

## What Wineries and Vineyards Should Know About Employment of Foreign Nationals

By Anna Putintseva, Esq.

### ***Seasonal Workers***

The U.S. wine industry is facing an imminent shortage of labor, particularly during harvest season. Throughout the United States, such work is mostly done by foreign workers. The H-2A visa program is commonly utilized by wineries to fill employment gaps, by hiring temporary, seasonal workers. H-2A visas are available only to eligible nationals from the countries designated by the Department of Homeland Security.

For a prospective foreign worker to qualify under the H-2A non-immigrant classification, the petitioning employer must satisfy all of the following conditions:

- offer a job that is of a temporary or seasonal nature;
- demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work;
- show that the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers; and
- submit a valid temporary labor certification from the U.S. Department of Labor with the H-2A petition.

With respect to each covered worker, H-2A employers must guarantee employment payment for at least 75% of the workdays in the contract period, provide housing at no cost to a worker who is not reasonably able to return to their residence within the same day, and provide either three meals per day, at no more than a DOL-specified cost, or furnish free and convenient cooking and kitchen facilities where workers can prepare their own meals. In addition, employers must not seek repayment of any kind from workers for any costs associated with obtaining the H-2A labor certification, including the employer's attorney, application, or recruitment costs.

### ***Professional and Highly Skilled Workers***

#### *H-1B Program*

Oftentimes, wineries or vineyards seek to hire a foreign worker for a high-skilled, professional position, such as a winemaker, director of viticulture, farm manager, agricultural director, etc. pursuant to the H-1B visa program. In order to sponsor a foreign national for an H-1B visa, the employer must demonstrate that:

- the job is a specialty occupation (i.e., one that normally requires an employee holding at least a U.S. bachelor's degree or its foreign equivalent);
- the foreign employee holds at least a bachelor's degree or its equivalent in a field related to the position (e.g., enology, viticulture, wine business, etc.); and
- the employer obtained the certified labor condition application (the "LCA") from the U.S. Department of Labor, in which the employer represented, in particular, that it will pay the foreign employee the greater of either the actual or the prevailing wage.

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With a statutory annual limit of 65,000 visa numbers available for new hires, and 20,000 additional visa numbers for advanced degree professionals who graduated from a U.S. university, demand for H-1B visas has historically exceeded the supply.

Beginning with fiscal year 2021, the USCIS will implement a new H-1B filing procedure. In particular, employers seeking to file an H-1B cap subject petition will be required to complete an online registration for each foreign worker. Petitioners selected in a computerized lottery will be afforded at least 90 days from the date of the selection notification to prepare and submit their H-1B petitions.

Initial H-1B petitions may be approved for up to three years, with subsequent extensions for up to another three years. Typically, the H-1B worker's total period of admission may not exceed six years, with exceptions available to some H-1B holders, including beneficiaries of pending labor certification applications or employment-based immigrant petitions.

If the prospective employee was previously counted against the cap (i.e., if another employer already filed an H-1B petition for such employee and it was approved), the winery may be able to proceed with the filing of the full petition for such employee, avoiding the requirement to submit an online registration and participate in a lottery. The employee is not subject to the cap if he/she:

- currently holds an H-1B status with another employer, was previously counted against the cap, and is seeking an extension with the same or a new employer; and
- held an H-1B status any time within the preceding six years that was counted against the cap and has not left the U.S. for a period of one year or more.

### *Other Visa Options*

Because of the limited supply of the H-1B visas, wineries and vineyards that file new H-1B petitions for prospective employees should consider alternative options and assess the prospective employee's eligibility for other visa classifications providing work authorization.



### Employee's Nationality

Canadians and Mexicans may qualify for **TN visas** if:

- the job offered is on the NAFTA<sup>1</sup> list of occupations; and
- the employee has the required education or credentials.

Employees from Chile and Singapore may qualify for an **H-1B1** visa and Australians may qualify for an **E-3** visa if:

- the job offered requires at least a bachelor's degree in a related field; and
- the employee has the required education.

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### Employer's Nationality

If the winery or vineyard is owned by at least 50% of nationals of a country with which the United States has a bilateral investment treaty, an employee may be eligible for an **E-1** or **E-2** status if:

- the employee is of the same nationality;
- the winery or vineyard engages in substantial trade with the country of the employer and employee's nationality (E-1) or is the beneficiary of substantial investment by investors from the country of nationality (or the employee is seeking to direct a company in which he has made a substantial investment) (E-2); and
- the U.S. job is executive or supervisory, or the employee possesses essential skills.

### Employee's Qualifications

An employee may be eligible for an **O-1** status if he or she can demonstrate extraordinary ability relating to the winery industry and seeks temporary employment in the United States in the area of extraordinary ability. Such employee would be required to provide evidence of at least three (3) of the following:

- receipt of nationally or internationally recognized prizes or awards for excellence in the wine industry;
- membership in wine associations or organizations which require outstanding achievements, as judged by recognized national or international experts in the field;
- published material in professional or major trade publications, newspapers or other major media about the employee and the employee's work in the wine industry;
- original scientific, scholarly, or business-related contributions of major significance in the wine industry;
- authorship of scholarly articles in professional journals or other major media in the wine industry;
- a high salary or other remuneration for services as evidenced by contracts or other reliable evidence;
- participation on a panel, or individually, as a judge of the work of others in the wine industry;
- employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation in the wine industry.



### Intracompany Transferee

An employee may be eligible for an **L-1** nonimmigrant visa status if such employee:

- worked abroad for at least one continuous year within the past three years as an executive or manager or in a position requiring specialized knowledge, for a parent, affiliate, subsidiary or branch office of the winery or vineyard; and
- is offered a position in the winery or vineyard as an executive or manager or in a position requiring specialized knowledge.

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### Trainee or Intern

A winery may offer training or internship to a college graduate or a current student studying winemaking, and the foreign national may be eligible a **J-1** exchange visitor status as a trainee or intern.

- **J-1 Trainee:**

- ◊ must be between 20 and 35 years of age;
- ◊ must have either a degree or professional certificate from a foreign post-secondary educational institution and at least one year of related work experience outside the U.S. or five years of work experience outside the U.S.; and
- ◊ must be sponsored by a qualified organization to engage in a training program in the U.S. for the winery or vineyard.

- **J-1 Intern:**

- ◊ must be between 18 and 25 years of age;
- ◊ must be currently enrolled in and pursuing a degree at a certified post-secondary academic institution outside of the U.S. or have graduated from one less than 12 months before the start date of the J-1 program; and
- ◊ must be sponsored by a qualified organization to engage in internship in the U.S. for the winery or vineyard.

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Information contained in this article is for general guidance only. It does not cover all the legal issues pertaining to various visa types. Every nonimmigrant visa has unique requirements and restrictions, and you should always consult with an immigration attorney about your specific question or situation. We can help you develop the best hiring strategy, based on the employee's and employer's qualifications, cost of immigration sponsorship, visa flexibility and suitability in light of the employer's or employee's future goals.



Should you seek to hire foreign workers for your winery or vineyard, please contact Bousquet Holstein Immigration Attorney, **Anna Putintseva**, to review your specific situation, address immigration issues, and discuss your legal needs.

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