

# Employment of Non-Citizen Seasonal Workers

Summer 2002



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# Disclaimer — Please read

This packet of information was prepared to answer general questions and give general advice about the law. This packet may or may not also include forms that you can use. When reading this packet or using the forms, keep in mind that the advice, information, and forms were created to assist readers with general issues, not specific situations, and as such does not replace the advice or representation of an attorney. Because of this and because of unanticipated changes in the law, the School of Law at Southern Illinois University and the person, institution, or agency who gave you this packet make no claim as to whether the use of this packet will achieve the result you desire and disclaim any responsibility for the consequences of any form prepared or action taken in reliance upon the information in this packet. If you are concerned or do not understand whether this packet will be of assistance to you or will apply to your specific situation, you should talk to an attorney. If you have any questions about this disclaimer, call the Self Help Legal Center.

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Look for these symbols to tell you when to:



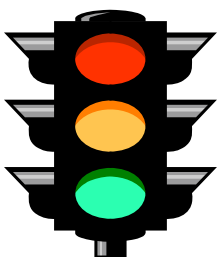
**STOP!**

You need legal representation or advice to continue.



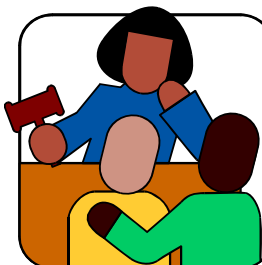
**USE CAUTION!**

This is a complicated step so pay attention.



**GO!**

You can proceed to the next step.



**CHECK IT OUT!**

This issue is discussed in another packet.

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# How to use this self help packet

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It is very important to read each section of this packet completely before you take any action in regard to a legal problem, including using any forms that supplement this packet.

Because this packet discusses terms and actions with which you are likely not familiar, you will need to refer back to the following sections from time to time while reading this packet:

## **People and Agencies You Should Know**

This section describes people and agencies that you may come in contact with in regard to a particular legal situation. It is important that you understand who these people and agencies are.

## **Books and Websites on Immigration Law**

This section contains a list of publications which discuss immigration issues.

## **What These Legal Terms Mean**

This section defines commonly used legal terms in words that you can understand. To use the rest of the packet and any supplemental forms, you need to understand exactly what these terms mean.

## **Summary of the Law in this Area**

This section contains a summary of the important aspects of the law relating to the hiring of non-citizen, temporary and seasonal agricultural workers.



# Warning to all readers



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**Before you proceed with using this packet, you should ask yourself the following questions:**

**1. Have I tried to consult a private attorney?**

No self-help publication, packet, or form can replace the advice and experience of a licensed attorney. An attorney may not cost as much as you think, especially if you just need to ask questions. Before you proceed on your own, call several local attorneys, compare prices, and find out whether you can pay an attorney or not.

**2. If I cannot afford an attorney, have I tried to find a free source of legal assistance?**

There are several agencies which provide legal assistance for free to certain groups of individuals. Some of these agencies are listed to the right. While they may not be able to help you with a particular problem, it does not hurt to call them to find out before you proceed on your own.

**3. Is this something that I can do on my own?**

If you have trouble following directions, or have difficulty reading, writing, or speaking in public, you may not be able to follow the directions and advice in this packet. If this is the case, find a friend or someone who can help you before you proceed on your own.

## Free sources of legal help

### Land Of Lincoln Legal Assistance

Serves the 65 southernmost counties in Illinois

Toll Free: 877-342-7891

For additional information, you may visit their website at:

[Http://www.lollaf.org](http://www.lollaf.org)

### Prairie State Legal Services

Serves most of northern and north central Illinois outside of Cook County

815-965-2134

800-331-0617

### Coordinated Advice and Referral Program for Legal Services

serving Cook County

312-738-9494

### Will County Legal Assistance

Serving Will County

815-727-5123

### Illinois Coalition for Immigrant and Refugee Rights

312-332-7360

### Immigration and Naturalization Service

1-800-375-5283



## **The Immigration and Naturalization Service (the**

**INS):** The agency responsible for administering the immigration and naturalization laws of the US. Inspects non-citizens to determine their admissibility into the U.S., and performs other immigration-related functions. The INS is a part of the U.S. Department of Justice.

## **U.S. Department of Justice (DOJ):** The department of the

U.S. federal government charged with enforcement of federal laws.

**U.S. Department of Labor:** The department of the U.S. federal government that promotes and improves the welfare, opportunities, and working conditions of wage-earners.

**U.S. Department of Agriculture:** The department of the U.S. federal government that institutes and administers all federal programs dealing with agriculture.

