

## *Chicago National Processing Center Ask the CO's: H2 Visa Programs*

**Office of Foreign Labor Certification  
Employment and Training Administration  
United States Department of Labor**

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## H2 Visa Programs Agenda

- Workload Trends
- H-2A Rental or Public Accommodations
- H-2A Farm Labor Contractors
- H-2A Temporary Need
- H-2B Advanced Filing Tips
- H-2B Temporary Need
- H-2A/B Tips for Responding to Audits.

# Workload Trends

Shane Barbour, Center Director – Chicago National Processing Center

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## H-2A Program Workload Trends, FY 2012 - 2018

### FY 2018 Workload

- 11,300 labor certifications
- 242,700 workers certified
- 97% certification rate
- 62% of certifications for individual farms-ranches
- 43% of workers certified for farm labor contractors

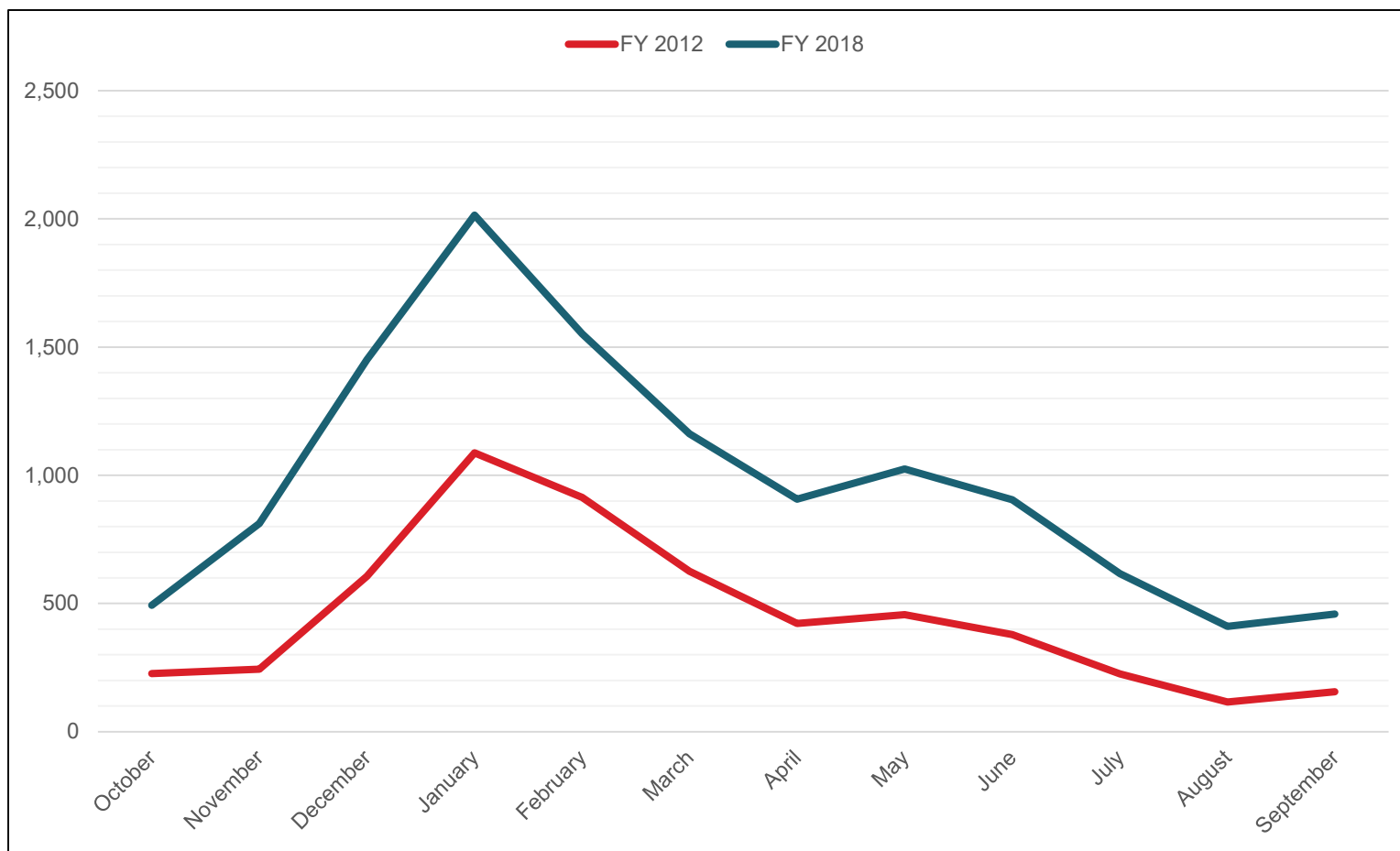
