

Pacific NW Reforestation Council

H-2B visas and
Business Risk
Management



PRESENTED BY
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H-2B PROGRAM

- The basics
- Key requirements
- Inherent risks
- Recent changes
- Update: I-9 and workplace enforcement

THE PROBLEM

- Oregon unemployment hits another record low, *Oregonian*, September 19, 2018
- Drop in U.S. jobless claims points to labor market strength, *Reuters*, August 23, 2018
- As Washington growers struggle with labor shortage, vote in Congress on farmworker bill remains elusive, *Seattle Times*, August 6, 2018

THE PROBLEM

- Forest Resources Association: because “work is seasonal, and because tree-planting crews are itinerant, without a connection to community, domestic workers are not interested in these jobs.”

<http://forestresources.org/policy-priorities/h2c-ag-act>



H-2B

THE SOLUTION?

Review of Positions Certified FY 2018 YTD (% of total certified FY 2018 YTD)			
Top 10 Occupations (based on SOC Codes)	Landscaping and Groundskeeping Workers	64,528	50.9%
	Maids and Housekeeping Cleaners	7,903	6.2%
	Amusement and Recreation Attendants	7,031	5.5%
	Forest and Conservation Workers	6,465	5.1%
	Meat, Poultry, and Fish Cutters and Trimmers	4,709	3.7%
	Construction Laborers	3,535	2.8%
	Waiters and Waitresses	2,152	1.7%
	Cooks, Restaurant	1,880	1.5%
	Counter Attendants, Cafeteria, Food Concession	1,868	1.5%
	Laborers and Freight, Stock, and Material Movers	1,790	1.4%

Source: U.S. Department of Labor, Office of Foreign Labor Certification

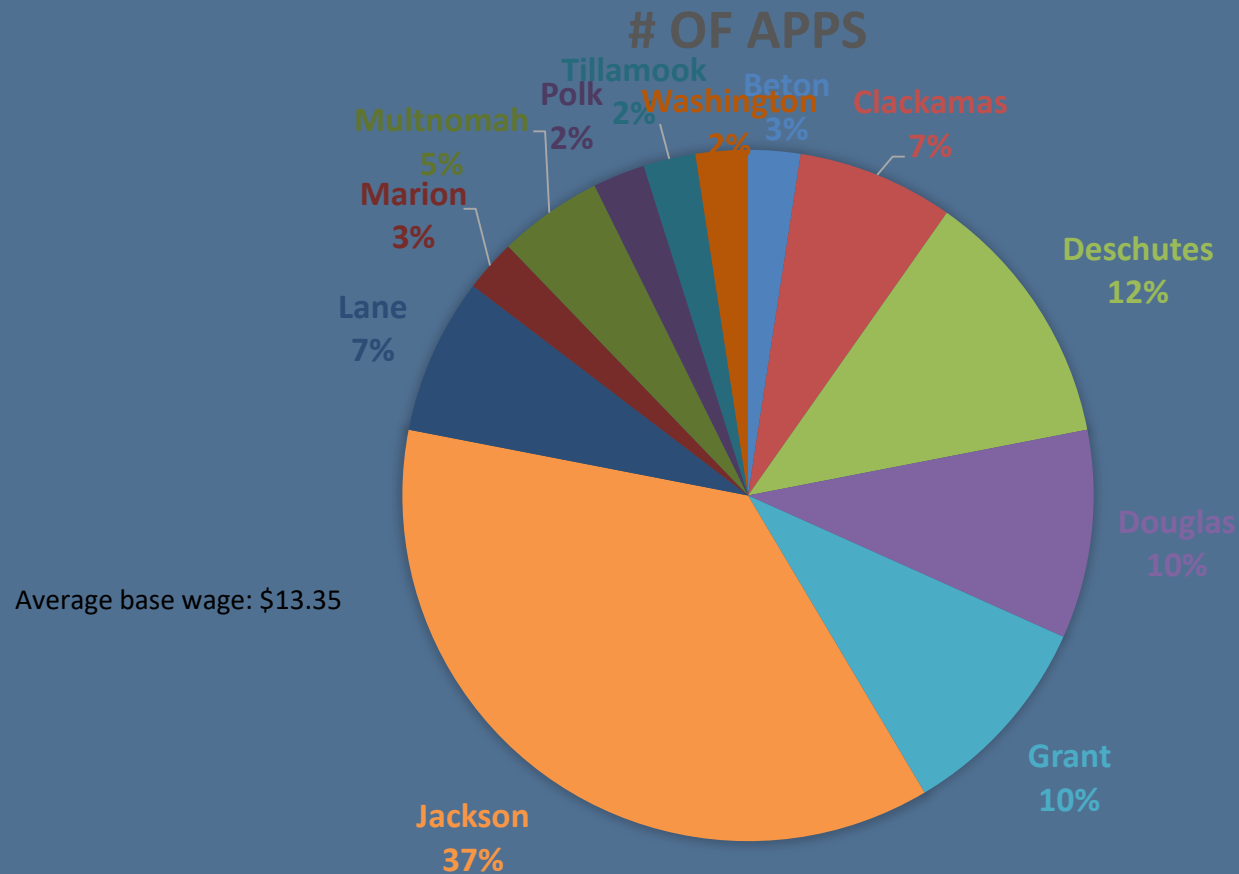
THE SOLUTION?

