

**Employment of H-2A Workers
Employer Federal Withholding Requirements/
H-2A Worker Federal Income Tax Filing Requirements**

The guidance provided in this document pertains to federal tax implications only. Please refer to individual state laws for state tax withholding and income tax requirements.

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I. Employer Withholding Requirements for H-2A Workers

Payments to H-2A workers are subject to different withholding and reporting requirements than wages paid to other agricultural workers. The following guidelines should be followed when making payments to H-2A workers.

A. Social Security Numbers/Individual Taxpayer Identification Numbers

- H-2A workers are required to furnish a Social Security Number ("SSN") or Individual Taxpayer Identification Number ("ITIN").
- If worker does not timely provide SSN or ITIN, and the aggregate annual payments to the worker equal or exceed \$600, the employer must do backup withholding on the payment(s) at the rate of 28%. *See* IRC 3406(a)(1). Employers may become liable for any uncollected amount, if they do not collect and pay backup withholding from affected workers as required. Accordingly, employers should withhold on payments until the SSN/ITIN is furnished.
- Forms and directions for obtaining a SSN or ITIN are below. Employers may provide forms and directions to workers, but **should not** complete or file the SNN or ITIN applications for workers.
- H-2A workers are eligible for and should apply for a SSN, not an ITIN. H-2A workers do not need a SSN prior to being hired or obtaining a visa, but should apply for a SSN as soon as possible after entering the U.S. to avoid backup withholding.
- Anyone 12 or older requesting an original Social Security number must apply in person at a Social Security office and present the following original or certified copies of the following documents:
 - Completed Form SS-5, Application for a Social Security Card <http://www.ssa.gov/online/ss-5.pdf>
 - Proof of immigration status (visa and Form I-94)
 - Proof of work eligibility (Form I-94)
 - Proof of age (birth certificate)
 - Proof of identity (Form I-94 with unexpired foreign passport)

Local Social Security office locations and hours are available on the Social Security Administration website. <https://secure.ssa.gov/apps6z/FOLO/fo001.jsp>

B. Social Security Number/Individual Taxpayer Identification Numbers for Family Members of H-2A Workers

- Family members who do not have their own work authorization are generally not eligible for a Social Security number. They may be eligible if they are in the U.S. and are eligible for a federal or state assistance benefit that requires a social security number. To qualify under this exception, the applicant must present an original letter from the government agency.
- Individual Taxpayer Identification Numbers (ITIN) is a tax processing number issued by the IRS to individuals who are not eligible for a Social Security Number. Spouses and dependents of H-2A Workers, in or out of the U.S., are eligible for ITINs. Depending on the worker's individual tax situation, ITINs for family members may be required for tax filing purposes. To apply for an ITIN, file Form W-7, Application for IRS Individual Taxpayer Identification Number with a valid federal income tax return and proof of identity and foreign status at the address listed on the Form W-7 instructions.

Form W-7: <http://www.irs.gov/pub/irs-pdf/fw7.pdf>

Form W-7 Instructions: <http://www.irs.gov/pub/irs-pdf/iw7.pdf>

C. Federal Income Tax, Social Security, Medicare Withholding Requirements

- **ISSUE 1099-MISC if total annual payment to individual H-2A Worker meets or exceeds \$600.** Payments to H-2A workers should be included on Form 1099-MISC if the total annual payments made to an H-2A worker is equal to or exceeds \$600. If an employer is required to issue one or more 1099-MISC, the employer must also file Form 1096.

Form 1099: <http://www.irs.gov/pub/irs-pdf/f1099misc.pdf>;

Instructions for Form 1099: <http://www.irs.gov/pub/irs-pdf/i1099misc.pdf>.

Form 1096: <http://www.irs.gov/pub/irs-pdf/f1096.pdf>

- Furnish Copy B of Form 1099 to H-2A workers by January 31, 2011. File Copy A of Form 1099 and Form 1096, *Annual Summary and Transmittal of U.S. Informational Returns* with IRS by February 28, 2011. If filing electronically, file Copy A of Form 1099 must by March 31, 2011.
- **Withhold Federal Income Tax ONLY IF H-2A worker fails to provide SSN or ITIN.** Employers are not required to withhold federal income tax from payments to H-2A workers unless the H-2A worker neglects or refuses to give his/her SSN or ITIN to the employer. If the H-2A worker provides his/her SSN or ITIN, do not withhold federal income tax.

- If the H-2A worker fails to provide his/her SSN or ITIN and if the total annual payments to that worker are equal to or greater than \$600, the employer must do backup withholding on the payments at the rate of 28%. Employers may become liable for any uncollected amount, if they do not collect and pay backup withholding from affected workers as required.
- **If backup withholding is required**, the employer must report the backup withholding on 1099-MISC.
- **File Form 945 if backup withholding required.** If backup withholding is required, the employer must also File Form 945, *Annual Return of Withheld Federal Income Tax*.