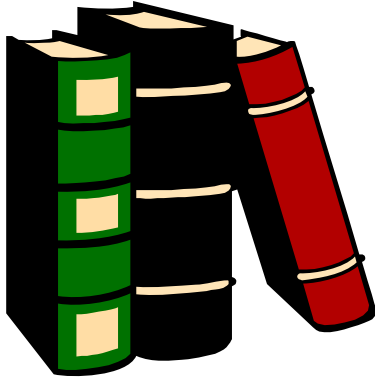
**U.S. Department of State:** The department of the U.S. federal government that sets forth and maintains the foreign policy of the U.S.

**Consulate:** The residence or headquarters of a United States consul, a public official placed in a foreign country responsible for developing and protecting the economic interests of the U.S. and looking after the welfare of American citizens visiting or residing in the foreign country. Also responsible for granting or denying visas to non-citizens wishing to enter the U.S. for various reasons.

**Dependents:** Spouses and unmarried children under 21 years of age of seasonal and temporary (H-2A) agricultural workers.

**Port of Entry:** Place in the U.S. where immigrants and others wishing to enter the U.S. first arrive.

# Books and Internet sources on Immigration <sup>7</sup>



## Disclaimer: Please Read !!



The following is a list of publications which discuss immigration issues. Because of unanticipated changes in the law, the School of Law at Southern Illinois University and the person, institution, or agency who gave you this packet make no claim as to the accuracy of the content of these publications including whether they will achieve the result you desire. The School of Law at Southern Illinois University and the person, institution, or agency who gave you this packet disclaim any responsibility for the consequences of any action taken in reliance upon the information in these publications. If you are concerned or do not understand whether a particular book will be of assistance to you or will apply to your specific situation, you should talk to the publication's publisher or an attorney. If you have any questions about this disclaimer, call the Self Help Legal Center.

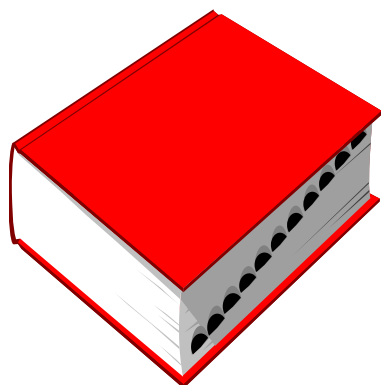
### Books

1. Immigrating to the USA, Dan P. Danilov, (7th Ed. 1999).  
A useful guide for the layperson. Primarily geared towards individuals seeking to immigrate to the U.S. Includes brief section on non-immigrant visas and copies of several documents that individuals might need to file.

### Internet Sources

1. The Immigration and Naturalization website at: <http://www.ins.usdoj.gov/graphics/services/tempbenefits/ecrd.htm#anchorH2>  
Includes links to forms that employers will need, as well as information on the location of local INS offices. People with immigration-related questions can also call the national INS toll-free information service at 1-800-375-5283.
2. U.S. Department Of Agriculture, Office of the Chief Economist website at: <http://www.usda.gov/agency/oce/oce/labor-affairs/h2asumm.htm>.
3. United States Department of State website at: <http://travel.state.gov/visa.tempwkr.html>.  
People with questions about the visa process can also call the State Department's Visa Office at 202-663-1225, or write to the State department at:  
U.S. Department of State  
Visa Services  
Washington, DC 20520-0113
4. United States Department of Labor website at: [www.dol.gov](http://www.dol.gov).
5. BusinessWeek Online at: [http://businessweek.findlaw.com/sblg.SBLGCHP11\\_c.html](http://businessweek.findlaw.com/sblg.SBLGCHP11_c.html). Online magazine gives information for small businesses on various subjects. Includes information on IRCA and what that law means for small businesspeople.
6. Nolo.Com ("Law for All: Putting the Law into Plain English") website at: <http://www.nolo.com/index.cfm>.  
A resource for non-lawyers. Contains basic information about most areas of law, though the Immigration and Green Cards section is more focused on individuals wishing to permanently immigrate to the U.S. than on prospective employers of temporary workers, or temporary workers themselves.

# What these legal words mean



**Immigration:** When people who are not United States citizens come to the U.S. for the purpose of living permanently in the United States.

**Immigrant:** A person who is not a United States citizen who comes to the United States for the purpose of living permanently in the United States.

**Nonimmigrant:** A person who is not a citizen of the United States who comes to the United States for a variety of temporary reasons, such as tourism, education or temporary employment.

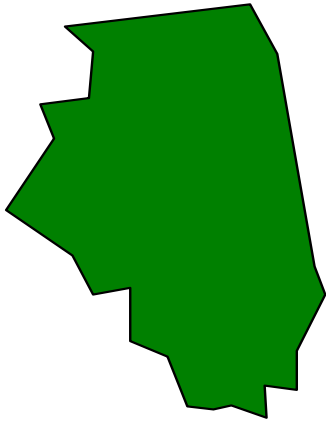
**Non-Citizen:** A person who is in the United States who is not a United States citizen. Also called an **alien**. May be in the U.S. legally or illegally.