### Top States of Employment

	FY 2012	FY 2018
Georgia	8,475	32,300
Florida	6,945	30,400
Washington	7,086	24,800
North Carolina	10,536	21,700
California	3,089	18,900



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## H-2A Applications Received, FY 2012 vs. FY 2018



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## H-2A Applications Received and Worker Requested

### Q1 and Q2 (Oct 1<sup>st</sup> through March 31<sup>st</sup>)



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## H-2B Program Workload Trends, FY 2012 - 2018

### H-2B Program Features

- 9,490 applications processed during FY 2018
- 98% certification rate
- Peak season (Dec-Feb; July-Aug)

### Top Occupations of Employment

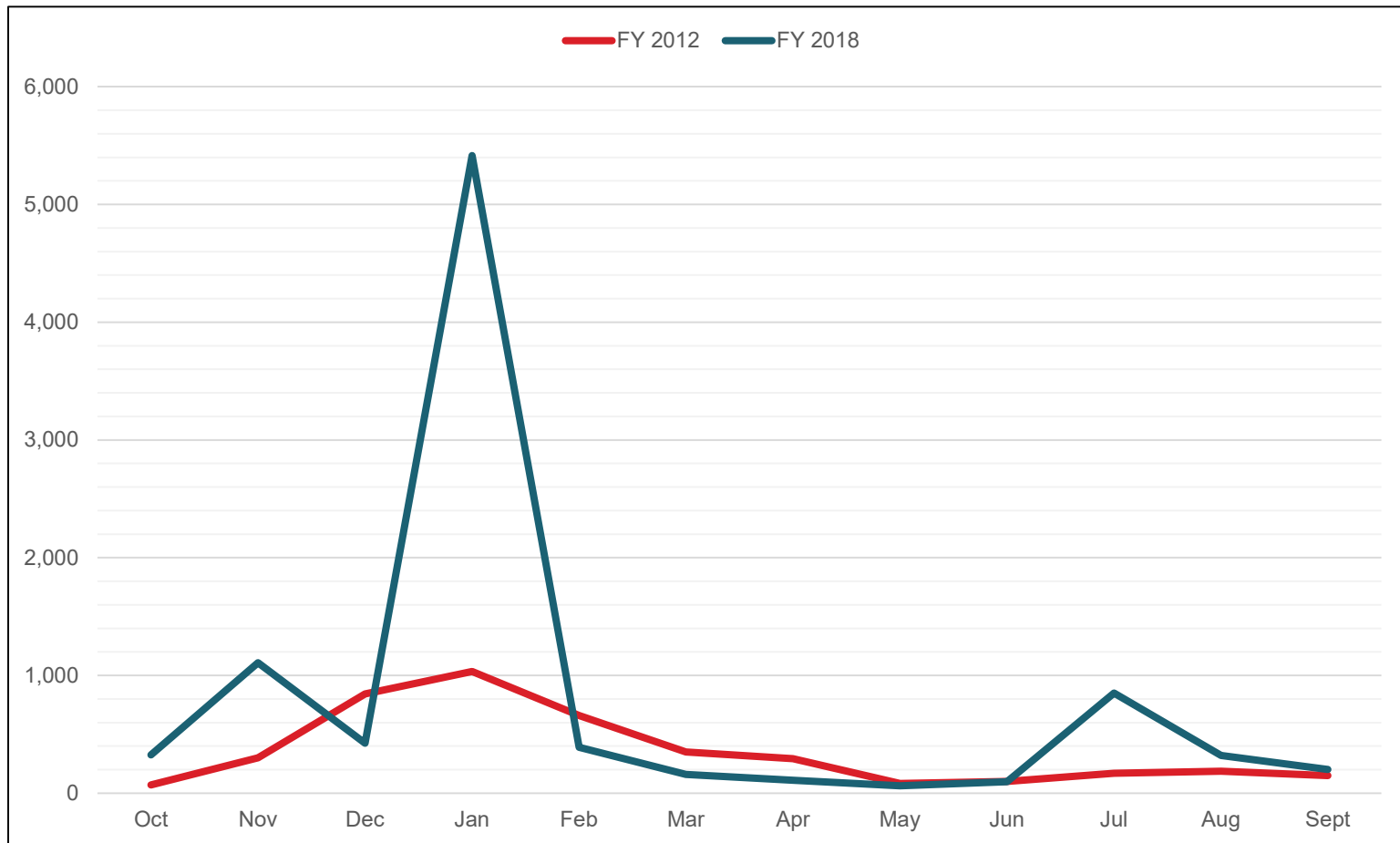
	FY 2012	FY 2018
Landscaping ...	24,094	67,112
Forest and Conservation	7,522	11,093
Maid and Housekeeping	3,113	9,180
Amusement and Recreation	5,125	7,865
Meat, Poultry and Fish ...	1,304	6,011





