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**H-2B Coronavirus Impacts FAQ**

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### **What happened this week?**

This was another quiet week for H-2B visas. We are still waiting for news regarding President Trump's potential new Proclamation (see Section #4 below). The previous immigration restrictions on new green card holders expires on June 22<sup>nd</sup>, and therefore, we would anticipate an announcement on possible new restrictions by next week.

Like many of you, we have continued to hear rumors about the possibility of J-1 program restrictions/reform in the coming months. This has led to questions from our clients about how to adjust H-2B staffing planning to account for this contingency. Luckily, no rush decisions need to be made right now. Please see Section #5 below for answers to your questions.

### **Current Trends**

1. **What is Pabian Law currently seeing in terms of how winter-season H-2B employers are handling coronavirus?**

Many winter-season H-2B employers in the hospitality industry significantly scaled back operations or closed entirely for the remainder of their 2019-2020 H-2B employment period (which typically ends in April or May).

2. **How are 2020 summer-season H-2B employers planning for business needs?**

Many summer-season clients that we have spoken to are expecting to have slow months, or no business at all, in April, May, and even into June. However, they are expecting and planning to be very busy again starting in July or August. Our clients are very much looking to state and federal guidelines and guidance on how they handle opening. Most of our summer-season H-2B clients are currently still planning on proceeding with their summer 2020 petitions.

3. **How are 2020-2021 winter-season employers planning for next year?**

Based on conversations with our clients, it does not seem that coronavirus concerns have impacted planning for the 2020-2021 winter season at this point. Our clients remain hopeful that the winter 2020-2021 season will be back to business as usual by the time we reach October, November, and December. Please see #21 below for additional information.



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#### 4. **Will President Trump's rumored mid-to-late June Presidential Proclamation on immigration scale back the H-2B program? If not, how will it impact my organization?**

No – there are no indications that there will be any permanent or wide-scale restrictions on the H-2B program, generally. In fact, the Administration, as well as bipartisan groups in Congress, have recognized the value of H-2B visas in assisting with an economic recovery.

However, sources indicate that there could be a temporary suspension on entry of H-2B workers from outside the U.S., lasting between 90 and 180 days, which could go in effect as soon as mid-June.

#### **What does this mean for your organization?**

For summer-season H-2B employers – We do not expect this to impact summer-season H-2B employers at all, **unless** you have H-2B workers who are still outside the U.S.

- If this is the case, we would recommend that your H-2B workers abroad who have already received their visa (or who expect to receive their visas very soon) enter the U.S. as soon as possible (ideally, by June 15<sup>th</sup>) to avoid being stuck outside the U.S.
- Also, even if this suspension is implemented and workers become stranded, there may be an exception to the ban for employers that can demonstrate they have conducted certain recruitment efforts without success. We do not know what additional recruitment may qualify or how workers would apply for the exception, but we will keep you updated.

For winter-season H-2B employers – we are optimistic that this may not have significant impacts on our winter-season clients for the following reasons:

- **For in-country H-2B petitions:** Because this temporary ban applies only to workers outside the U.S., if you are planning to hire workers for the upcoming winter season who are already in the U.S. through in-country transfer petitions, this would have **no impact** on those plans (provided those workers do not leave the U.S. over the summer).
- **For out-of-country H-2B petitions:**
  - Assuming a 90-day ban, it would be over in September, which would have **no impact** on out-of-country petitions for winter-season employers.
  - Assuming a 180-day ban, it would be over in December. Therefore, the worst-case scenario would result in a delay of only a month or two, depending on your start date.
    - We do not recommend changing your H-2B recruitment strategy at this time. However, if a worst-case scenario is implemented and a delayed start date is problematic, we would be happy to work with you to identify additional in-country recruiting options to limit your reliance on out-of-country workers.
  - **Exception to the ban:** There may be an exception for employers that can demonstrate they have conducted certain recruitment efforts without success.
    - We do not know what additional recruitment may qualify or how workers would apply for the exception, but we will keep you updated.



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Note, however, that we have been hearing about increasing initiatives to scale back or eliminate parts of the J-1 program in the coming months, including the Summer Work and Travel Program, the Intern program, and the Trainee program. **This further increases the importance of moving forward with H-2B petitions to ensure that you have staffing flexibility if J-1s visas are eliminated or restricted.**

Please keep in mind that none of the above is concrete or confirmed. We will keep you updated as we learn more.

