

# H-2A VISA Workers & U.S. Tax Law



Prepared for  
**WESTERN RANGE ASSOCIATION**  
**2017 Annual Meeting**  
Reno, NV June 21, 2017



## PRESENTER

- *Bob Wunderle, CPA*
  - Director, La Posada Tax Clinic
  - Email-- [LaPosadaTC@outlook.com](mailto:LaPosadaTC@outlook.com)
  - Email-- [TAXHELPID5@EARTHLINK.NET](mailto:TAXHELPID5@EARTHLINK.NET)
  - Phone-- (208) 735-1189

## A LITTLE HISTORY

- Foreign workers have come to work in agriculture since the Bracero Program (1942) was set up in 1942 by Executive Order
- Bracero Program enacted into law in 1956
  - Peak year was 1956, 445,197 Braceros entered U.S.
  - The number of illegal's who entered the U.S. during the tenure of the Bracero program was equal to or surpassed the number of braceros.
- Workers have always been exempt from FICA (Social Security and Medicare tax) by statute and from Federal income tax withholding (FITW) by Treasury Regulations, derived from Statute.
- Workers have never been exempt from income taxes, BUT IRS Publications obscured this fact.

3

## IRS Guidance for H-2A Workers

- Prior to September 2011, IRS told employers
  - They could not withhold federal income tax
  - They could not report wages on a W-2
  - They should report "wages" on Form 1099 MISC
    - May show up as *nonemployee compensation* or *other income*
    - Guidance specified *other income* reporting starting in 2009
- Guidance to employers was not in IRS Pubs
- Many employers did not report H2A wages
- Pubs now require wage reporting on a W-2 and allow workers to volunteer for FITW

## Affordable Care Act

- All persons with legal presence in the U.S., including H-2A worker must have health insurance or pay a penalty tax.
- Applicable Large Employers (ALE) must provide insurance for their employees
  - On average, 50 full time employees or full time equivalents, unless state law differs (e.g., California).
  - Full time is defined as 30 hours a week.
  - H-2A workers are generally included in this count.

HO-1 ACA Exemptions & Who Grants Them

## ACA Exemptions

- Household or gross income is under the filing threshold;
- Short Coverage Gap: less than three consecutive months;
- Nonresident aliens, including
  - a dual-status alien in the first year of U.S. residency;
  - a nonresident alien or dual-status alien who elects to file a joint return with a U.S. spouse;
  - Those who file Form 1040-NR or Form 1040-NR-EZ;
- Coverage is considered unaffordable;
- Hardships.

## Employers' Perspective

- H-2A employers are subjected to burdensome regulation and inspections by the Department of Labor.
- For decades, they weren't concerned with the income tax regulations governing the employment of temporary foreign workers.
  - Most believed that the workers were exempt from all federal and stated taxes
  - Some, not knowing what to believe, reported wages on a W-2 or 1099-MISC
  - Most didn't report the wages at all.

## TAX LAW & H2A WORKERS

### Did You Know ...

- Employers may be exempt from withholding of federal taxes, but not exempt from reporting of wages paid to foreign agricultural employees on H-2A visas.
- H-2A workers must have a U. S. Social Security Number (SSN).



### Do I need a Social Security number before I start working?



We do not require you to have a Social Security number before you start work. However, the Internal Revenue Service requires employers to report wages using a Social Security number. While you wait for your Social Security number, your employer can use a letter from us stating that you applied for a number.

## SSA Guidance on SSNs

- Employer Responsibilities When Hiring Foreign Workers (<http://www.socialsecurity.gov/employer/hiring.htm>)
- Advise workers to apply for a Social Security number.
- The ten day rule
  - Wait ten days after worker enters the U.S. to apply for an SSN.
  - Delay needed to ensure that SSA can verify documents with DHS
- The fourteen day rule
  - SSA will not accept an application if worker has less than 14 days of authorized U.S. presence remaining on the visa.
  - SSA may reject application if, when application is processed, worker has less than 14 days of authorized U.S. presence remaining on the visa.