Form 945, *Annual Return of Withheld Federal Income Tax*:
<http://www.irs.gov/pub/irs-pdf/f945.pdf>;

Instructions for Form 945, *Annual Return of Withheld Federal Income Tax*: <http://www.irs.gov/pub/irs-pdf/i945.pdf>

- File Form 945 by January 31, 2011. Form 941. (However, if you made deposits on time in full payment of the taxes for the year, you may file the return by February 10, 2011.
- **Do not withhold Social Security or Medicare Taxes.** H-2A workers are exempt from U.S. social security and Medicare taxes. Therefore, the 7.45% FICA tax (6.2% Social Security; 1.45% Medicare) should not be withheld from the pay of H-2A workers. *See* IRC 3121(b)(1).
- **Do not include H-2A payments on Form 943, *Employer's Annual Federal Tax Return for Agricultural Employees*.** Payments made to H-2A workers should not be included on Form 943 since the payments are not considered "wages" for this purpose. *See* IRC 3401(a)(2); 3121(a)-(b).
- **Do not issue W-2s to H-2A Workers; do not include H-2A payments in Form W-3, *Transmittal of Wage and Tax Statements*.** Since payments made to H-2A workers are not "wages" they should not be reported on Form W-2 for Form W-3.
- **Do not file Form 1042-S.** The Form 1042-S reporting requirement is waived for H-2A agricultural workers.

II. Income Tax Reporting Requirements of H-2A Workers

Even though H-2A workers are exempt from federal income tax withholding (unless subject to backup withholding as discussed previously), **H-2A workers may owe federal income tax**. A common misconception is that all H-2A workers are exempt from federal income tax. An H-2A worker may or may not be required to file a U.S. income tax return, depending on the individual worker's situation and whether the worker is a nonresident or resident alien.

A. Non-Resident Alien v. Resident Alien – the "Substantial Presence Test"

- There are two tests for determining whether a person is a resident vs. a nonresident for tax purposes: the green card test and the substantial presence test.
- Under the green card test, a person is a permanent resident if he holds a green card anytime during the year
- Under the Substantial Presence Test, a person is a resident alien in 2010 for tax purposes if he is physically present in the United States for:
 - 31 days during 2010, AND
 - 183 days during the 3 year period that includes 2010, 2009, and 2008, based on the following calculation:
 - All the days physically present during 2010, ADDED TO
 - 1/3 of the days present during 2009, ADDED TO
 - 1/6 of the days present during 2007.

Number of Days	Total		
2010	_____		_____
2009	_____	Divide by 3 =	_____
2008	_____	Divide by 6 =	_____
		TOTAL	_____

See IRS Publication 519 <http://www.irs.gov/pub/irs-pdf/p519.pdf> for further explanation and examples of Substantial Presence Text.

B. Nonresident Alien Income Tax Reporting Obligation

- Nonresident aliens are required to pay federal income tax only on their income from U.S. sources.

- A nonresident alien whose total annual wages total less than the personal exemption amount (\$3,650 for 2010) and who has no other U.S. source income, is not required to file a U.S. Income Tax Return. The personal exemption amount is published each year in IRS Publication 51.

C. Resident Alien Income Tax Reporting Obligation

- Resident aliens are taxed on their worldwide income and in the same manner as U.S. citizens.
- Resident aliens are required to file Form 1040, 1040-EZ, or 1040A if total worldwide income equals or exceeds the filing amounts published annually in the instructions to IRS Form 1040.

D. Treaty-based Income Tax Considerations

- Workers claiming tax treaty benefits are required to file a tax return and Form 8833, Treaty-Based Return Disclosure, even if no tax is due on the tax return.

Form 8833: <http://www.irs.gov/pub/irs-pdf/f8833.pdf>

E. Employer's Responsibility for H-2A Worker's Failure to file Income Tax Return

- It is the H-2A worker's responsibility to file a Federal Income Tax Return if required. It is not the employer's responsibility to ensure the worker files his/her return.
- The employer may provide information to H-2A workers about where to find information about filing, however, the employer should not fill out forms or provide substantive tax advice.

F. Implications for H-2A Worker's Failure to file a U.S. Income Tax Return

- Most U.S. consulates abroad, including the consulates in Mexico, do not require tax return documentation before issuing a non-immigrant visa and we have not heard reports of H-2A visas being denied or delayed for failure to file a tax return. However, consulate requirements change frequently and consulates may require additional information from applicants. H-2A workers should be encouraged to timely file their tax returns to avoid future problems.