- In FY2018:
 - 50% of all Labor Certification Applications filed were for Texas alone
 - 14% were granted to employers in Texas
 - 51.3% filed/50.9% issued were for landscaping positions
 - For Forest and Conservation: 4.8% filed/5.1% issued (down considerably from three years ago)

THE SOLUTION?

- Q3 2018 (April-June, 2018)
 - Oregon:
 - 63 LC applications (45/71% for forest workers)
 - 2,045 workers (1,724/84% for forest workers)
 - Washington
 - 93 LC applications (11/12% for forest workers)
 - 2,856 workers (363/12% for forest workers)
- FY2017
 - Oregon:
 - 66 LC applications (45/68% for forest workers)
 - 2,952 workers (2,111/71% for forest workers)
 - Washington
 - 114 LC applications (16/14% for forest workers)
 - 3,818 workers (566/14% for forest workers)

H-2B FOREST WORKER APPLICATIONS FILED IN OREGON Q3FY18



H-2B APPLICATIONS FILED IN OREGON Q3FY18

- Half of the labor certifications filed in Oregon were denied or only partially certified
- Some of those certified were not certified in time





H-2B PROGRAM: THE BASICS

- Temporary non-immigrant visa (guest worker) program
- Available for non-agricultural jobs
- Job opportunity must be temporary in nature
- Only available to citizens of designated countries
- Employer must obtain certified Labor Certification
- Timing is critical: limited number of visas and they must be available
- Employer must offer AND PAY the *required* wage
- Job must be clearly and carefully defined

MUST BE TEMPORARY

- Nine months or less
- Must be:
 - Seasonal need (recurring annually, documented as tied to a specific season of the year)
 - Peak load (tied to peaks in your business, not necessarily a season)
 - Intermittent (occasional, for short periods)
 - One-time occurrence (contract for a specific project)
- Depends on employer's need, not contract