### 5. **If J-1 visas are restricted significantly in the coming months, how would that impact H-2B staffing planning?**

As mentioned in #4 above, if J-1s restrictions are imposed over the summer, H-2B staffing would become even more important for organizations that have historically relied on J-1s. As a Pabian Law winter-season client, below are some things you need to know about changes to your H-2B staffing plans:

- **When is the latest that I can add a new H-2B application (i.e., add a totally new job)?**
  - You can add a new H-2B application up to 4 months prior to your desired employment start date. Therefore, if you are targeting a December 1<sup>st</sup> start date, you have until the end of July to make the decision to add a new job.
  - Also, even if your ideal start date would be earlier in the fall, you could still ask the government for a later start date this year without generating additional risks or penalties. We could then move the start date earlier in future years if necessary.
- **When is the latest that I can increase the number of workers on an existing H-2B application?**
  - You can add additional spots to an existing H-2B application until 3 months before the start date.
  - Note, because we file the application on the 3-month mark, we may need to charge a “rush fee” to make changes to the application close to the filing date. You should have an email from us outlining this, but if not, please let us know and we would be happy to resend.

### 6. **New H-2B Rule published on May 14, 2020**

On May 14, 2020, due to COVID-19, the U.S. Department of Homeland Security (DHS) published a new rule that extends additional benefits to certain H-2B workers who are “essential to the U.S. food supply chain.” Specifically, it has two benefits:

1. Workers on in-country transfer petitions could start working for their new employer as soon as the petition is filed (rather than waiting for it to be approved); and
2. Workers on in-country transfer petitions could extend their H-2B visas beyond the typical three-year limit of H-2B status.



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Some of our clients have asked us about this new rule and whether it could apply to them. **Our advice has been that this rule does not apply to workers in the hospitality industry.**

Specifically, although the rule mentions “restaurants” as a business category that could have essential workers, it does not mention which types of restaurants or which types of restaurant workers could qualify as “essential to the U.S. food supply chain” (which sounds like a very high bar). Additionally, guidance published by the U.S. government regarding essential restaurant-related workers tends to focus on quick-serve food operations, such as dark kitchens and food prep centers, rather than hospitality. Therefore, although we would be happy to discuss in further detail with our clients, we are confident that the rule would not apply to the vast majority of our clients in the hospitality industry, and any attempt to take advantage of the rule could present more risk than potential benefit.

Finally, even though this rule does not necessarily benefit the hospitality industry, it does at least demonstrate that the current administration has acknowledged the critical nature of the H-2B program to the food-service industry. We are hopeful that the administration will continue to see the benefits that seasonal workers provide to the U.S. economy (as they have in the past) and that this will bode well for the H-2B program in the future.

### 7. **PREMIUM PROCESSING UPDATES**

#### March 20<sup>th</sup> suspension of Premium Processing

Importantly, U.S. Citizenship and Immigration Services (USCIS) announced on March 20, 2020 that they would be suspending Premium Processing service on all petitions (including H-2Bs). Therefore, for the time being, H-2B petitions can take up to 2-3 months to process, rather than the typical 15 calendar days. Please note that, while petitions could remain pending for 2-3 months, almost all of the petitions we filed since March 20<sup>th</sup> have been approved in 3 weeks or less. Therefore, the impact of this suspension on processing times could end up being minimal.

We expect this suspension to be temporary. Once this restriction is lifted, we can file applications to upgrade the petitions to premium processing and pay the additional premium processing filing fee, if necessary.

For summer-season H-2B organizations, this could actually be great news because, if processing times increase, it could delay the start date of your petition as well as the  $\frac{3}{4}$  guarantee payment obligation if you are filing in-country transfer/extension applications.

#### May 29<sup>th</sup> announcement regarding resuming Premium Processing

On May 29, 2020, USCIS announced that it would be resuming premium processing for certain visa petitions in phases in the month of June. Once premium processing is again available, petitions that are filed with (or upgraded to) premium processing will again see guaranteed adjudication in 15 calendar days.



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Premium processing will become available for H-2B petitions on the following schedule:

- On June 8<sup>th</sup> for any petitions that were filed prior to June 8<sup>th</sup> and remain pending; and
- On June 22<sup>nd</sup> for all newly filed H-2B petitions (or petitions filed on or after June 8<sup>th</sup>).

If you have a pending H-2B petition that you would like to see approved as soon as possible, please contact Pabian Law right away, and we can discuss the option of upgrading the petition to premium processing.

### **Travel & consulate restrictions**

#### **8. Are certain consulates in H-2B eligible countries closed for visas applications?**

##### Closure of consulates and embassies generally

As of March 20, 2020, all U.S. consulates and embassies worldwide have suspended routine in-person visas services indefinitely. If your out-of-country H-2B workers have not yet applied for their H-2B visas, we would expect significant delays before they are able to do so.

##### Issuance of H-2B visas during closure (waiver of in-person interview requirements)

On March 26, 2020, the U.S. Department of State announced that consulates and embassies may begin waiving in-person interview requirements for H-2 visas. This announcement was made in an H-2A visa press release, and therefore, waivers may not become available for H-2B workers at all embassies and consulates.

