

## DOs AND DON'Ts FOR HIRING FOREIGN WORKERS

**Q** *What are some of the specifics employers need to know to stay in compliance?*



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There is a tremendous demand for workers in the construction, transportation, service, agricultural, computer programming, maintenance, engineering and health fields. The economy is creating 500,000 unskilled jobs each year that are not being filled by U.S. workers, and employers will need to hire foreign workers.

Employers need to stay abreast of the changing immigration laws to stay in compliance as they seek to grow and expand their business.

Hiring temporary foreign workers to work in the H-1B and H-2 categories in the U.S. normally requires approval from several government agencies. First, employers must seek labor certification through the U.S. Department of Labor. Once the application is certified, the employer must petition the U.S. Citizenship and Immigration Services for a visa. Approval by the Department of Labor does not guarantee a visa issuance. The Department of State will issue an immigrant visa number to the foreign worker for U.S. entry. Applicants must also establish that they are admissible to the U.S. under the provisions of the Immigration and Nationality Act.

Whether businesses are looking to hire unskilled, vocational or professional workers, there are several do's and don'ts an employer should know.

The U.S. government issued 66,000 H-2B visas for foreign workers in 2007 but demand was so great that some small businesses could not find enough workers. Texas ranks the No. 1 state hiring H-2B visa workers. Some small business organizations across the country are urging Congress to pass legislation that would allow them to re-hire workers with expired H-2B visas. If this doesn't happen, there will be hundreds of small business owners that will have to cut back or shut down.

Labor certifications for foreign workers are mandated by regulations published by the Code of Federal Regulations. These regulations provide instruction on the processing of applications, period of validity and employer responsibilities. It should be determined if the employment will be temporary or permanent, and abide by specifications per occupational category.

If the employer asks for requirements that are different or higher than the industry standard, the employer must show business necessity — the employer must establish that the job requirements are reasonably related to the occupation and are essential to performing the job.

This requested documentation of business necessity is often required for

positions requiring a higher "specific vocational preparation," and the Department of Labor often changes the SVP for an occupation from one year to another. Also, depending upon the nature of the program, the process for filing can vary from months to years.

The wages to be paid in labor condition applications or for H-1Bs and permanent alien labor certification applications (ETA and PERM applications) must comply with Department of Labor regulations. Employers are required to pay 100 percent of the prevailing wage.

The prevailing wage is determined by governmental surveys and typically notes four levels of wages proportionate to the experience, education and supervisory level. Employers that disagree with their prevailing wage determination can provide

supplemental information to the State Workforce Agency.

In filing to employ foreign workers, the employer must comply with all employment related laws and regulations. In the case of H-1B specialty (professional) workers and "H-2A," temporary seasonal agricultural workers, additional obligations also apply.

Additional areas of noncompliance may constitute failure to verify Social Security numbers, verify the identity and employment eligibility of anyone to be hired and re-verify their eligibility to work. Oftentimes, the Social Security number remains valid long after the employment authorization documentation has expired.

Even if extensions for employment authorization documents are filed timely, even three or four months ahead of their expiration date, USCIS does not always issue a timely decision, putting the employer in an awkward position if U.S. Investigations and Customs Enforcement happens to choose this time to review the I-9 forms.

