

THE H-2B VISA PROGRAM IN TENNESSEE

GENERAL OVERVIEW

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This publication aims to provide a general overview of the H-2B visa program in Tennessee. Specifically, we address the use of the program in terms of certified workers, the geographic distribution of these workers, the certification process, businesses or firms that could help with the certification process and program cost considerations for employers of H-2B workers. This publication is designed to provide an overview and should not be taken as a “How To” instructional document.

What is the H-2B Visa Program?

The H-2B temporary non-agricultural visa program is a program that allows U.S. employers experiencing a shortage of domestic workers to fill seasonal or temporary non-agricultural jobs with foreign nonimmigrant workers. Before issuing an H-2B certification to an employer, the U.S. Department of Labor determines that 1) there are no qualified and available U.S. workers that could perform the temporary labor or services for which the employer is requesting foreign workers, and 2) that employing H-2B workers will not negatively affect the wage and working conditions of U.S. workers employed in similar positions (U.S. Department of Labor, 2024a).

This program is unique from the H-2A visa program. The H-2A visa program allows U.S. agricultural employers experiencing a shortage of domestic workers to fill seasonal or temporary jobs with foreign nonimmigrant workers for agricultural work that is seasonal or temporary in nature (e.g., planting or harvesting crops). You can learn more about the H-2A visa program by reading “The H-2A Visa Program in Tennessee: General Overview,” available at tiny.utk.edu/2bK7F.

Requirements for H-2B Jobs

The job offered by the employer should be:

- **Non-agricultural**¹
- **Full-time** (i.e., 35 or more hours per week)
- **Temporary** (i.e., nine months or less, with the exception of one-time occurrences that could last up to three years). Per the U.S. Department of Labor (2024a), this may include,
 - A one-time occurrence
 - Seasonal need
 - Peak-load need
 - Intermittent need

To qualify, employers need to prove that the job offered qualifies for the program. For example, they need to prove that unique events forced them to fill a job that otherwise would be permanent for a short period of time with a temporary worker or that their labor needs are tied to a season or are short-term.

The H-2B Cap and the Lottery System

There is a numerical limit or cap on the number of non-US citizens who might receive an H-2B visa during each fiscal year. The statutory cap for H-2B visa holders is 66,000. Half of those visas (33,000) are allocated in the first half of the fiscal year (October 1 to March 31), and the rest are allocated in the second half of the fiscal year (April 1 to September 30). If there are unused visas from the first half of the year, those will be allocated to workers in the second half of the fiscal year. Unused H-2B visas do not carry over from one fiscal year to the next (U.S. Citizenship and Immigration Service, 2024).

¹Non-agricultural work includes everything that is not related to maintaining crops and tending livestock under the supervision of farmers, ranchers, and other agricultural managers. For examples of jobs traditionally performed by agricultural workers, go to tiny.utk.edu/luSrM.

Workers exempt from the cap include:

- Workers in the U.S. under the H-2B visa status who extended their stay or changed their employment or conditions of employment.
- Roe processors, fish roe technicians, supervisors of fish roe processing or workers performing labor or services in the Commonwealth of the Northern Mariana Islands or Guam until December 31, 2029 (U.S. Citizenship and Immigration Service, 2024).

Over time, the demand for H-2B workers by U.S. employers has exceeded the supply of H-2B visas available for potential workers. Therefore, in recent years, the Department of Homeland Security (DHS) has released additional visas beyond the statutory 66,000 cap to address labor shortages. These additional visas are made available on a fiscal year basis. Therefore, these additional visas do not represent a permanent increase in the statutory 66,000 visa cap. For example, in FY 2025, an additional 64,716 visas were made available, for a total of 130,716 H-2B visas (66,000 visa cap + 64,716 additional visas). Nonetheless, there are restrictions on the allocation of those supplemental visas. For example, in FY 2024, 44,716 of the 64,716 additional visas were reserved for returning workers or those who received an H-2B visa in the last three fiscal years (U.S. Citizenship and Immigration Service, 2024).