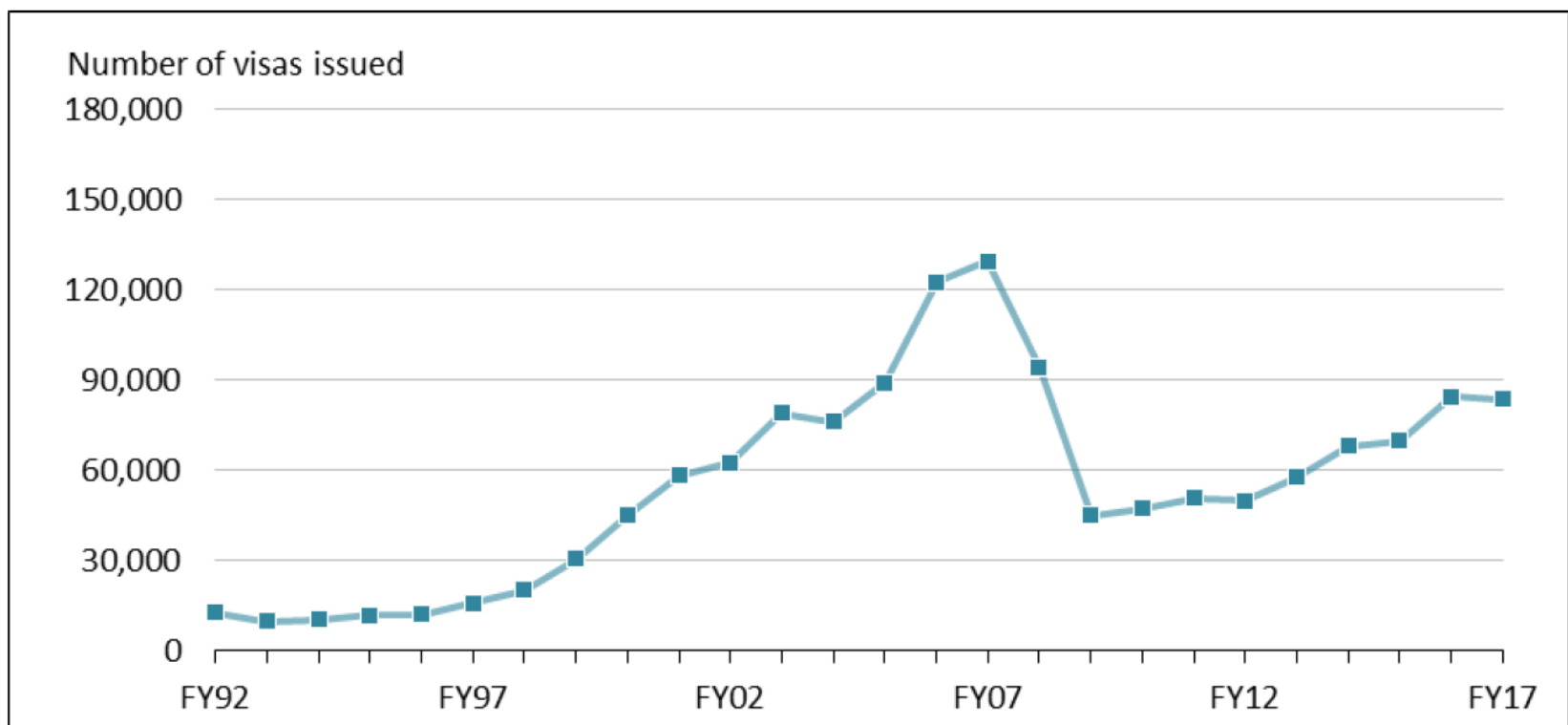
MUST OBTAIN LABOR CERTIFICATION

- Designed to protect U.S. workers
- Must not adversely affect wages or working conditions of similarly-employed U.S. workers
- There must be NO qualified and willing U.S. workers available for the job
- No recent or future layoffs
- Contact former employees
- Disclosure to current employees