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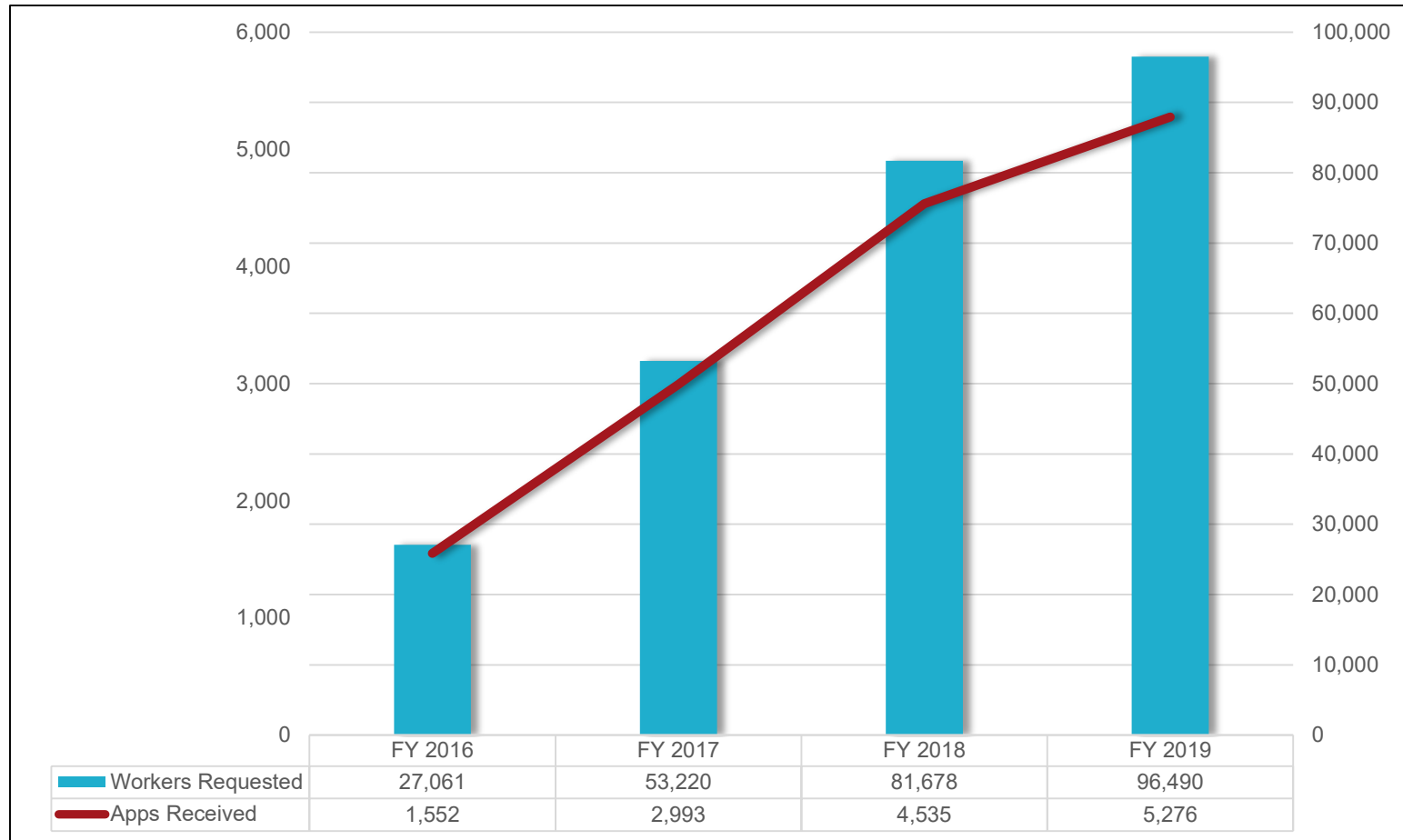
## H-2B Applications Received, FY 2012 vs. FY 2018