99

## Be Careful With Names

### SOCIAL SECURITY ADMINISTRATION Application for a Social Security Card

Form Approved  
OMB No. 0960-0066

<b>NAME</b> TO BE SHOWN ON CARD		First	Full Middle Name	Last
<b>1</b>	FULL NAME AT BIRTH IF OTHER THAN ABOVE	First	Full Middle Name	Last
	OTHER NAMES USED			
<b>2</b>	Social Security number previously assigned to the person listed in item 1		[ ] [ ] [ ] - [ ] [ ] - [ ] [ ] [ ] [ ]	
<b>3</b>	<b>PLACE OF BIRTH</b> (Do Not Abbreviate) City State or Foreign Country	Office Use Only FCI	<b>4</b>	<b>DATE OF BIRTH</b> MM/DD/YYYY
<b>5</b>	<b>CITIZENSHIP</b> (Check One)	<input type="checkbox"/> U.S. Citizen <input type="checkbox"/> Legal Alien Allowed To Work <input type="checkbox"/> Legal Alien Not Allowed To Work (See Instructions On Page 3) <input type="checkbox"/> Other (See Instructions On Page 3)		
<b>6</b>	<b>ETHNICITY</b> Are You Hispanic or Latino? (Your Response is Voluntary) <input type="checkbox"/> Yes <input type="checkbox"/> No	<b>7</b>	<b>RACE</b> Select One or More (Your Response is Voluntary) <input type="checkbox"/> Native Hawaiian <input type="checkbox"/> American Indian <input type="checkbox"/> Other Pacific Islander <input type="checkbox"/> Alaska Native <input type="checkbox"/> Black/African American <input type="checkbox"/> White <input type="checkbox"/> Asian	
<b>8</b>	<b>SEX</b>	<input type="checkbox"/> Male <input type="checkbox"/> Female		

## Information Return Reporting

- Payments of compensation to H-2A & H-2B workers must be reported on Form W-2
- If the worker has applied, but doesn't have a Social Security number when wage reports (Forms W-2) are due
  - Paper filers, enter "Applied For" in Box a.
  - Electronic Filers, enter all zeros in the SSN field.
  - Submit Form W-2c when you receive the worker's SSN
- If worker has not yet applied, see **26 CFR 31.6011(b)-2 - Employees' account numbers**. Internet search easily finds this reference on Cornell University's Law School Web site.

11

## Failure to File Penalties

- Any person who fails file an information return on or before the prescribed due date is subject to a penalty. For returns due after 12/31/16, the penalties increase to
  - \$50 per return if filed within 30 days of due date
  - \$100 per return if filed on/before August 31
  - \$250 per return if filed after August 1
  - \$500 per return if due to intentional disregard.
- Similar penalties for failure to provide a timely payee statement

## When and Where?

- For the 2016 and future years, W-2s must be mailed/given to the taxpayer and submitted to SSA NLT January 31.
- Technically, the taxpayer's W-2 should be sent to the taxpayer's permanent home address.
  - Practically, it is often better to use an address where the taxpayer will actually receive correspondence.
  - Have never heard of a penalty being assessed against an employer for not having the worker's "correct" address on a W-2

## Receiving Mail Is A Problem

- IRS and State agencies will send mail to the address on the most recent tax return or W-2
  - If this is a U.S. address,
    - Ensure that the mail is forwarded, or
    - Worker has authorized someone trusted to open mail and call with important information.
  - If this is a foreign address,
    - Does worker's employer and tax preparer have a valid mailing address on the W-2 and tax return?
    - Is mail delivery to that address reliable?
    - Will tax authorities make unwarranted assumptions about the tax return because of the taxpayer's main home address?
- If practical, consider filing a change of address with IRS and State Tax agency when leaving the U.S. and upon return.