As of mid-May, we began hearing from our contacts that Jamaica and Mexico have commenced H-2B visa issuance for applicants who are eligible for an interview waiver (only) and therefore do not need to appear in person at the consulate to have their visa issued. The process of applying for an H-2B with an interview waiver is similar to the process of applying for a typical, in-person visa application interview, and the online application system will prompt the applicant for evidence of eligibility for interview waiver. Workers may be eligible for an interview waiver if they have received an H-2B visa in the past year and meet other requirements. Additionally, Jamaica is requiring a recently signed letter from the employer confirming that the job opportunity still exists, despite COVID-19 impacts.

Other consulates/embassies around the world may be allowing visa application appointments, some with similar restrictions. Some of our clients have been successful in scheduling non-emergency appointments; however, these were for non-H-2B visa appointments. Therefore, we would strongly recommend having your workers contact the specific consulate/embassy where they plan to apply to inquire about current application procedures.





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### Rejection notices for interview waiver applications

Some applicants may be issued a “rejection notice” after submitting an H-2B application through the interview-waiver process. This rejection notice or other communication from the consulate may indicate that the rejection was due to “221(g)” or “administrative processing.” This does not mean that the application was denied. Instead, it simply means that the consulate needs additional information or documentation to verify eligibility for the visa and the applicant may need to physically appear once in-person services resume (the consulate/embassy will contact the applicant to schedule this). Unfortunately, this may cause significant delays as the U.S. government has provided no update regarding when routine visa services at embassies and consulates will resume or what wait times will look like once this occurs.

### **9. Has the U.S. banned travel of foreign nationals from certain countries?**

#### European and Brazilian Travel Bans

The U.S. government has suspended travel for foreign nationals from most European countries starting on March 13<sup>th</sup>. Although originally slated to last thirty (30) days, it was later extended for an indefinite period of time. This applies to the twenty-six (26) countries in the Schengen region, as well as the UK and Ireland. If a foreign national was in one of these countries during the fourteen (14) days prior to their planned arrival in the United States, they cannot travel to the U.S. until the restriction is lifted. This does not apply to U.S. citizens or green card holders.

- Note: if a worker is able to travel to a third country and wait 14 days before attempting to enter the U.S., they may be granted entry. However, this raises an entirely separate set of questions and potential complications (e.g., will the worker be granted entry to the third country? Will the worker need a visa to do so? Will the travel ban be extended to that country as well?)
- In late-May, the U.S. government issued an additional travel ban covering Brazil, due to growing case numbers in that country, which went into effect on May 28<sup>th</sup>. Travelers from Brazil are subject to the same provisions as the European ban.

#### Canada/Mexico border closure

On March 19<sup>th</sup>, the U.S. closed its border with Canada and Mexico to “non-essential” travel. This applies only to land border crossings and not flights. Additionally, work-related travel is excluded from the ban, and therefore, workers travelling to the U.S. with employment-based visas should not be impacted. The ban is currently in effect through June 22, 2020 and could be extended further.

### **10. Have certain airlines cancelled travel?**

Certain airlines have suspended all flights to certain countries. Additionally, we have been hearing more and more from clients that flights have been cancelled, even if the country indicates that its borders are open. Therefore, we strongly recommend that organizations check with airlines before all international and domestic flights to get the most updated information.





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This includes travel from the U.S. to get workers home, as well as travel to the U.S. at the beginning of the season.

### 11. **What if a foreign national's home country will not let them travel home?**

Although many countries have instituted border closures or travel bans, most countries remain open to their own citizens returning from overseas. One notable exception to this is Jamaica, which has closed its borders completely, including to Jamaican citizens.

**\*June 1<sup>st</sup> update\***: As of June 1<sup>st</sup>, the Jamaican border is no longer closed to Jamaican citizens. This means that Jamaican citizens should be able to return home, even if they have not yet been approved for “controlled reentry,” which is outlined in more detail below. Additionally, rather than undergoing quarantine at a government facility (which was the procedure under “controlled reentry”), from June 1<sup>st</sup> through June 15<sup>th</sup>, Jamaicans will now be tested for COVID-19 upon reentry and will be quarantined at home with either “phone or wristband geo-fencing.”

#### What to do for a Jamaican H-2B who cannot get home?

If you have a Jamaican worker who needs to get home, we would recommend continuing to check flight availability and, if a flight is available, contacting the airline to ensure that the flight will depart as scheduled. Please visit the website of the Jamaican Consulate in Miami for updates regarding the border closure: [www.jamaicacgmiami.org](http://www.jamaicacgmiami.org).

Additionally, as of April 16<sup>th</sup>, Jamaica has instituted a registration system where workers who are stuck in the U.S. can call or email to request guidance from the Jamaican Embassy. Employers or workers can call the below number to obtain information. Alternatively, workers can complete and email a form (link below) to register with the Jamaican Embassy that they are stuck in the U.S., and the Jamaican Embassy will reach out to them with guidance on flights and the best way to maintain visa status.