TIMING IS CRITICAL

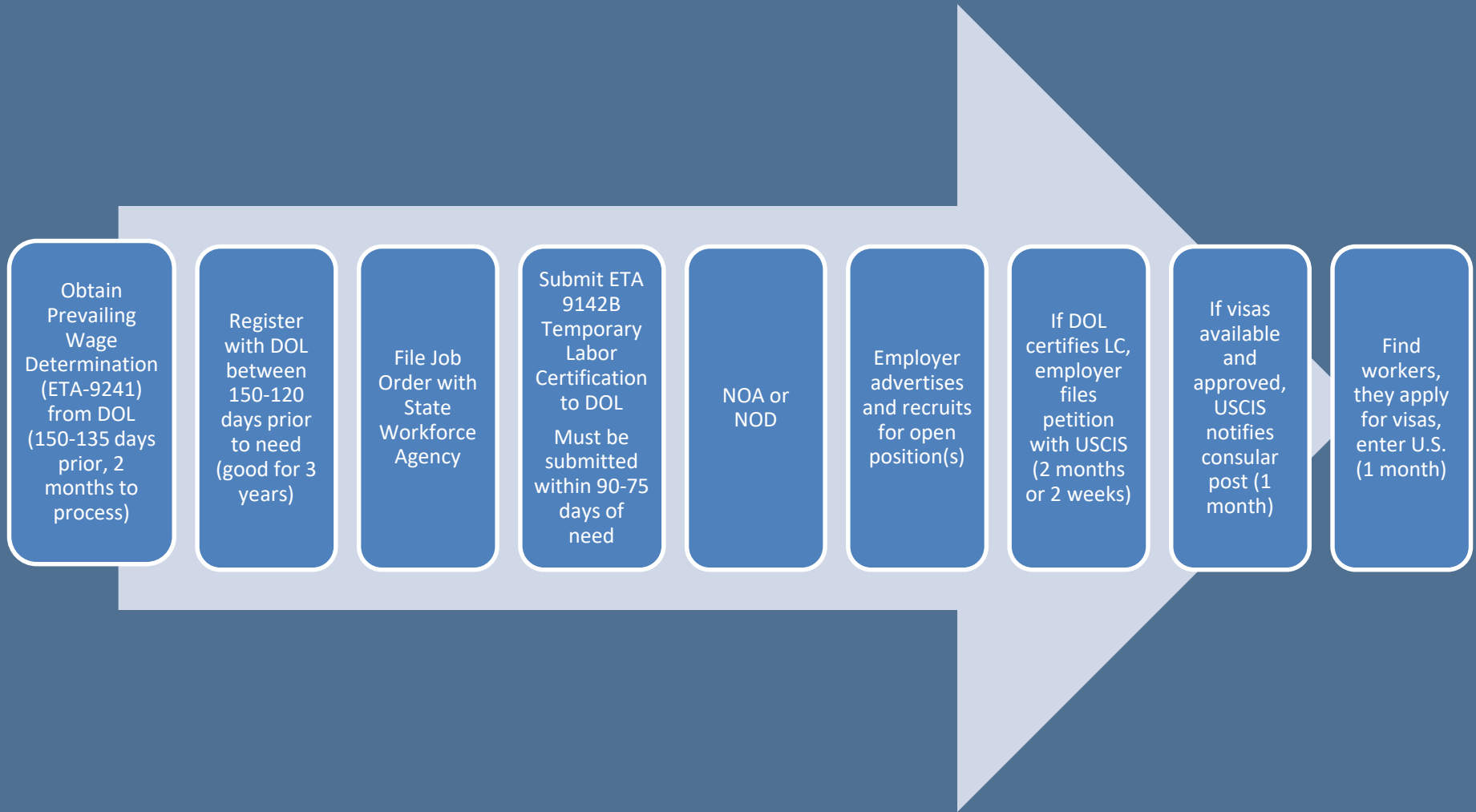
- 66,000 H-2B visas available per year:
 - 33,000 for October 1 - March 31 (unused carried over)
 - 33,000 for April 1 - September 30
- Demand greatly (and increasingly) exceeds supply
- Accommodations made for FY2016-FY2018
- Not counted: returning w/in same FY, extension applications, fish roe