Due to the high demand for H-2B visas, the U.S. Citizenship and Immigration Services (USCIS) often uses a lottery system to allocate these visas when the number of applications exceeds the available visas. Employers can submit their petitions for H-2B workers up to 120 days before the job's start date. When the number of petitions exceeds the number of available visas, the USCIS announces the use of a lottery for the allocation of visas. In the lottery, the USCIS randomly selects petitions to fill the visa quota for that period. Specifically, H-2B applications requesting workers for the earliest date that were filed during the first three days of the filing period are given a random number for processing. The applications are then sorted in ascending order based on the random number assigned to each application. Using this system, applications are selected until the number of workers requested reaches the semi-annual cap. The U.S. Department of Labor, Office of Foreign Labor Certification (OFLC), assigns applications to National Processing Centers (NPC) analysts. Once all applications have been received and processed, applicants will receive a Notice of Acceptance or Notice of Deficiency (Selection Procedures, 2019). Those applications that are not selected in the lottery process will have their petitions returned or waitlisted for future visa availability (if applicable).

H-2B Workers in the US and Tennessee

In the U.S., the number of certified temporary jobs under the H-2B visa program has increased by about 41 percent since FY 2019, going from over 150,000 certified temporary jobs to 211,666 in FY 2023 (U.S. Department of Labor, 2024b).

In Tennessee, the U.S. Department of Labor certified 5,130 temporary jobs with workstations in Tennessee under the H-2B visa program in FY 2023 (U.S. Department of Labor, 2024b). An average of 85 percent of the total workers requested were certified between FYs 2019 and 2023. In FY 2023, a total of 2,410 certified jobs were requested by employers who provided a Tennessee address, and 2,720 were requested by employers who listed an addressee outside of Tennessee (see Figure 1). The number of H-2B certified workers with workstations in Tennessee increased by about 120 percent between FYs 2019 and 2023. The number of certified workers with workstations in Tennessee under the H-2B program requested by Tennessee employers increased by about 128 percent between FYs 2019 and 2023 from 1,058 to 2,410 workers. An average of 82 percent of the workers requested by Tennessee employers were certified during this same period.

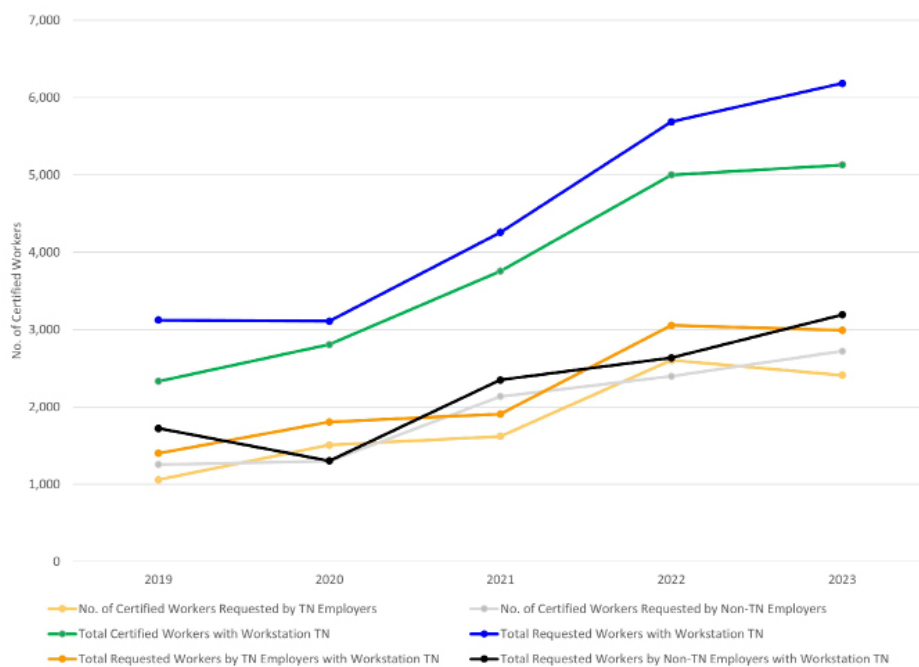


Figure 1. Number of H-2B certified jobs in TN between FYs 2019 and 2023

Source: U.S. Department of Labor and authors' calculations

Occupations

In FY 2023, the top five occupations under the H-2B visa program in the U.S. were landscaping and groundskeeping, maids and housekeeping, forest and conservation workers, amusement and recreation attendants, and meat, poultry, and fish cutters and trimmers (U.S. Department of Labor, 2023).