- Website: <http://www.embassyofjamaica.org/>
- Link to registration form (which can be completed and emailed to the below email address): <http://www.embassyofjamaica.org/documents/COVID-19-Registry.pdf>
- Email address: [consul@jamaicaembassy.org](mailto:consul@jamaicaembassy.org)
- Phone number to call for questions: 877-226-6879 (9am to 5pm Eastern Time)

Furthermore, in early-May, Jamaica instituted a “**controlled re-entry**” application process for Jamaican citizens who are stuck abroad. The online application, details about the process, and answers to frequently-asked questions, can be found at the following website: <https://jamcovid19.moh.gov.jm/immigration.html>.

Applicants who receive approval for re-entry will still need to have their own flight booked per normal procedures before returning home (Jamaica will not be organizing charter flights for stranded workers). Additionally, due to the border closure, flights may be extremely limited or



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completely unavailable. The Jamaican government is liaising with the major carriers to provide them with information on the number of persons with re-entry approval in various high concentration locations so that they can try to arrange flights. However, Jamaica cannot guarantee flight availability.

### Other issues and resources

A few other countries have also instituted border closures, including South Africa and Peru. If you have a worker from one of those countries who cannot get home, we would recommend contacting that country's embassy in the United States to determine the available options.

Additionally, some countries (e.g., Argentina) have instituted self-imposed or mandatory quarantines for any individuals travelling from affected countries, which may include the U.S.

Note: border closures and travel restrictions seem to be changing on an hour-by-hour basis. Therefore, we would recommend reviewing the below resources. Although they are not always updated with the most recent possible information, they are a good start. Additionally, calling the airline before travel is another best practice.

Some useful resources are the following:

- Countries with travel bans/suspensions: <https://www.cnn.com/travel/article/coronavirus-travel-bans/index.html>.
- Additional article re: travel bans/suspensions (seems to be updated regularly): <https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html>
- Restrictions on U.S. visas/entry: <https://www.nafsa.org/regulatory-information/covid-19-restrictions-us-visas-and-entry>.

### What can a worker do to avoid unlawful presence in the U.S. after a layoff or visa expiration?

If a foreign worker is not allowed to leave the U.S. at the end of their H-2B visa, s/he has two options:

- (1) file an application to change his/her status to B-2 (tourist visa); or
- (2) overstay his/her visa.
  - To date, the government has not passed any legislation that would forgive overstaying one's visa status due to coronavirus. Therefore, it remains illegal to remain in the United States without valid visa status and we do not recommend that the worker does so.
  - Given uncertainty, the safest course of action – and the legal one – is to apply for a tourist visa.

Given the above, the best option for a foreign national no longer working in the United States is to depart the U.S. as soon as possible. If the worker is unable to do so, we recommend that s/he apply for tourist visa status to legally remain in the United States.



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### The tourist visa application process

Workers who are inside the U.S. can apply to change status from H-2B to B-2 (tourist visa status) by filing Form I-539 online at <https://www.uscis.gov/i-539>. In order to submit a valid change-of-status request, the application must be filed prior to the expiration of the worker's current visa status and prior to any resignation or termination of employment. However, given COVID-19, the government may be willing to waive a late filing if the reason for the late filing is explained and justified.

There is a \$455 filing fee for the application. Because this application is personal to the employee and not employment-related, the employer is not responsible for covering this fee. Workers may also be able to apply for a fee waiver due to COVID-19 at the same time they file the I-539 (by filing Form I-912), and therefore, they may be able to file the tourist visa application free of charge.

Please note that although I-539 is available for online filing, it is not clear whether I-912 can be filed online. Therefore, if the worker is not able to submit a fee waiver request when filing Form I-539 online, then the worker may need to either (1) file the I-539 by mail together with the I-912; or (2) file I-539 online without a fee waiver request and pay the fee.

### **12. What other concerns should foreign workers consider when travelling?**

The following are several questions to consider:

- Is the U.S. government allowing travel from that country?
  - (see above regarding European travel ban)
- Are there restrictions on travel back to a worker's home country?
  - (this is a fluid situation – please see end of Q&A for links to further information)
  - Some countries have closed their borders, including some to their own citizens and permanent residents. The vast majority of the world's countries are continuing to allow their own citizens and permanent residents to return.
- Are airlines flying to and/or from that location?
- If flying, is the individual's flight connecting through a country with travel restrictions?
  - (we recommend checking with the airline for specific questions)

### **13. Does the U.S. Government have any plans to provide relief for some of the immigration-related consequences of coronavirus?**

No. The government, including the U.S. Department of Labor and U.S. Department of Homeland Security appear to be all consumed with other aspects of the coronavirus response. Therefore, we do not expect any H-2B-related immigration relief to be provided.