H-2B DEMAND

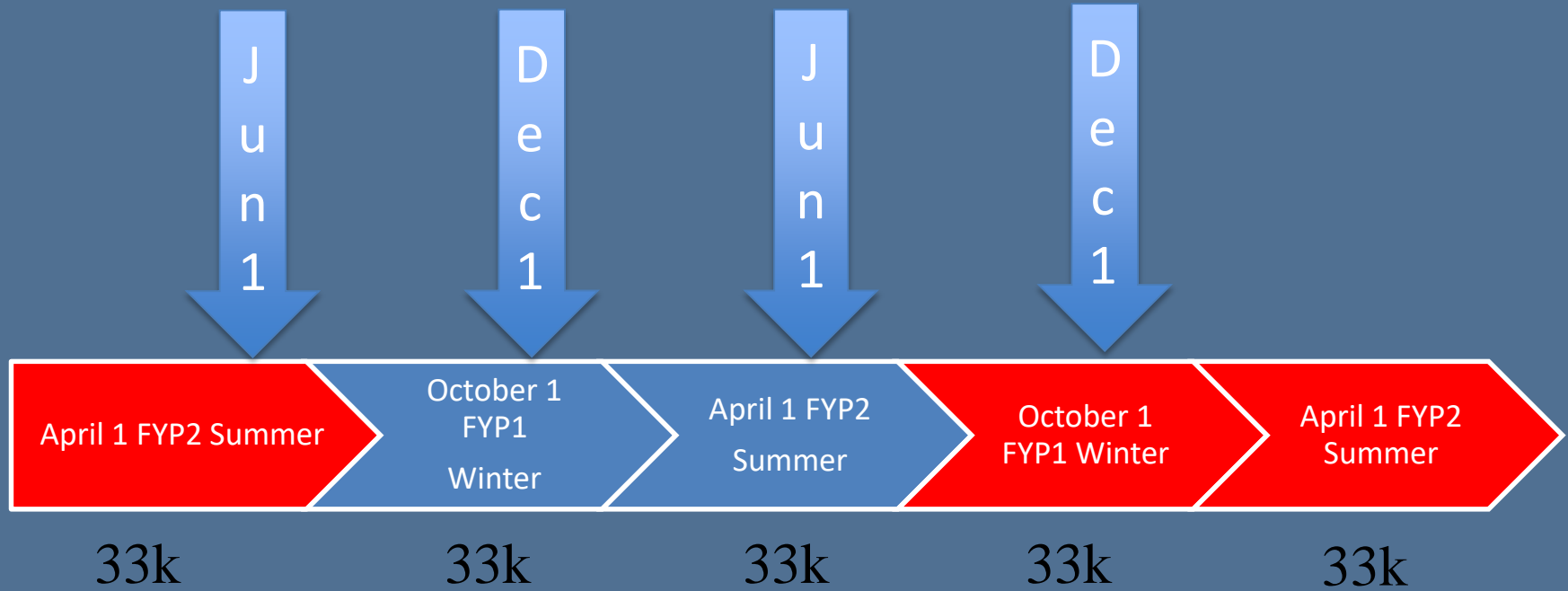


Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.

H-2B APPLICATION PROCESS



H-2B ANNUAL APPLICATION CYCLE



Start Date	Oct 1	Nov 1	Dec 1	Jan 1	Feb 1	Mar 1	Apr 1	May 1	June 1	July 1	Aug 1	Sept 1
File LC (90 -75 days)	Jul 1	Aug 1	Sep 1	Oct 1	Nov 1	Dec 1	Jan 1	Feb 1	Mar 1	Apr 1	May 1	Jun 1
File I-129	Aug 15	Sep 15	Oct 15	Nov 15	Dec 15	Jan 15	Feb 15	Mar 15	Apr 15	May 15	Jun 15	Jul 15
Visa	Sep 15	Oct 15	Nov 15	Dec 15	Jan 15	Feb 15	Mar 15	Apr 15	May 15	Jun 15	Jul 15	Aug 15