Under the Standard Occupation Classification, about 42 percent of the certified workers with workstations in Tennessee requested by Tennessee employers in FY 2023 were classified as **landscaping and groundskeeping workers** (Table 1). According to the U.S. Bureau of Labor Statistics (2023), workers under this classification:

“Landscape or maintain grounds of property using hand or power tools or equipment. Workers typically perform a variety of tasks, which may include any combination of the following: sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation, and installation of mortarless segmental concrete masonry wall units. Excludes “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” (45-2092).”

Other occupations employed in Tennessee using the H-2B program include maids and housekeeping cleaners; construction laborers; stocker and order fillers; restaurant cooks; pesticide handlers, sprayers, and applicators; janitors and cleaners; highway maintenance workers, cement masons and concrete finishers; and food preparation workers. Table 1 shows the top five occupations in terms of the number of H-2B certified workers requested by Tennessee employers.

Table 1. Top five occupations in terms of the number of H-2B certified workers requested by TN employers in 2023.

| Occupation | No. of Certified Workers | % |
|--|--------------------------|--------------|
| Landscaping and Groundskeeping Workers | 1,014 | 42.1 |
| Maids and Housekeeping Cleaners | 303 | 12.5 |
| Construction Laborers | 277 | 11.5 |
| Stockers and Order Fillers | 154 | 6.4 |
| Cooks, Restaurant | 125 | 5.2 |
| Total | 1,873 | 100.0 |

Geographic Distribution Across Tennessee Counties

Figure 2 shows that in FY 2023, the H-2B certified workers in Tennessee were concentrated in five counties: Davidson, Madison, Rhea, Sevier and Shelby. Sevier County had the highest percentage of H-2B certified workers (26 percent of total certified workers or 624 workers). All these workers were performing jobs for the service industry, with the majority of them being classified in the maids and housekeeping cleaners category, as well as in the food industry job categories (e.g., cooks, food, and fast food and counter workers). Davidson and Rhea counties had the highest percentage of H-2B workers in the landscaping and groundskeeping category (34 percent and 10 percent, respectively). Other counties with a high percentage of H-2B workers in the landscaping and groundskeeping category include Madison, Sumner, Shelby, Bedford, Rutherford and Williamson counties.

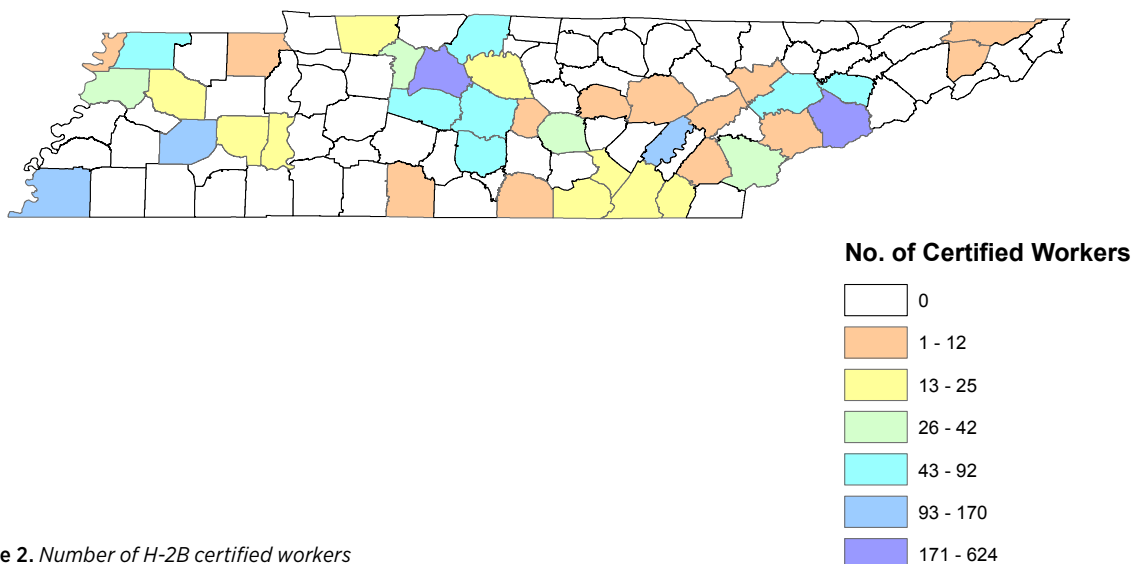


Figure 2. Number of H-2B certified workers employed by TN businesses by county in FY 2023
Source: U.S. Department of Labor (2024)