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### 14. Will H-2B Cap relief be issued?

On April 2, 2020, Acting Secretary of the Department of Homeland Security (DHS), Chad Wolf, announced via Twitter that DHS is holding off on plans to issue additional H-2B visas. Previously, DHS had announced the planned release of 35,000 additional H-2B visas. However, according to DHS, the release of those visas is on hold indefinitely due to the economic circumstances surrounding COVID-19. We at Pabian Law are unfortunately pessimistic that H-2B visa cap relief will be instituted for summer 2020 organizations.

### Questions about decreases in business and the impacts on H-2B employment

### 15. IMPORTANT: what if business levels drop, and I can no longer fully employ H-2B workers?

This depends on the specific scenario you are encountering, as follows:

- As you may know, you have an obligation to offer workers full-time employment in a way to comply with the three-fourths guarantee<sup>1</sup>. This hour obligation only ends in two circumstances:
  - The worker voluntarily abandons employment or is terminated for cause and the employer notifies the government of the early end of employment; or
  - There is an “impossibility of fulfillment” of the employment (see below).
- If you can reduce hours for all full-time, temporary workers in a way that complies with the three-fourths guarantee, then you would not need to take any further action.
- If some workers leave voluntarily, and that reduction in workforce allows you to continue employing other workers on a full-time basis, then you may continue to do so without taking further action.
- However, you cannot terminate workers (unless for cause) without continuing to pay them for the rest of the season (in compliance with the three-fourths guarantee).
  - Exception: if you cannot meet your three-fourths guarantee, you could file an application to cancel the H-2B job order (called “impossibility of fulfillment”). This is a rare allowance due to an “Act of God.” If accepted by the government, your three-fourths obligation would end and you may legally layoff H-2B workers and schedule their travel home.
  - \*UPDATE\*: the H-2B regulations state that impossibility of fulfillment cancels the entire job order and all H-2B workers in that position must be terminated once

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<sup>1</sup> **The three-fourths guarantee**: this means that you must offer workers three-fourths of the total full-time hours averaged over a 12-week period. The total hours obligation is calculated based on the full-time hours that you listed on the H-2B application (either 35 or 40) – therefore, the obligation would be either 26.25 or 30. As long as hours do not fall below this minimum threshold, when averaged over a 12-week period, then you would remain compliant with the three-fourths guarantee. The 12-week periods are unique to each individual worker. The first 12-week period begins when the employee arrived at your property at the beginning of the season. The last period is almost always shorter than 12 weeks, as it would end when the worker ends employment. Hours required for partial weeks at the end of the last period would be calculated on a pro-rata basis.



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it is approved. However, there may be a possibility to partially terminate the H-2B job order using impossibility of fulfillment (i.e., lay off some H-2B workers in a given H-2B position but keep others). If you are interested in this possibility, please contact Pabian Law, and we would be happy to discuss further.

### **16. Can I lay off U.S. workers?**

The H-2B program places restrictions on the ability to layoff U.S. workers, as follows:

- **During the season**: the employer may not lay off any similarly employed U.S. workers during the H-2B employment period without first laying off all H-2B workers in that position (but see “three-fourths guarantee” above regarding protections for H-2B workers).
- **Before the next season**: the employer may not layoff any similarly employed U.S. worker within 120 days prior to the beginning of the next season (otherwise the employer would be prohibited from participating in the H-2B program in the following season).
  - **\*Update\***: However, there is an exception to this if the layoffs are for a lawful reason such as lack of work caused by an unforeseen event and the laid off U.S. workers are hired back before any H-2B workers begin employment.

### **17. What if an H-2B worker needs to be quarantined?**

It is legally possible for an H-2B worker to be placed on a leave of absence. However, as you likely know, the H-2B program has a minimum hours requirement called the “three-fourths guarantee” (see footnote #1 above). Therefore, if a worker is on unpaid leave from work for long enough where his/her average hours fall below the three-fourths guarantee minimum, you may need to pay them for a certain minimum number of hours to ensure they do not fall below the legal requirement. This is a very fact-specific requirement (again, see footnote #1), and therefore, we would be happy to discuss the specifics if such a situation arises.

### **18. If quarantined, would I need to grant H-2B workers Emergency Paid Sick Leave (EPSL) under the Families First Coronavirus Response Act (FFCRA)?**

The FFCRA states that any employee would be covered by EPSL, and therefore, our assumption is that this would apply to H-2B workers. However, this is an employment law question, and therefore, we would strongly recommend speaking with your employment lawyer regarding whether a specific H-2B worker who is quarantined or out on sick leave due to COVID-19 would qualify for EPSL.