**Visa:** An official endorsement made on a person's passport which states that the passport has been examined and that the bearer of the visa may proceed into the United States. A visa is generally required for admission of non-citizens into the United States.

**Temporary Labor Certification:** First step of hiring process for non-citizen seasonal workers. Temporary labor certificates assure that admission of non-citizens to work in the United States on a temporary basis will not negatively affect American workers' job opportunities, wages, or working conditions. In a labor certification application, an employer must demonstrate that there are insufficient American workers to meet the employer's hiring needs, and that the proposed wages and working conditions meet regional standards.

**The Immigration and Nationality Act:** The federal law which governs immigration and nationality. This law is enforced by the INS, a branch of the DOJ. It is often referred to as the **INA**.





As a general rule, it is illegal to knowingly hire people who are not authorized to work in the United States. Employers are required to file **I-9 Employment Eligibility Verification** forms for all employees. Employers who knowingly employ illegal workers can be sanctioned by the federal government. Potential sanctions may include monetary fines and jail time.

However, the law recognizes that there are certain types of labor for which it is difficult to find workers who are American citizens. With this problem in mind, the law has developed alternative procedures to make non-citizen workers eligible to do these types of work. One such area is that of seasonal or temporary agriculture labor.

Agricultural employers can hire seasonal or temporary non-citizen agricultural workers under the **H-2A Temporary Foreign Worker Program**. The H-2A program is governed by the INA, section 101(a)(15)(H)(ii)(a). It is designed to assure employers an adequate labor force, while at the same time protecting the jobs and wages of American workers. To enjoy the benefits of the H-2A program, an employer must demonstrate that there are insufficient American workers to perform the agricultural labor in question. They must also show that employment of foreign workers would not have a negative impact on American workers. Employers seeking to hire temporary and seasonal workers under this program must file a **Labor Certification Application** with the Department of Labor. Department of Labor regulations at 20 CFR Part 655, Subpart B govern the labor certification application process. Prospective employees must obtain a visa if they are living outside the United States.

# Who can hire non-citizen seasonal workers?

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An agricultural employer who needs workers to perform labor or services of a temporary or seasonal nature may apply under the H-2A Temporary Foreign Worker Program. Qualifying employers include individual agricultural employers, and associations of agricultural producers, partnerships, or corporations.

To hire workers under the H-2A program, an employer must demonstrate both that there are not enough American workers to perform the labor in question, and that employment of foreign seasonal workers will not have a negative impact on American workers.

Employers seeking to hire seasonal workers under this program must file a Labor Certification Application with the Department of Labor.

Employers can also hire non-citizens for temporary, non-agricultural labor pursuant to the H-2B program. Information about this program can be found on the INS website listed at the end of this packet. **Please note:** The information in this packet only applies to employment of temporary or seasonal agricultural laborers.



# How do I employ non-citizen seasonal workers?

- **First, Obtain Temporary Labor Certification:** Obtaining temporary labor certification is the first step in hiring an H-2A worker. Temporary labor certificates assure that admission of non-citizens to work in the US on a temporary basis will not negatively affect American workers' job opportunities, wages, or working conditions. An employer must apply for a temporary labor certification with the appropriate United States Department of Labor, Regional Administrator, Employment and Training Administration, and local office of the State Employment Service. There are links to the appropriate form of the Department of Labor website at: <http://www.usda.gov/oce/oce/labor-affairs/h2asumm.htm>

**What the Employer Must Demonstrate:** In the application, an employer must demonstrate that there are not enough United States citizens available to meet the employer's hiring needs, and that the proposed wages and working conditions meet regional standards.

## **The Employer Must Also:**

1. Make active efforts to recruit American workers to fill the position. This includes newspaper and radio advertising in areas where such workers are likely to live. The Department of Labor website listed above includes suggested recruiting methods.
2. Show that the rate of pay for non-citizen workers will be at least as high as for American workers.
3. Provide free, approved housing for workers who are not able to go home each day.
4. Provide certain types of transportation for workers.
5. Provide Worker's Compensation Insurance or equivalent insurance for all workers. Proof of insurance must be presented before labor certification will be granted.
6. Provide appropriate tools and supplies at no cost.
7. Guarantee workers a certain amount of employment (3/4 of the work days in the contract period) and agree to employ United States workers who apply for the position until 50% of the contract period has passed.
8. Show that the position is not open because of a labor dispute (a strike or lockout).

# Steps to hire non-citizen laborers

**How to Apply:** You can file the application in person, by certified mail, or delivered by guaranteed commercial delivery to the appropriate Regional Administrator and local office of the State Employment Service.

**Fees:** If the certification is granted, the employer must pay a fee of \$100, plus \$10 for each job opportunity certified, up to a maximum of \$1000 for each certification granted.