## Other Issues

- Wages paid to a nonresident alien (NRA) workers are not subject to 30% withholding of FIT under IRC 1441.
- Wages paid to a NRA worker are **not** subject to reporting on Forms 1042/1042-S—use Form W-2.
  - Forms 1042/1042-S are used to report the wages earned by alien taxpayers legally in the U.S. who, by statute, are exempt from the substantial presence test.
- Wages paid to a resident alien worker are subject to backup withholding if the worker fails to provide an SSN or ITIN.
  - Report backup withholding on Form 1099, not Form W-2.
  - Employers who fail to do Backup Withholding when required will be held liable for the amount of the Backup Withholding tax

155

## Tax Law for Guest Workers

*Is very complicated  
Few Preparers Know it  
Workers don't know it  
Few IRS Employees Know it*

## The Challenges

- Tax professionals who know the law are rare.
- Incompetent, ignorant and fraudulent tax preparers are prevalent.
- Tax law is exceedingly complex.
- Insurance exchange employees generally do not understand the guest worker program.
- **No government agency provides outreach to H-2A workers about their tax obligations.**

17

## Foreign Workers

- Knowledge of tax ranges from limited or no knowledge of U.S. tax law to being badly misinformed
  - When visas are issued, they are told that they are exempt from Social Security and Medicare taxes.
  - Are told nothing about U.S. income taxes
- Many believe they are exempt from all U.S. taxes
  - Many know others who worked in the U.S. for generations and never filed tax returns
  - For generations, they have not received W-2s or 1099s
- Some believe they are entitled to refundable credits such as CTC/ACTC

## H-2A Workers' Compliance History

- Some will have never filed
  - Have never been contacted by IRS or State tax authorities
  - Have ignored IRS correspondence
  - May not have received IRS correspondence asking for returns
  - May have Substitute returns and be in Collections
  - Coming into filing compliance will generate late filing & payment penalties
- IRS and State Collection Issues may arise.
  - Penalty abatements will help, but are hard to get.
  - Federal alternatives to full payment include not collectible status, installment agreements and offers-in-compromise.

## Knowledgeable Preparers are RARE

- File as guest workers single with no dependents, even if married with eligible dependents, simply because spouses & dependents are not in the U.S. and/or don't have tax ID numbers.
- File as non-residents with no standard deduction allowed, when correct filing would be as a resident with the standard deduction
- Not knowing if/when H-2A may be eligible to claim the Earned Income Tax Credit (without children)
- They don't know the residency tests for guest workers

## Dishonest Preparers are Prevalent

- File resident returns for nonresident workers
- Encourage workers to claim anybody's children for exemptions
- Claim the Child Tax Credit for children living outside the U.S. who are not U.S. citizens
- This is a pandemic problem for all foreign born taxpayers
- Use the Preparer Complaint Form 14157 and/or 14157-A to report dishonest preparers
- Seek Assistance From the Taxpayer Advocate Service

## Issues For Those Who Filed

- Victimized by inadequately trained or unscrupulous tax preparers
  - Used wrong tax form (1040 vs 1040NR)
  - Filed tax returns with false claims –CTC/ACTC for NRA children
  - Fail to claim all available benefits
- Did not get expected refunds, don't know why and don't know how to find help
- Never received letters sent them by the IRS and state.
- Don't understand or reply to letters from the IRS or State agencies.
- No one can amend a return to elect a joint return filing status more than three years after the return's original filing date.



## Why Should Workers File and Pay?

- To comply with federal and state tax laws
- Employers must report their wages—eventually the IRS will enforce the law.
- Failure to File and not withholding or making estimated payments will add costly penalties to the tax due.
- When immigration reform is enacted
  - Agricultural workers will be at the head of the line, **but**
  - They will need to have filed tax returns for five years

## What The Law Requires

- **IRC § 6012** requires a tax return of every individual having gross income which equals or exceeds the exemption amount plus other statutory deductions & exemptions based on filing status.
  - Non-resident and dual status workers must file if wages exceed the exemption amount
  - Resident workers may claim the standard deduction and exemption(s) that raise their filing threshold
- Obtain health insurance if not covered by an employer policy.

