):

Yeah. I mean, we're starting to try to be a little creative about getting new ones in, but historically lots of landscaping companies use them in the summer resorts. Like I said, cooks, housekeepers, groundskeepers on these resorts with three or four golf courses, those kinds of things, which are going to be more popular in the summer. There are some manufacturing companies that can show, again, you have to show this peak for some reason. And sometimes that can be tough if you have a 365-day business, right. That kind of makes the same thing all year round. If you can try to show a peak, if it's related to season or just revenue for some reason, we had an ice cream company where we tried to prove that people eat more ice cream in the summer.

So we could show that their revenue increased when the United States was slightly hotter. And so it really kind of depends on if you have that need. And sometimes I have clients that are, they think they can prove it. And then we get all of the data and there is no peak. They're running the same all the time or it kind of goes up and down. And so it really depends on if you want to get creative, but there are, like I said, landscapers, resorts. Those are most of the ones that I see too.

Brenda Oliver (20:32):

And Jesse is the threshold to prove this, that high? So I like that the ice cream industry is showing that there certainly we all eat, we love ice cream and we all would eat more ice cream in the summertime, but is there a threshold that a certain category or types of documentation that needs [crosstalk 00:20:52] shown?

Jessica Feinstein (20:53):

Yeah. So not to give my trade secrets away, but I always kind of have this USA

Today take on immigration documentation. I want it to be pretty. I want it to be simple. And so I do a lot of bar graphs. So my clients will send me the raw data of how many employees do they normally hire by month. So that's an important piece of this when you're proving the temporary need is you have to do it by month. So you're going to show revenue by month. You're going to show employees by month. And so hopefully what you see and last year, because 2020 was bad for especially a lot of the resorts I do work for because they were closed down for COVID and then restricted and all of those things, 2020 kind of doesn't count. So we've been going back to 2018.

So I've been having my clients send me this data, monthly data for 18, 19, 20, and then 21 again, how many people do you normally employ? So we'll say, okay, let's say we're a landscaping company. So in the winter I only have two employees, but then all of a sudden in April I have 40 employees. And I show that I have all of these employees and it happens every year. So that kind of data is very helpful. And also what I like about the graphs is that it visually looks like a peak. It visually looks like it's a temporary need. And so that's normally what I do. If that's not sufficient, the government will ask us for more information. And then at that point, we try to really dig in, but yeah, revenue, employment numbers, I used to do a lot of overtime, so I could show if we would've had workers, we would've have paid, because we didn't have workers, we paid a million dollars in overtime or whatever.

Brenda Oliver (22:34):

Right.

Jessica Feinstein (22:34):

And you can kind of show that over the months, overtime goes up as you get busier. So overtime reports can be helpful as well.

Brenda Oliver (22:42):

That's really creative Jesse. And I guess you have to be creative in our industry, in immigration industry in general, to prove something to the government. And I agree visual is always good. But just even with when you mentioned, there are some companies that you work with where there may not be that peak, what do they do? Because there is that need. And we see, and we've heard on the news, there is a labor shortage right now. COVID has done a really interesting thing in our economy or our country right now because there are those who have been laid off from industry or furloughed. And then when we needed them to come back because things are opening up again, people have taken early retirement, or they just decided, Hey, I'm going to wait by the sideline and see what happens. And so thus creates the labor shortage.

Jessica Feinstein (23:34):

Yeah. So unfortunately this program is not for a labor shortage. So if you come to me and you say, I have had 200 open recs for three years, I'm not going to be able to prove a temporary need. That is the real key to the H-2Bs. It is a temporary need. And most of the time when we're talking about a labor shortage, you are

short permanent employees. You need these people all the time and you need them now. Again, we can try to fit it in. We try see is there some peak that, and it happens sometimes where they don't think about it until we have start having the conversation. And then they're like, oh no, totally. We do have we ramp up hiring in the summer and then we lay people off in the fall. But to your point, very directly, if it is a labor shortage problem, this is not the visa to solve your problem.

Brenda Oliver (24:26):

Right. Well, I think we're coming to the end, but is there a solution? What do you think Jesse?

Jessica Feinstein (24:33):

I mean, I feel like we should keep trying. I think the government needs to see the need. They need to see that people are applying for this. And hundreds of thousands of workers are needed to run the economy of our country. So I don't want people to be discouraged. I want people to still show the government that we need this program to change. And I think in continuing to apply and show that need, that's going to put the numbers that the government needs potentially to make change, but we also just need the government to do their job.

Brenda Oliver (25:03):

Right. Well, I mean like any like a visa category, right? It's not the be-all and end-all solution for any employer. And we as business immigration practitioners, we have to counsel our clients and say, this is a solution right now, and this is how we can work the solution, but it may not be that, like we said, be-all and end-all that you need.

Jessica Feinstein (25:03):

Yeah.

Brenda Oliver (25:24):

And let's get our lobbying machines together and come up and put our thinking caps on and come up with something creative.

Jessica Feinstein (25:32):

Absolutely.

Brenda Oliver (25:33):

Any last words for us? Is H-2B still good to use?

Jessica Feinstein (25:38):

I think so. I mean, like I said, it's you can't rely on it, but when it works for you, it really does I think eliminate a lot of stress for employers when they do actually get the workers in. So I'd say still try it.

Brenda Oliver (25:53):

I agree. I think this hopefully was a good introduction to the H-2B visa category for our listeners. And as Jesse said, "Hey, still try it." It may be the solution for you particular employer and maybe not be the solution for everybody, but it's still worth looking at.

Jessica Feinstein (26:13):

Absolutely. Thanks, Brenda. This was fun.

Brenda Oliver (26:16):

This was fun. I appreciate it. I enjoy talking with you about this.

Jessica Feinstein (26:20):

You too.

Alitia (26:22):

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