### **19. If I am a summer-season employer and business levels in April and May have been significantly impacted, can I delay the arrival of H-2B workers?**

The H-2B regulations contain a prohibition against “staggering,” which means that employers cannot typically delay the arrival of workers due to ramping up of business levels during the shoulder season. Business impacts caused by coronavirus would not eliminate this prohibition,



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and therefore, we cannot advise you that staggering would be 100% legally compliant. However, based on our experience with government audits, we anticipate that the government would be willing to consider coronavirus concerns and potentially overlook staggering violations this year. Please note, though, that if you decide that you cannot bring your H-2B workers in at the beginning of your employment period, we would strongly recommend maintaining documentation regarding lost business to produce in the event of an audit.

### **20. Should I stop moving forward with the H-2B program for the 2020 summer season?**

Even if you are worried about significant impacts to business levels this summer, we would not recommend ceasing your H-2B applications. There is no benefit of withdrawing the H-2B application at the current time. Instead, we would recommend waiting to see how significant the impacts are. If the outbreak is short-lived, and business levels return to normal in the summer, a wait-and-see approach will allow you the flexibility to still hire your workers.

### **21. If I am a winter-season employer, how should I handle our 2020-2021 H-2B visa petitions?**

We will be starting work on winter-season petitions in early April. We can delay the start a bit until May. Based on where things stand today, we recommend moving forward with next season's petitions if you were worried about staffing for next season prior to the outbreak. At the moment, it sounds like health officials are optimistic that coronavirus will be behind us by the fall/winter, when the winter-season H-2B visas will take effect.

We understand that it may be difficult to predict what next season may hold. Therefore, we are happy to work with you to try to provide as much flexibility as possible. If you are a winter-season employer that is not ready to fully commit to business-as-normal for next season, below are some strategies to consider:

- Request fewer workers this year than you did last year: if you are worried about business levels being as high in 2020/21 as they were last year, you can request fewer workers to ensure that you are not overstaffed.
- Apply for a later employment start date this year: you have flexibility to delay your season slightly by requesting a later start date. Additionally, it is possible to change your start date until 3 months before. Therefore, many winter-season employers will have until July or August to decide what start date to use for the H-2B program.
- Plan to hire out-of-country workers only: we strongly recommend that all winter-season employers move forward with out-of-country (OOC) petitions for the coming season. Out-of-country H-2B petitions give you more flexibility than in-country transfers in the following ways:
  - You do not need to worry about losing your in-country workers if they are laid off or sent home by summer-season employers;
  - You do not need to worry about gaps in employment between summer and winter employers if you ultimately decide to delay your start date;
  - You may have flexibility to delay the arrival of your workers from overseas. Although the legal regulations prohibit delaying the arrival of workers (called





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“staggering”), this may be possible if there is a legitimate, business-based reason for the need to delay. Please see #19 above for more information on staggering.

- **Note:** if you file an OOC petition, you can still hire the same workers you hoped to hire on an in-country transfer petition. Those workers would simply need to return to their home country in the fall before returning to the U.S. to start the winter-season employment period.

### **In-country H-2B transfers between employers**

#### **22. What about workers transferring to their next employer in the U.S.? How do H-2B in-country transfer petitions work if winter-season H-2B employees are leaving early or being terminated due to lack of work?**

For an H-2B in-country transfer petition to be approved, an H-2B worker should be employed in the U.S. at the time the H-2B petition is filed with U.S. Citizenship and Immigration Services (USCIS). Therefore, if a winter-season employer shuts down or lays off workers, then the summer-season employer may not be able to file an in-country H-2B transfer petition.

Here are some steps to take if you are worried about this situation:

- **If you are a winter-season employer:** be sure to communicate your plans with any summer-season H-2B recruiting partners (and/or encourage your workers to communicate with their summer employers). If you shut down and fly workers home immediately without giving workers time to communicate with their summer-season employers, it may create panic. If it is possible to keep workers on payroll for a few days or more, that may go a long way toward helping workers and summer employers plan for the transfer to occur (or to make alternative plans).
- **If you are a summer-season employer:**
  - Be sure to communicate with your workers and your winter-season recruiting partners. If they can delay terminating workers/sending workers home until after you file your in-country transfer petition, that could solve any potential issues.
  - However, if one or more of your workers are terminated before you are able to file your petition, this may create problems. Please see the below questions for more detail.

#### **23. As a summer-season employer, if a worker has ceased employment early with their winter-season employer, are they allowed to travel to our property now?**

As long as you have already filed an in-country transfer petition with USCIS for that worker, they may legally remain in the U.S. pending adjudication of the petition and could travel to your property. However, as you know, the worker cannot work until your employment start date.





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**24. As a summer-season employer, what if I have not yet filed my in-country transfer petition with USCIS and some of my employees are laid off?**

If you have not yet filed your in-country transfer petition, you will want to file it as soon as possible. However, if workers are being laid off there are no guarantees that it will be approved (as outlined at the beginning of this section). If you have workers travel to your property during this time, there is a risk that the petition will not be approved and you would have to pay to fly the workers home.