Financial Considerations

Wage Requirements

Employers of H-2B workers must pay at least the wage rate specified in the job order. This wage rate should be at least the highest rate between the prevailing wage rate obtained from the Employment and Training Administration (ETA) and the minimum wage rate set at the federal, state or local levels, whichever is higher (U.S. Department of Labor, 2024c). The prevailing wage rate is the average wage rate paid to workers in similar employment in a specific occupation in the area of intended employment (U.S. Department of Labor, 2024d). Other federal wage requirements apply to H-2B workers such as overtime provisions of the Fair Labor Standards Act (U.S. Department of Labor, 2024c).

When submitting the ETA-9142B form, H-2B Application for Temporary Employment Certification², an employer should specify the rate to be paid to workers. Some employers specify this rate as a range, specifying the minimum and maximum wage rates to be paid to employees. For example, in FY 2023, Tennessee employers who submitted ETA-9142B forms to employ H-2B workers in Tennessee workstations in the landscaping and groundskeeping worker category specified an average hourly wage rate between \$15.27 and \$15.63. The specified hourly overtime rate was between \$22.90 and \$23.44.

The employer could pay employees using a method other than an hourly wage rate, such as commissions, bonuses and piece rates. Regardless of the payment method, employers should guarantee that the employee is earning the wage rate as specified in the job order. For instance, if the employer is using a method different from the hourly wage rate to pay an employee and an employee gets lower earnings than the specified offered wage in a workweek, the employer should supplement the pay to guarantee the offered wage (U.S. Department of Labor, 2024c).

Although deductions required by law (e.g., taxes payable by workers that are required to be held by employers) from workers' paychecks are allowed, other deductions not required by law must be specified in the job order. Some of the authorized deductions include deductions for the reasonable cost of board, lodging and furnished facilities for employee use and other deductions that the employee has previously authorized, such as union dues. None of those deductions should be related to third-party payments associated with recruitment, visa, work certification or any other expenses related to worker recruitment. Those expenses are the employers' responsibility (U.S. Department of Labor, 2024e).

More information about wage requirements, deductions, and prohibited fees can be found at tiny.utk.edu/7InG4 and tiny.utk.edu/7pBzQ.

"Free and Clear" Payment

Wages are only considered to be paid by the employer in full if they are paid unconditionally. Expenses incurred by the employee to complete the work required (i.e., purchase of tools or supplies) are legally viewed as a wage deduction. Employers must provide all materials and resources necessary for the employee to complete the work.

Under the Fair Labor Standards Act, "The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee."³

Employer Costs

Costs associated with using the H-2B visa program vary depending on the number of workers and the agency or firm the employer is working with. In Table 2, we present some fees associated with the H-2B visa process that would have to be covered by the employer requesting the workers, and that would not vary by employer.

For some employers using the program, there might be an agency fee in the form of an annual membership fee that will cover various costs, including worker petition filing fees, visa application consulate fees, assistance during the application process and access to legal counsel. We interviewed two Tennessee employers using the H-2B visa program to gather information about the costs associated with using this program. They indicated their annual agency fee was between \$2,200 and \$5,500.

The employer covers workers' inbound and outbound transportation and subsistence costs while traveling. These costs would vary depending on the workers' place of residence and the mode of transportation. One of the Tennessee employers we interviewed, who employed workers from Mexico, indicated that in FY2023, they paid \$600 per worker for inbound (by bus) and outbound (by plane) transportation and paid \$15.88 per day for subsistence costs while traveling, which is the minimum allowable subsistence amount per day according to the U.S. Department of Labor (U.S. Department of Labor, 2024f). It was estimated that the total subsistence cost for 12 workers while traveling was \$3,500, which is equivalent to \$292 per worker. For more information about inbound and outbound transportation expenses, go to tiny.utk.edu/x8Mz5.

Although the H-2B visa program does not require employers to provide housing to workers, both employers we interviewed provided housing to their H-2B workers. This is an important consideration given the challenges workers face finding housing once they arrive in the U.S. One of the employers we interviewed provides housing to 12 H-2B workers at no cost. He estimated this cost

² tiny.utk.edu/mH6ko

³ tiny.utk.edu/z3BmI

to be about \$20,000 per year. The other employer deducts housing costs from workers' pay, which is one of the allowable pay deductions under the H-2B visa program.