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## H-2B Applications Received and Worker Requested

### January (1<sup>st</sup> week)



# H-2A Rental or Public Accommodations

Lynette Wills, H-2A Certifying Officer

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## H-2A Rental or Public Accommodations

- H-2A employers must provide housing
- Housing maybe either rental or other public accommodations. Rental or other public accommodations must meet local standards for such housing
- In absence of local standards, State standards will apply. If neither local or State standards exist DOL OSHA standards at 29 CFR 1910.142 apply

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## H-2A Rental or Public Accommodations

- Charges for rental housing must be paid directly by employer to owner/operator of the housing.
- Check with the SWA in area of intended employment to determine if local or State standards require inspection
  - If SWA inspection is required, the employer must submit a copy of the SWA inspection report or certification.

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## H-2A Rental of Public Accommodations

- Employers must submit documentation to the CO identifying which standards (i.e., local, State, or Federal) apply to the rental housing or public accommodations it will use, and demonstrate that the housing or accommodations comply with those standards.
- Employers are encouraged to submit this documentation when filing the H-2A Application for Temporary Employment Certification, Form ETA-9142A.

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## H-2A Rental or Public Accommodations

- If SWA or another local, State, or Federal authority inspection is not required, the employer must submit:
  - Submit written statement, signed and dated, identifying applicable housing standards and confirm that no local, State, or Federal inspection is required;
  - Attest that the accommodations are compliant with applicable standards.
  - The written statement may be prepared and signed either by the employer, the employer's attorney or agent, or the person or entity that owns, controls, or otherwise operates the housing.

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## H-2A Rental or Public Accommodations

- If rental housing or public accommodation standards require inspection by local, State, or Federal authority other than the SWA, employer must submit copy of official documentation from that authority.
- Documentation may include, but is not limited to, a certificate from the local or State Department of Health or building department (e.g., the current certificate of occupancy).



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## H-2A Rental or Public Accommodations

- Business and tax licenses are not sufficient to show housing meets applicable standards
- All required housing documentation must be provided prior to issuance of Final Determination

# H-2A Farm Labor Contractors

Ishel Quintana, H-2A Certifying Officer

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## H-2A Labor Contractors Trends

- In FY 2017, Applications Received from H2ALC's increased by 32% as compared to FY 2016
- 2000 applications filed by H2ALC's in FY 2018
- Current FY19 on track for double digit increase in number of applications filed
- 43% of workers certified are for farm labor contractors

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## H-2A Labor Contractors Issues

- Issues with H2ALC documentation submitted
  - Itinerary not submitted or not complete- missing dates of work at specific locations, missing worksites, gaps of time when no work is performed listed, general inconsistent information
  - Original surety bonds not submitted, surety bonds not signed by principal, surety bonds for incorrect amount, bonds being sent to WHD instead of CNPC
  - Work contracts not submitted, not signed or dated, letters of intent provided, incomplete set of work contracts submitted (multiple fixed site growers), general inconsistencies
  - FLC documents not submitted, documents expired, insufficient number of vehicles to transport workers, insufficient number of drivers to transport workers or alternative explanation, assurance to renew FLC not provided