H-2B FY 2018/2 SUMMMER APPLICATION CYCLE

12/01/17
I-129 can
file for
4/1/18

01/01/18
Can file LC for
4/1/18
4.4k/97K
filed/84Kcert
versus
1.5k/26K in
2017

01/18/2018
DOL
announces
new policy
withholding
until
2/20/2018

02/21/18
First I-
129 filed
2,770/47K

02/27/2018
Cut off +
lottery

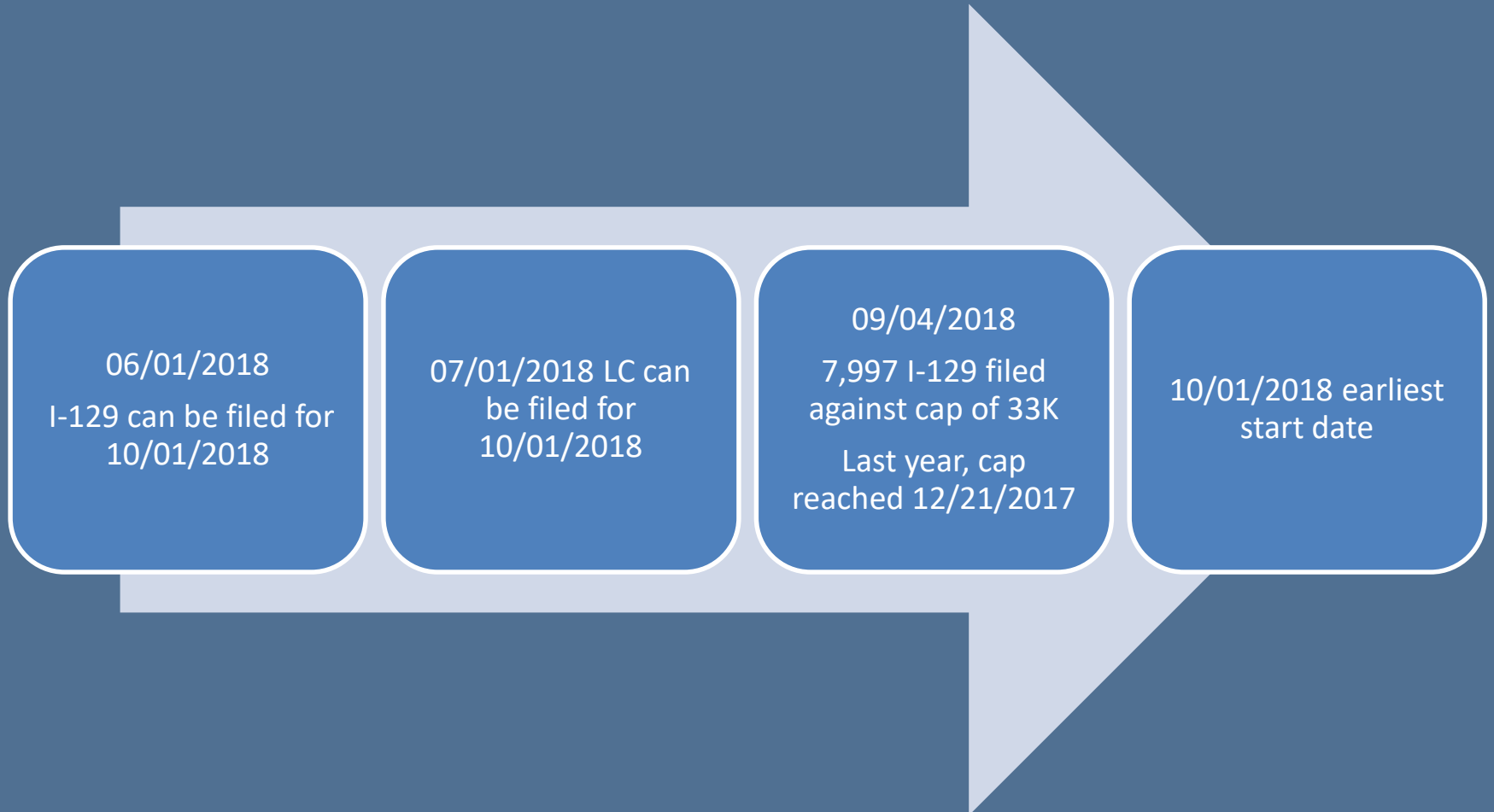
03/23/18
Exec Order

04/01/2018
Start date

05/31/2018
15K more

06/06/18
Cap again

FY2019 PROGRAM USE



BOTTOM LINE REGARDING TIMING

- Timing is everything (winter is better)
- Work with an experienced lawyer or trusted partner
- Register early
- File PWR, job order, LC, I-129 ASAP
- Have trusted partners for recruiting abroad
- Avoid pitfalls in LC application process

THE REQUIRED WAGE

- Higher of either:
 - Actual wage paid to all similarly-situated U.S. workers, OR
 - Prevailing wage as determined by DOL
 - Geographic specific
 - May be higher than actual
- Guaranteed/free and clear

THE REQUIRED WAGE

Foreign Labor Certification Data Center Online Wage Library

www.flcdatacenter.com



Wage Library

Quick Search
Search Wizard

Case Disclosure Data Archive

H1B Data
H2A Data
H2B Data
Perm Data

Also available: File Archive

Skill Level
Explanation

SVP Explanation

FLC Wage Data
updated
July 1, 2018

Job Zones updated

FLC Wage Results [New Quick Search](#) [New Search Wizard](#)

You selected the All Industries database for 7/2018 - 6/2019.