**Reasons Why Labor Certification Might Not Be Granted:** Labor certification may be denied for several reasons, including where the Department of Labor finds that sufficient American workers exist, where one of the above requirements has not been met by the employer, and in certain situations where the employer has not complied with previous certification in the past two years. If labor certification is denied, the employer may appeal the decision.

- **Next, File a Petition with the Immigration and Naturalization Service:** After obtaining temporary labor certification, the employer must file a petition called an I-129 form (Petition for Nonimmigrant Worker) with the INS. Form I-129 can be downloaded from the INS website at [www.ins.gov](http://www.ins.gov). Along with Form I-129, the employer must include:
  1. Labor certification from the Department of Labor.
  2. Copies of evidence that each named non-citizen met the requirements as stated when employer applied for temporary labor certification.

**If the Petition is Approved:** The employer will receive notice of approval from the INS. This notice is called Form I-797. **Please note:** Approval of a petition does not guarantee visa issuance to a worker found to be ineligible by the INS under provisions of the Immigration and Nationality Act. Certain classes of people are ineligible under section 212 of the INA to receive visas, though sometimes people in these classes can apply for waivers from the INS and be issued a visa if the waiver is approved. These classes can be found in the INA, section 212. They are also listed on Form DS-156, the form which the worker will need to submit with his visa application. Examples include people who have been convicted of certain kinds of crimes, especially those involving controlled substances, and people who are deemed to be a threat to the national security of the United States.

- **When Should I File the Petition?** You should file your petition as soon as possible, but no more than six months before the proposed employment will begin. **Please note:** If the petition is not submitted at least 45 days before employment will begin, the petition may not be processed in time, and the visa may not be issued by the time you need the worker to start working.
- **What Does the Worker Need to Do?** Workers living outside the United States must apply for a visa with their local American consulate. To apply, the worker must file an application form called Form DS-156. Additionally, the applicant must pay a nonrefundable fee of \$45, and present a valid passport, a photograph of specified dimensions, and the notice of approval of the employer's petition, Form 797. The applicant may also be required to show proof of binding ties to a non-U.S. residence that they do not intend to abandon. **Please note:** A visa does not guarantee admission into the United States. The INS can refuse to let the worker enter at the port of entry for a number of reasons. The INS official at the port of entry can also alter the length of stay authorized by the official at the consulate.
- **If I Need Several Workers, Do I Have to File Separate Petitions for Each Worker?** A single petition may cover several workers if they will perform the same services, work in the same location, are included on the same labor certification, and come from places that are served by the same United States consulate.
- **Can Temporary Workers Bring Family Members to the United States?** Certain family members, called "dependents," may accompany an H-2A worker to the United States. Spouses and unmarried children under age 21 are considered "dependents." These individuals must get an H-4 visa. They cannot be employed while in the U.S.
- **How Long Can Seasonal Workers Stay in the United States?**  
Workers can stay as long as allowed under the labor certification, with a maximum stay of one year. An H-2A visa is considered a nonimmigrant visa, meaning that individuals granted this kind of visa do not intend to stay permanently in the United States. If one of your workers decides that he or she wants to stay permanently, that person must leave the United States, then apply to come back as an immigrant.
- **What is My Responsibility In Determining if Documents Presented By Workers are Genuine?**  
According to the INS, employers of temporary non-citizen workers must examine the document(s) presented by the workers. If the documents reasonably appear to be genuine and to relate to the person presenting them, the employer must accept them. To do otherwise could be an unfair immigration-related employment practice. If a document does not reasonably appear on its face to be genuine and to relate to the person presenting it, the employer must not accept it. Also, employers may not accept photocopies of documents, with the only exception being a certified copy of a birth certificate. Employers may contact the local INS office with questions.

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- **What Are the Sanctions For Hiring Non-citizens Without Obtaining the Proper Paperwork?**

Employers who hire illegal non-citizen workers can be subject to various sanctions, including monetary fines, and possibly time in jail. Further, under federal regulations, employers who violate certain terms and conditions of the labor certification process can be denied certification for periods of up to three years. Employers who engage in lesser violations may be subject to additional procedural requirements the next time that they apply for labor certification. Because of the potential for these undesirable sanctions, you should read the INS, Department of Labor, and State Department rules carefully. If you have questions or do not understand the process, it is wise to seek the advice of an attorney who specializes in immigration law.

## Tips

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### **Get help**

If you have trouble following directions, doing things on time, filling out forms, or keeping track of paperwork, then this process may be much more stressful than it needs to be. If, however, you have a friend who can help you do these things, the job will be a lot easier. Keep in mind, however, that a friend cannot take the place of the advice and experience of an attorney. Consequently, if you need legal advice, talk to an attorney.

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