# H-2A Temporary Need

John Rotterman, H-2A Certifying Officer

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## Temporary or Seasonal Need (20 CFR 655.103(d))

- **Issues with Temporary and Seasonal Need**
  - The burden is on the employer to establish that its need is temporary or seasonal
  - We are seeing industries and occupations which do not facially possess a temporary or seasonal need, e.g., poultry, greenhouses, etc.
  - Employers should affirmatively present, or be prepared to in response to a NOD, documentation to substantiate their claimed need.
    - Payroll showing increases in labor need corresponding to the period sought.
    - Sales showing the same
    - Documentation to substantiate statements made in the application

# H-2B Advanced Filing Tips

Alejandra Dominguez, H-2B Certifying Officer

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## H-2B Advanced Filing Tips

### All Cases:

- Valid ETA-9141 Prevailing Wage Form (PWD) – unless an emergency filing
  - Multiple worksites
  - Highest wage (consider increasing min wage)
- Completed Form ETA-9142 (completed online if filing electronically)
  - Email address for employer's POC
  - Email address for employer's agent/attorney



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## H-2B Advanced Filing Tips

- Signed and dated Form ETA-9142, Appendix B
  - Most updated version avail:  
[https://foreignlaborcert.doleta.gov/2015\\_H-2B\\_IFR.cfm](https://foreignlaborcert.doleta.gov/2015_H-2B_IFR.cfm)
- Attorney or Agent Documentation (if applicable)
- Foreign Labor Recruiter Agreement(s), or a statement that the employer is not using a Foreign Labor Recruiter
  - A negative response is required (attachment preferred with clear title)
- State Workforce Agency (SWA) Job Order
  - Expedite amendments to job orders
- Forestry Cases (Itinerary Issues)

# H-2B Temporary Need

Leslie Abella, H-2B Certifying Officer

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## H-2B Temporary Need

- Always remember to check information in the application against the regulatory requirements for the type of temporary need requested.
- Employers can help avoid a Notice of Deficiency (NOD) if the temporary need basis is well established up front.
- Additional documentation is not required with the filing, but the employer's temporary need should be fully explained in its Statement of Temporary Need.

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## H-2B Temporary Need

- The employer's Statement of Temporary Need must explain:

(a) The nature of the employer's business or operations

**TIP:** Historical information about the company is not needed. Information about the nature of the employer's business or operations as they relate to a temporary need should be provided.

(b) Why the job opportunity and number of workers being requested for certification reflect a temporary need, and

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## H-2B Temporary Need

(c) How the employer's request for the services or labor to be performed meets the chosen standard of a seasonal, peakload, one-time occurrence, or an intermittent basis.

**TIP:** Employers should be mindful that their Temporary Need Statement is complete and addresses these topics.

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## H-2B Temporary Need

- If a NOD is received, the employer must keep in mind that the response to the NOD must serve to establish the regulatory requirements, as well as be responsive to what is specifically asked for.
- The employer must provide all documents requested in its NOD. If the employer is unable to submit the requested documents, the employer must explain why the documents were not included in its NOD response.
- Documents that are submitted in response to a NOD on temporary need must be responsive to the issue. Also, employers should provide an *explanation* as to how submitted documents are to be read, if not clear, and how the document(s) serve to support temporary need.

# H-2A and H-2B Tips for Responding to Audits

Marva Hamilton, Audit Certifying Officer

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## H-2A and H-2B Program Audits

- Audits may be conducted on certified H-2A applications and any adjudicated H-2B applications
- Applications selected within the sole discretion of the Certifying Officer (CO)



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## H-2A and H-2B Program Audits

Audit begins with issuance of a Notice of Audit Examination (NOAE) Letter:

- Requests documentation related to the application
- Due date for response is no more than 30 days from the issue date
- Letter indicates that failure to comply with the audit process may result in the imposition of additional recruitment requirements, revocation of certified application, or program debarment

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## H-2A and H-2B Program Audits

- Read the Notice of Audit Examination letter carefully and respond to all items requested
- NOAE letters can and do change periodically. Make sure to respond to the instructions in the letter issued to you --- not a previous NOAE

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## H-2A and H-2B Program Audits

- A single extension (up to 14 days) may be granted during audit examination
- Extenuating circumstances related to timely or complete responses to audits will be considered on an individual basis
- Employer should make every attempt to submit all information requested in one response.