Your search returned the following: [Print Format](#)

Area Code: 32780
Area Title: Medford, OR MSA
OES/SOC Code: 45-4011
OES/SOC Title: Forest and Conservation Workers
GeoLevel: 2
Level 1 Wage: \$11.48 hour - \$23,878 year
Level 2 Wage: \$12.72 hour - \$26,458 year
Level 3 Wage: \$13.96 hour - \$29,037 year
Level 4 Wage: \$15.20 hour - \$31,616 year
Mean Wage (H-2B): \$13.96 hour - \$29,037 year

This wage applies to the following O*Net occupations:

45-4011.00 Forest and Conservation Workers

Under supervision, perform manual labor necessary to develop, maintain, or protect areas such as forests, forested areas, woodlands, wetlands, and rangelands through such activities as raising and transporting seedlings; combating insects, pests, and diseases harmful to plant life; and building structures to control water, erosion, and leaching of soil. Includes forester aides, seedling pullers, and tree planters.

O*Net™ JobZone: 3

Education & Training Code: No Level Set

JOB MUST BE CLEARLY DEFINED

- Exact location(s)
- If itinerant, must include language that optional housing offered at no cost to worker
- Requirements, including “special requirements”
- Type and basis for need
- # required
- Hours
- Rate of pay including deductions, range, overtime, frequency
- In/outbound transportation, if applicable
- Tools

RECRUITMENT

- SWA posting
- Newspaper advertisement on two separate days, including one Sunday, in largest newspaper in area of employment
- Contact and solicit return of former U.S. workers within past year (if any)
- Notify union/bargaining rep (if any)
- Internal posting, 2 locations, 15 days

OTHER REQUIREMENTS

- Must provide all tools, supplies, and equipment needed without charge
- Guarantee offer of employment for a total number of work hours equal to $\frac{3}{4}$ of the workdays in every 12-week period (or 6-week period if less than 120 days)
- No collection of payment from agent or recruiter
- No payment to administer the program
- Can't lay off U.S. worker
- Must reimburse full cost of visa expenses
- Must cover expense of inbound travel who complete 50% of job order and outbound travel who work until the end of the job or are dismissed early

INHERENT RISKS

- Timing, especially at USCIS
- Increasing demand, static numbers
- Politics
- Can't discriminate against U.S. workers or prefer H-2B (DOJ MOU)
- Fraud and abuse is an enforcement priority
- Can't amend
- Recruiters/agents/fees
- Must notify DHS/DOL within 2 days if worker leaves

RECENT CHANGES

- H2C
- New 9142 coming
- Sunset of returning worker exception
- Politics
- I-9 enforcement

THANK YOU

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Shareholder

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“Experienced, focused, creative problem solver.”

Bradley Maier is an attorney with the Northwest law firm of Schwabe, Williamson & Wyatt where he focuses on business immigration and customs law and compliance. He assists foreign and domestic companies with a wide variety of immigration matters to acquire foreign talent and key personnel. He also advises companies regarding I-9 compliance and U.S. customs. A native Oregonian, he attended Lewis & Clark Law School, Reed College and Portland State University. Before law school, Mr. Maier directed immigration counseling programs for two local non-profits as an Accredited Representative. His professional accomplishments have been recognized by Chambers USA, Oregon Super Lawyers, and the Daily Journal of Commerce. Mr. Maier is an active member of the American Immigration Lawyers Association (AILA) and served as Chapter Chair of the Oregon Chapter between 2010 and 2012.

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