

DHS Announces New COVID Flexibility for H-2B Nonagricultural Worker Program

by Ieva Aubin

In recent weeks, the Trump Administration has announced several restrictions on immigration that garnered significant media attention. However, not all of the administration's recent policies are aimed at restricting immigration. The Wednesday May 13 announcement of a temporary final rule for the H-2B nonagricultural worker program provides welcome additional flexibility to employers whose businesses are essential to the U.S. food supply chain. The new rules are similar to those previously issued for the H-2A agricultural temporary worker program.

Businesses that could benefit from these new flexibilities include those engaged in the processing, manufacturing, or packaging of human or animal food, as well as businesses engaged in all aspects of food transportation and retailing of food to consumers. However, due to the ongoing requirement for a valid, certified Temporary Employment Certification (TLC), only businesses that have previously utilized H-2B workers are likely able to take advantage of the new provisions; obtaining a new TLC takes a significant amount of time.

Eligible employers who file new H-2B petitions through September 11, 2020 on behalf of foreign nationals who are already physically located in the U.S. in valid H-2B status may benefit in the following ways:

1. Employment may commence immediately upon filing the petition. Under the previous rules, employers needed to wait for petitions to be approved before the foreign worker could start, a process which could take months. Now, H-2B workers are permitted to start employment immediately after filing, at least for a period of up to 60 days while the immigration service adjudicates the petition.
2. H-2B workers are exempted from requirement that they depart the country for at least 3 months after every 3 year period of stay in the U.S. Under the new rules, qualified workers can stay in the U.S. for more than 3 years without interruption.

Note that employers must attest (under penalty of perjury) that the workers they are

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seeking to hire under these new provisions are providing services or labor that are essential to the U.S. food supply chain.

The new rules will provide much needed flexibility for employers in the food production space who are dealing with COVID-19 disruptions. In particular, allowing workers to begin employment immediately after filing the H-2B petition significantly shortens the typical wait times involved and lets employers rapidly increase staffing levels as needed. Due to recent labor shortages, meat packing plants are a specific type of business that could benefit from the new rules.

The full text of the temporary final rule is available [here](#), pending official publication in the Federal Register.

If you have any questions about how your company could benefit from the H-2B visa program, please reach out to a Dorsey Labor & Employment attorney, and visit our [immigration practice group](#). Our lawyers have extensive experience working at the intersection of immigration and labor law for food, agribusiness, and co-op businesses and we would be happy to assist you with your needs.