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## H-2A and H-2B Program Audits



### Tips on Responding to H-2A and H-B Audits

#### General, Non-Program Specific Tips

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## H-2A and H-2B Program Audits

### *Helpful Tips*

- Help us complete your audit by providing as much supporting documentation as you can
- A statement from the employer without supporting documentation is not always sufficient to address a problem we see or a question we have about what was submitted

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## H-2A and H-2B Program Audits

### *Helpful Tips – Recruitment of U.S. Workers*

- We need to see documentation that employer continued their recruitment of U.S. workers as required by the H-2A and H-2B regulations
- These activities should be recorded during the time the recruitment was to take place --- not after the initiation of the audit

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## H-2A and H-2B Program Audits

### *Helpful Tips – Newspaper Advertisement*

- We need to see proof that all required advertisements were actually published
- Copies of the actual newspaper page showing the ad, the newspaper name and the publication date is the best documentation

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## H-2A and H-2B Program Audits

### *Helpful Tips – Newspaper Advertisement*

- You can also submit a notarized affidavit from the newspaper indicating the ads ran and showing the newspaper name, publication dates and ad language
- Invoices, receipts, requests for advertisement are not acceptable documentation as they don't necessarily show proof the ad was published



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## H-2A and H-2B Program Audits

### *Helpful Tips – Newspaper Advertisement and Job Orders*

- Advertisements and job orders are intended to help the employer recruit available and qualified domestic workers --- new workers
- It's critical that employers let potential U.S. workers know if they will pay higher wages based on experience or if there will be any other variances in wages

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## H-2A and H-2B Program Audits

### *Helpful Tips – Earnings Records*

- We're looking for documentation that shows workers were paid at least the wage required by the regulations
- Paid wages that are different than advertised wages will be questioned
- The employer should explain any of those differences up front

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## H-2A and H-2B Program Audits

### *Helpful Tips – Earnings Records*

- Few, if any, assumptions will be made about earnings records
- We're going to ask questions if something is unclear
- We need to see earnings records that are broken down by no less than pay period
- Do not submit monthly summaries or multiple month summaries

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## H-2A and H-2B Program Audits

### *Helpful Tips – Earnings Records*

- Provide documented explanations if workers do not consistently work full-time hours
- Identify, quantify and explain all deductions
- Exception: The employer does not have to explain Federal, State and Local taxes but just about everything else requires a description

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## H-2A and H-2B Program Audits



### Helpful Tips for Responding to H-2A Audit Examinations

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## H-2A and H-2B Program Audits

### *Helpful Tips*

- Submit translations of documentation in English, particularly work contracts outside of the certified job order/application
- Ensure the newspaper advertisements contain all minimum content required by 20 CFR 655.152

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## H-2A and H-2B Program Audits

### *Helpful Tips*

- The reason for the late start” and/or “early end” to work must be explained and documented
- Earning records must be submitted as specified in Departmental regulations at 20 CFR § 655.122(j).
  - When submitting payroll documentation, if the employer has multiple concurrent certs please specify which worker belongs to which cert

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## H-2A and H-2B Program Audits



### Helpful Tips for Responding to H-2B Audit Examinations



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## H-2A and H-2B Program Audits

### *Helpful Tips – Job Orders*

- Provide proof that the required job order was actually placed and ran
- Copy of the request form asking the SWA to open a job order is not sufficient
- The best documentation would be copies of the screens taken from the SWA website showing entire job order and language

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## H-2A and H-2B Program Audits

### *Helpful Tips – Number of Workers / Period of Need*

- The number of workers and dates worked do not have to match the application exactly, but if there are significant differences, we need to know why

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## H-2A and H-2B Program Audits

### *Helpful Tips – Early Separation of Workers*

- Employer should report any early separation of H-2B workers for any reason
- Many employers quote wage and hour regulations when explaining that they don't need to report early separation unless it's more than 30 days; however
- H-2B regulations say that the employer must report any workers that separate early