## What H-2A Workers Should Consider

- If asked about tax compliance when being interviewed for a future visa, will they be able to answer truthfully with credibility?
- Although the law is complex, they have options and benefits which reduce and sometimes eliminate tax liabilities.
- Many who file, will not have to pay!
- When immigration reform is enacted
  - Agricultural workers will be at the head of the line, **but**
  - They will need to have filed tax returns for five years

## Tax Law Complexities

*What H-2A  
Employers need to  
know!!*



## What You Need Know

- Workers **supporting** families in Mexico or Canada may be able to claim exemptions that will lower their tax liability.
- Children outside the U.S. are not eligible for the Child Tax Credit.
- Failing to file a tax return
  - Will jeopardize any chance of legal permanent residency
  - May jeopardize issuance of future work visas

## Tax Law Residency Definitions

- **Resident Alien**
  - Permanent resident/green card holder
  - **Substantial Presence Test** aliens
    - Nonimmigrant visas (Asylees, Refugees, Guest Workers, et.al.)
    - Aliens in the U.S. illegally (without authorization to be in the U.S.)
- **Nonresident Alien**
  - All aliens living outside the United States
  - Aliens in the U.S. who do not have **Substantial Presence**
  - Aliens who are exempt from the **Substantial Presence** rule by law or treaty
- **Dual Status Alien**—someone who is a nonresident alien part of the tax year and a resident alien the rest of the year.

## Substantial Presence In the U.S.

- Requires physical presence in the United States
  - All 50 states, D.C. and U.S. territorial waters
  - **Not** U.S. possessions, territories or airspace
- For 183 days during a three year period
  - At least 31 days in the tax year, **and**
  - 183 formula days counting the current tax year, and two years preceding the current tax year.
- Any time in the U.S. during any day is a day of presence
- Some days don't count— for example, commuting days, when in a hospital, more—see Pub 519 for details

HO-2A Substantial Presence Test



## Residency Starting Date

- Residency starts the first day present in the U.S. in the calendar year for which the substantial presence test is met, **UNLESS**
- Taxpayer was a U.S. resident during any part of the preceding calendar year. Then taxpayer will be considered a U.S. resident at the beginning of the calendar year.

30



## Residency Ending Date

- A resident alien who departs the United States before year end is generally treated as a resident alien through December 31
- If for the remainder of the tax year,
  - The taxpayer had a closer tax connection to a foreign country than the U.S., and
  - The individual is not a resident of the United States at any time during the next calendar year,
  - The residency may terminate on the
    - First day no longer a Lawful Permanent Resident if Green card was abandoned.
    - The last day physically present in U.S., if a resident under the Substantial Presence Test
- Ending earlier allows taxpayer to exclude foreign source income received after departure.

31

## Residency Matters

- Nonresidents file Form 1040NR
  - Must file as single or married filing separate
  - There is **no standard deduction**. Limited itemized deductions are allowed.
- Residents file Form 1040 and are treated like all other U.S. citizens and lawful immigrants.
  - All filing statuses are possible.
  - Eligible to claim standard deduction.
  - May elect to file jointly with nonresident spouse.
  - Taxed on world-wide income for entire year
- Dual Status residents
  - Form 1040 if resident at year-end, else Form 1040NR
  - **No standard deduction**

## Benefits Available to H-2A Workers

- Nonresident H-2A workers may be able claim exemptions for a spouse and for other dependents.
  - Spouse and dependents, and must live in U.S. , Mexico or Canada.
  - Spouse/dependents cannot have income exceeding the exemption amount.
  - Spouse and other dependents must have a tax identification number (SSN or ITIN).
- Resident H-2A workers
  - Have the same benefits available to U.S. citizens.
  - May file a joint return with an nonresident spouse.