**25. As a summer-season employer, what do I do if I was planning to file an in-country transfer petition and my workers are laid off before I can file?**

As stated in the question above, you could still file your petition, but there is a significant risk that it may not be approved. Additionally, if winter-season employers are willing to keep workers on payroll for a little longer to help you file in time, that could solve the issue. However, if none of these solutions are viable, there is an additional option that could work to allow you to hire laid off workers, called an “out-of-country, cap-exempt” (OOCCE) petition.

What is an OOCCE petition? If a worker originally came from outside of the U.S. to begin work at its winter-season employer, that worker was already counted against the Fiscal Year 2020 H-2B cap. Therefore, even though the 2020 H-2B cap has already been hit, and the worker needs to leave the U.S., these workers would be exempt. Accordingly, if your workers are laid off and leave the country, you may still be able to hire them for summer 2020 by filing an OOCCE petition. However, if you are planning to file an in-country petition for some of your workers who have not yet been laid off, and also filing an OOCCE petition for other workers in the same position that have been laid off, then that would require the filing of two separate H-2B petitions, which would increase costs.

Who is eligible? Remember, your workers would need to have come from outside the U.S. to begin employment with their winter-season employer. **Otherwise, they would not be eligible.**

Are there any benefits to an OOCCE petition instead of an in-country transfer? Yes. If your workers are eligible for an OOCCE petition, filing such a petition may have a big benefit. If you file an in-country transfer, you would need to start paying workers on a full-time basis beginning on your start date. Therefore, an OOCCE petition could allow you more flexibility to bring in workers later in the summer when your business actually picks up. As we mentioned above in #19, this would typically raise staggering concerns, but the government may be willing to excuse staggering given coronavirus.



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### 26. Can an H-2B employee work for their summer-season employer while the in-country transfer petition is pending?

**No.** We have heard that some H-2B recruiters may be giving very dangerous legal advice that workers can work for their summer-season H-2B employer as soon as the employer files an H-2B transfer petition. **This is not correct – an H-2B employee cannot begin work until the petition is approved.** This is a good reminder of why it is extremely important to work with an experienced immigration attorney, rather than relying on a recruiter alone, when using the H-2B program.

### Filing strategy for summer season employers

### 27. As a summer-season employer, if my winter-season partner is shutting down, and I have not yet filed my in-country transfer H-2B petitions with USCIS what is my best filing strategy?

There are two possible filing strategies:

- 1) File the in-country transfer petition as soon as possible
  - a. As outlined above in #22-24, if you can file the petition before the workers are terminated, then you may have no issues.
  - b. However, if you cannot file before the workers are terminated, even if you are able to have the workers stay in the U.S., the petition will be at risk.
- 2) File an OOCCE petition (see #25 above)
  - a. If you file an OOCCE petition, all workers would need to be cap-exempt (as outlined above) and all workers would need to leave the country, apply for a visa at a consulate abroad, and return to the U.S. at a later date.

Neglecting the risks associated (which are outline above) and assuming I will receive approval, what are the costs/benefits of filing an in-country petition vs. and OOCCE petition?

- 1) In-country transfer petition:
  - a. Pros:
    - i. Your workers remain in the U.S. and you have peace of mind that they will not be subject to quarantine, travel restrictions, denials of visas at consulates, etc.
    - ii. Your workers should be able to arrive right at the beginning of your season if you want them to do so.
    - iii. You do not have to pay for international flights for your workers to arrive.
  - b. Con:
    - i. You must begin employing your workers (or at least complying with the three-fourths guarantee) on the first day of your employment period.
    - ii. Workers are stuck in the U.S. without work while the petition is pending.



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- 2) OOCCE petition:
  - a. Pros:
    - i. You may have more flexibility in when to bring your workers into the country, and therefore, may have more financial flexibility if your season starts slow.
  - b. Cons:
    - i. Workers must be eligible by being “cap-exempt” (outlined above).
    - ii. Given the unknown nature of the times we live in, workers may get stuck abroad for a long time due to consulate closures, travel restrictions, etc.

### **Other considerations for in-country transfer petitions**

The suspension of Premium Processing has created a situation where workers may be in the U.S. for up to a few months without having employment authorization. Below are some of the most frequently asked questions regarding this situation

#### **28. When would the hours obligation (three-fourths guarantee) begin?**

The three-fourths guarantee only begins after three things happen:

- 1) The petition is approved;
- 2) You are within your H-2B employment period; and
- 3) The worker has arrived at the work location.

However, please be aware that if you have an April 1<sup>st</sup> start date and the workers travel to your property while the petition is pending, and the petition gets approved earlier than you anticipate, your three-fourths obligation would begin, even if you do not have work for them to do.