One of the employers mentioned that the lottery process has negative financial implications for the employer. Specifically, he mentioned that the lottery process introduces a variation in time to recover what he considers the fixed costs associated with using the H-2B program. For example, suppose the workers arrive later than expected because of delays associated with the lottery process. In that case, they have a shorter time to recover filing, agency and housing costs through gross revenue H-2B workers help generate.

Although not discussed in this publication, employers should investigate costs associated with worker compensation and taxes when considering using the H-2B visa program.

Table 2. Example of fees associated with the H-2B visa program, FY 2025.

| Expense | Description |
|--|---|
| Nonimmigrant worker petition filing fee I-129 (to USCIS) | \$1,080/application if filing a petition with a named worker, \$540/application if filing as a small employer or nonprofit, \$580/application if filing a petition with unnamed workers, or \$460/application if filing as a small employer with unnamed workers ^a . |
| Nonimmigrant worker petition filing fee I-129 (to USCIS) additional fees | Additional fees include a fraud prevention and detection fee (\$150) and an asylum program fee, which is \$300 if you are filing as a small employer; otherwise, you will have to pay \$600 ^a . |
| H-2B visa application consulate fee | \$205 per worker ^b . |

^a tiny.utk.edu/1vlRw

^b tiny.utk.edu/QqjMC

The H-2B Certification Process and Who Can Help?

The U.S. Department of Labor oversees the certification process of all H-2B temporary positions. In Tennessee, 2,991 positions were requested by Tennessee employers, and 2,410 were certified in FY 2023 (U.S. Department of Labor, 2024b). The process of applying to hire H-2B workers involves several steps and requirements:

Step 1: Before filing an H-2B application, and at least 60 days before the determination is needed, an employer should obtain a prevailing wage determination (Forms RTA-9141 and 9165) from the Office of Foreign Labor Certification, National Prevailing Wage Center.

Step 2: Between 90 and 75 days before the workers are needed, an employer should file a job order with the State Workforce Agency and submit an H-2B application (Form ETA-9142B and Appendices) with supporting documents and a copy of the job order filed to the State Workforce Agency to the Chicago National Processing Center.

Step 3: Within 14 days of receipt of the Notice of Acceptance, employers are required to recruit U.S. workers following instructions for how to prepare and when to submit a recruitment report to the Office of Foreign Labor Certification National Processing Center.

Step 4: If temporary labor certification is granted, the Office of Foreign Labor Certification will provide the employer with its final determination notice.

After the final determination notice, the employer will complete an H-2B visa petition with the U.S. Citizenship and Immigration Services. Workers will apply for the H-2B visa with the Department of State. Approved workers will travel to the worksite and arrive on the start date with an arrival/departure record.

Employers who are considering employing H-2B workers should review the resources and references provided at the end of this publication, including the U.S. Department of Labor and U.S. Citizenship and Immigration Service websites, which have detailed information on how and where to apply.

Because the H-2B visa process can be complex and time-consuming, some employers use law firms or agencies to help them complete the processes. Table 3 presents the top five businesses/firms in terms of certified jobs used by Tennessee employers to handle H-2B job certifications in FY 2023.⁴ Employers should conduct their research before using an attorney or agency to handle the certification process.

⁴ The University of Tennessee does not endorse the businesses/firms presented in this publication.

Table 3. Agents or attorneys who helped Tennessee employers with the H-2B applications, FY 2023

| Law firm/Business | E-mail or Website | Phone Number | Certified Workers |
|---|--|----------------|-------------------|
| Mas Labor H2B, LLC (They merged with AgWorks H2, LLC in 2022) | www.maslabor.com/agworksh2 | (434) 263-4300 | 440 |
| YOUNGBLOOD & ASSOCIATES, PLLC | H2@YOUNGBLOODASSOCIATES.COM | (931) 274-7811 | 343 |
| United Work and Travel | kmaglin@unitedworkandtravel.com | (443) 501-4240 | 315 |
| Law Office of Michele Contreras, LLC | office@h-2visas.com | (856) 281-9750 | 265 |
| Labor Consultants International | www.laborci.com/visas/h-2b | (208) 777-2654 | 247 |

Source: U.S. Department of Labor

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