## Maximizing Tax Benefits

- First Year Choice
  - Gives the benefits of filing as a U.S. resident one year sooner
  - Makes Standard Deduction Available Sooner
- Election to file a joint return with nonresident spouse
  - Both worker & spouse are treated as U.S. residents for the entire year.
  - Provides the MFJ standard deduction
  - Provides an exemption for a spouse regardless of country of residence.
  - Subjects any spousal income to U.S. taxes

## FILING STATUS

### Resident Alien Taxpayer

- Single
- Married Filing Joint
  - Tax ID # not required
- Married Filing Separately
- Head of Household
- Widow(er) with Qualifying Child

### Non-resident Alien Taxpayer

- **Single**
- ~~Married Filing Joint~~
- **Married Filing Separately**
- ~~Head of Household~~
- ~~Widow(er) with Qualifying Child~~

## DEDUCTIONS

### Resident Alien Taxpayer

- May claim the standard deduction for the filing status used
- May take all itemized deductions available to U.S. Citizens

### Nonresident Alien Taxpayer

- Not eligible for the standard deduction
- This is also true for Dual Status Aliens
- Itemized Deductions are limited
  - State & Local Taxes Paid
  - Contributions to U.S. charities
  - Uninsured Casualty losses
  - Gambling losses up to amount of gambling winnings

# EXEMPTIONS

## Resident Aliens

- May claim exemption for a spouse
  - No matter where spouse lives
  - On an MFS return, only if spouse has no Gross Income
- May claim exemptions for dependents
  - Who are U.S. citizens, or
  - Others who reside in the U.S., Canada or Mexico.

## Nonresident Aliens

- May claim spouse's exemption
  - Only if spouse resides in the U.S., Canada, Mexico or South Korea, **and**
  - Spouse has no Gross Income
- Mexican and Canadian nonresident aliens may claim exemptions for dependents
  - Who are U.S. citizens, or
  - Others who reside in the U.S., Canada or Mexico.

## Simplified Tests for A Dependent

- Relationship—generally a close relative: child, parent, grandparent, grandchild, sister, brother, aunt, uncle, niece or nephew.
- Support test—generally taxpayer must provide more than  $\frac{1}{2}$  of the financial support for each dependent
- Generally, dependent cannot be a U.S. taxpayer
- A dependent cannot have income equal to or greater than the exemption amount (\$4,050 for 2016)

## H-2A Worker Tax Responsibilities

*What they need  
to know!!*



### **File on Time or File an Extension**

- If taxpayer not in the U.S. before April 15, he has an automatic two month extension.
  - A statement claiming the extended filing deadline must be attached to the return to avoid late filing or payment penalties.
  - If e-filed, statement will be ignored, penalty assessed anyway.
  - Have someone file extension before April 15.
    - IRS Form 4868
    - Many States require a separate extension request.
    - Saves late filing penalties, not late payment penalties.
- Adequate withholding or Estimated Payments will prevent late payment penalties.

## To Withhold or Not to Withhold

- FITW is voluntary, but pay as you go is not!
  - Worker must ask.
  - Employer must agree (Does not have to agree)
  - If worker does not withhold, estimated quarterly payments may be required
- Should worker withhold Federal and State Income Tax
  - In first two years of employment, IRS fraud programs work against guest workers who ask for withholding
  - Recommend estimated payments
- WHY???? – Next Slide Please

## IRS Safeguards Against Refund Fraud Impact Innocent H-2A Workers

- Taxpayer Protection Program (TPP) & Integrity & Verification Operation (IVO) hurt
  - First time filers claiming refunds
  - No tax due filers claiming refunds
- The IRS is looking for fraudulent refund claims.
- The screening filters it uses to detect fraud are preventing the Service from issuing legitimate refunds to H-2A filers.
- Refunds may take up to six months, and some may be “frozen” and never sent unless the taxpayer complains and provides proof
  - that the W-2 wages were really his, and
  - that he is a bona fide taxpayer.