#### **29. If a worker travels to a summer-season employer’s property while the petition is still pending, am I allowed to provide free housing and meals to the workers?**

Please keep in mind that you are technically not yet their H-2B employer, and therefore, there is a lot of grey area involved in the relationship. It is more of a landlord/tenant relationship than an employer/employee relationship. Given the uncertainty, there is some risk in providing housing during this time. The government could take the position that giving benefits to H-2B workers (free housing), but not stating that this was a possibility when we filed the H-2B application, could be viewed as discriminatory against U.S. workers. We think this would be an absurd stance for the DOL to take, and we hope that they would take a more human and understanding approach given the unprecedented situation we are in. However, we wanted you to know that this risk exists.



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### 30. **What if we have an H-2B petition pending and we later decide that we do not need the workers?**

You would need to let Pabian Law know that you would like us to withdraw the H-2B petition, and you would need to pay for the workers' flights home.

Note, however, that if the petition has already been approved and the three-fourths guarantee has already begun, you would need to file an impossibility of fulfillment application in order to cancel your H-2B contract and three-fourths obligation.

### 31. **What if a worker needs to leave the U.S. while the in-country transfer petition is pending?**

All workers on an in-country transfer petition must be in the U.S. for the entire time while the petition is pending. If a worker must leave the U.S., you would likely receive a Request for Evidence (RFE) from the government and you would need to remove the worker from the petition. This would likely mean that you would not be able to hire the worker for the 2020 summer season (unless the worker is cap-exempt, as outlined above, and you are willing to file an OOCCE petition for him/her).

### 32. **Is there a chance that the H-2B petition may be approved quicker than 2-3 months from now?**

Yes. Given that USCIS is likely processing far fewer petitions than normal, they may be able to process petitions quickly, even though they have suspended premium processing. Therefore, if you have filed an in-country petition and are hoping that it will be adjudicated slowly to give you some flexibility before you have to employ the workers, this may not be the case.

## **Public Assistance/Benefits**

### 33. **Can a worker receive emergency medical benefits, given the new “public charge” rule?**

The U.S. government recently instituted a “public charge” rule, which prohibits some foreign nationals from receiving visas if they have received certain public benefits. The rule prohibits certain specific benefits, most of which are need-based (and not medical-based). Additionally, the government specifically excludes disaster relief and medical benefits for the prevention of communicable disease from the public charge rule. Therefore, it is unlikely that any public assistance directly-related to coronavirus would impact a worker's ability to apply for visas in the future. However, Medicaid is one of the listed prohibited benefits, and therefore, any H-2B workers should avoid applying for any Medicaid benefits.



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### 34. **Does H-2B workers' payroll count toward the qualification criteria in the Small Business Association (SBA) Payroll Protection Program (PPP)?**

The PPP Loan is based on a company's aggregate payroll costs for employees whose "principal place of residence" is the United States. Typically, an H-2B worker (or any temporary worker) is not considered a resident of the United States. However, for the purposes of the PPP, the definition of "principal place of residence" likely depends on whether a specific H-2B worker is considered a resident under the IRS definition based on physical presence in the United States over the calendar year. Therefore, we would recommend running this question by your accountant. Our CPA was very helpful with answering Pabian Law's PPP questions, so that might be a good resource here. This really is a tax question rather than an immigration one, so I would defer to the accountant's advice and/or the advice of a tax lawyer.

### **More resources**

#### 35. **Where can I find more information?**

- We at Pabian Law are always happy to help!
  - (617) 939-9444
  - [www.pabianlaw.com](http://www.pabianlaw.com)
- Consulate/Embassy Closures: <https://www.usembassy.gov>.
- U.S. Citizenship & Immigration Services:  
<https://www.uscis.gov/news/alerts/uscis-response-2019-coronavirus>.
- U.S. Citizenship & Immigration Services office closings:  
<https://www.uscis.gov/about-us/uscis-office-closings>.
- U.S. Department of State: <https://www.state.gov/coronavirus>.
- Travel advisories/suspensions:  
<https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html>.
- U.S. Department of Labor: <https://www.dol.gov/coronavirus>.
- Centers for Disease Control and Prevention:  
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>.
- Countries with travel bans/suspensions:  
<https://www.cnn.com/travel/article/coronavirus-travel-bans/index.html>.
- Restrictions on U.S. visas/entry: <https://www.nafsa.org/regulatory-information/covid-19-restrictions-us-visas-and-entry>.

To learn more about Pabian Law, our incredible H-2B Visa Team, and our services, please contact Keith Pabian at (617) 939-9444 or [keith@pabianlaw.com](mailto:keith@pabianlaw.com). You can also visit our website at [www.pabianlaw.com](http://www.pabianlaw.com).