## To Withhold or Not to Withhold

- IRS records
  - Tax return information in its Individual Master File (IMF)
  - Information return information in an Information Return Master File (IRMF)
  - It does not establish these accounts until it receives tax return information from a taxpayer
- An Estimated Payment (Form 1040-ES or 1040NR-ES forces the IRS to establish an account for the worker in its IMF. The payment is posted to the taxpayer's account.
  - A W-2 submitted by an employer has nowhere to post before a tax return is filed.
  - When the tax return is filed, the IRS will not be able to match the W-2 withholding on the tax return to the employer submitted W-2

## Completing Form W-4

- Use the IRS's 2017 Withholding Calculator
  - IRS.Gov web page
  - Enter **Withholding Calculator** in the search box
- Enter worker's marital status – Single, MFJ or MFS
- Enter number of jobs for the year—typically 1
- Enter number of actual dependents
- All credit entries should be left blank
- Complete wage and withholding section with expected contract wage for year
- Enter job start and end dates
- If worker is NRA or dual status alien, check the itemized deductions box to force standard deduction to zero

Exemptions, Deductions, Credits

*QUESTIONS???*



## Tax Hazards Hurting H-2A Workers

Incompetent and Dishonest Preparers

IRS Fraud Prevention Programs

Challenge of Obtaining ITINs

## Tax Compliance Challenges

- Obtaining Tax Identification Numbers (ITINs)
  - IRS is very nit picky & detail oriented, leading to rejected applications
  - Requirement to send original documents to the IRS—e.g., passports, voter ID cards, etc.
- Not having a year round mailing address to receive and react to IRS correspondence
- U.S. legal and cultural expectations do not match taxpayer's experience in home country
- Unreliable & time consuming ways of corresponding between work place and home.

## Applying for an ITIN

*Form W-7 or W-7(SP)*

## ITIN Application Overview

- Form W-7 is available in Spanish
- Documentation is required to substantiate
  - Alien (foreign citizen) status
  - True identity of applicant
- Taxpayer, spouse, each dependent
  - Requires individual application
  - Parent/guardian signs for a minor under 14
  - All others sign their own or give a PoA to a designated representative who must be a relative, attorney, CPA or enrolled agent.
- Submit the W-7s with a 1040 or 1040X
- Follow up requires a power of attorney (Form 2848) or Information Disclosure Form (Form 8821), unless you are a Certifying Acceptance Agent

## Acceptable Documents

- Passport
- Two or more of the following
  - National ID Card
  - Civil Birth Certificate
  - U.S. State ID Card
  - Visa
  - Foreign Voter Registration Card
  - U.S. Citizenship and Immigration Services (USCIS) photo identification
  - Medical records (dependents under age 6 only)
  - School records (dependents under age 18 only)
  - U.S. driver's license
  - Foreign driver's license
  - Military ID card
  - Foreign military ID card
- One of the above must have applicant's photograph unless applicant is less than 14 years old or less than 18 **and** a student

## Birth Certificates

- Must be one of the documents submitted unless a passport is used.
- Must be original (first issued) or a certified copy issued by a government bureau of vital statistics
- IRS looks for specific security features
- Not all original birth certificates have those features or IRS examiners may not recognize them
- Birth Certificates for children are subjected to enhanced examination
- Cannot be laminated

## Medical Records

- May only be used for children aged 5 and younger as of the date the Form W-7 is signed & mailed
- Consists only of a shot/immunization record which documents
  - The patient's name, date of birth, and complete address
  - Chronological dates of medical history and care
  - The name, address and phone number of the doctor, hospital or clinic where treatment was last administered
- If this information is not printed on the medical record, it must be provided in a signed and dated letter on official letterhead from the government authority, physician, hospital or clinic that accompanies the medical record.
- If the W-7 shows a date of entry into the U.S., the record must be from a U.S. facility.

## School Records

- Accepted only for dependent applicants under the age of 18.
- Defined as an official report card or transcript signed by a school or ministry official.
- Record must contain
  - Student's name
  - Course work with grades
  - School name and address
  - Course work and grades are not required for children under age 6 in kindergarten or pre-school.
- If the W-7 shows a date of entry into the U.S., the record must be from a U.S. facility.

## Contact Information

*Bob Wunderle, CPA*

*La Posada Tax Clinic*

*Email-- LAPosadaTC@outlook.com*

*(208) 735-1189*

*PO Box 1962, Twin Falls ID 83303*





*That's all folks*

*Thank you*

55