

**QUESTIONS AND ANSWERS:**  
**H-2A WORKERS, TAXES, and the**  
**AFFORDABLE CARE ACT**

**Q: Are H-2A Workers Eligible to Enroll in Coverage and Receive Subsidies Under the Affordable Care Act?**

A: Yes. Because they are in the United States lawfully on non-immigrant visas, H-2A workers are eligible to purchase an insurance policy through the federal Marketplace and to receive a tax credit to help pay for that insurance coverage. If an H-2A worker desires to buy health insurance in the federal marketplace and wants to apply for the federal tax credit, he may do so, as long as he meets the income eligibility requirements.

**Q: Does the Affordable Care Act Require H-2A Workers to Enroll in Health Coverage?**

A: It depends. H-2A workers are required to enroll in health insurance under the ACA only if they are required to pay taxes in the United States. If they a) earn enough money to be required to file income taxes, *and* b) meet the definition of a “resident alien” under the tax code, then they are required to pay taxes *and* required to enroll in health coverage unless they meet one of the other exceptions.

The definition of “resident alien” is complicated, and can be found in IRS Publication 851.<sup>1</sup> Since H-2A workers are not legal permanent residents, they would have to meet the “substantial presence test” regarding how many days they have been here in the U.S. in order to be considered “resident aliens.” Legal Aid of North Carolina-Farmworker Unit provides this helpful formula to determine if an H-2A worker (or anyone on a temporary visa) is a resident alien or not:

NUMBER OF DAYS YOU HAVE BEEN IN THE U.S.		
THE CURRENT YEAR (YEAR YOU ARE PAYING TAXES ON):	Number of days =	
THE PREVIOUS YEAR:	_____ / 3 Number of days divided by 3 =	
THE YEAR BEFORE THE PREVIOUS YEAR:	_____ / 6 Number of days divided by 6 =	
	TOTAL (add the above 3 rows) =	

<sup>^^</sup> *If your total is 183 days or more based on the above chart, you are considered a “resident alien” for tax purposes. You must file taxes, and you must enroll in health coverage unless you meet one of the exemptions.*

**Q: Does an H-2A worker need a social security number to enroll in a plan under the ACA and to pay taxes?**

A: An H-2A worker does not have to have a social security number to *initially* enroll in the Affordable Care Act and apply for health insurance—he can use his I-94 arrival/departure number as well as other identifying information from his H-2A visa including his passport number, country of passport issuance, and the expiration date on his visa. However, once it is time to file his taxes in the subsequent year, if he is eligible for an SSN, he must use an SSN to file those taxes.<sup>2</sup> Since he must file taxes in order to reconcile the ACA tax credit, he does need to obtain an SSN before tax filing time.

<sup>1</sup> IRS Publication 851, “Resident and Nonresident Aliens,” available at: <http://www.irs.gov/taxtopics/tc851.html>

<sup>2</sup> See IRS Publication 5144, “Federal Income Tax and FICA Withholding for Foreign Workers with an H-2A Visa,” available at: <http://www.irs.gov/pub/irs-pdf/p5144.pdf>. See also Instructions for Form W-7, available at: <http://www.irs.gov/pub/irs-pdf/iw7.pdf> (indicating that if a taxpayer is eligible for a social security number, he should use an SSN, and not an ITIN, to file taxes).

## **Q: What tax filing status should an H-2A worker use if he wishes to get tax credits under the ACA?**

A: The most likely filing status for a **married H-2A worker** would be “married filing jointly” if he wishes to claim the tax credit for health insurance coverage under the ACA. The National Immigration Law Center states: “*Married couples cannot get tax credits through the health insurance marketplace... unless they file taxes jointly with their spouses. Exceptions apply to survivors of domestic violence and people eligible to file as a “head of household.”*”

“A person living in the U.S. who has a spouse living abroad can file as “married filing jointly” if the spouse residing in the home country chooses to be treated as a resident alien for tax purposes.<sup>3</sup> If so, both spouses will be treated as residents for federal income tax purposes for the entire tax year. If you elect to do this, you and your spouse will be taxed on your worldwide income, and you will not be able to claim to be a nonresident of the U.S. under any tax treaty. Your spouse will need to apply for an ITIN, if she or he does not already have one (and does not have an SSN), and submit the ITIN application with the tax return.”<sup>4</sup>

An H-2A worker who is legally married *and wants to claim the ACA tax credit* cannot file as “Head of Household” *unless*: he maintains a home where his qualifying children live for more than half the year, he can claim a deduction for those children, and his spouse did not reside in the home with the qualifying children during the last six months of the year (i.e., spouses must be actually separated).<sup>5</sup>

A **single H-2A worker or one who is not legally married** may claim an ACA tax credit using either the “Single” tax filing status, or the “Head of Household” designation if he maintains a home in which his qualifying children (or other dependents) live with him for more than half the year. His presence in the U.S. working on an H-2A visa is likely to be considered a “temporary absence” from his household to allow him to file as “Head of Household” if he is not married.<sup>6</sup>

Each H-2A worker should consult with an accountant, VITA tax clinic, or a reliable community-based organization for assistance in determining the correct filing status for himself and his family. H-2A workers should also make sure that the information that they put into the health insurance application regarding their family status matches what they put into their tax return.

## **Q: How does an H-2A Worker Obtain an ITIN Number for his Spouse and Children Who are Abroad?**

A: If a married H-2A worker wishes to enroll in health coverage and receive the tax credit under the ACA, he must obtain an Individual Taxpayer Identification Number (ITIN) for his spouse and children abroad. Unfortunately, the process can be cumbersome. The worker applying for ITINs for his family members must file IRS Form W-7 with his tax return. In addition to filing the form W-7, “[m]ost applications must now include original documents. Applications for...nonresident aliens for the purpose of claiming tax treaty benefits may submit notarized or apostilled copies of required documents. If you do not submit a passport document, you must provide a combination of documents (at least two or more) that are current and that (1) verify your identity (that is, contain your name and a photograph), and (2) support your claim of foreign status.” The Mexican consulate can assist all Mexican nationals in obtaining the right documentation for an ITIN application. H-2A workers of other nationalities should check with their consulates to see if assistance can be provided.

---

<sup>3</sup> See IRS Tax Publication 519 for more information about how to make this election, available at: [http://www.irs.gov/publications/p519/ch01.html#en\\_US\\_2014\\_publink1000222193](http://www.irs.gov/publications/p519/ch01.html#en_US_2014_publink1000222193)

<sup>4</sup> National Immigration Law Center, “Frequently Asked Questions: Immigrants, Taxes, and the Affordable Care Act,” November 2014, available at: <http://www.nilc.org/ACAfacts.html>.

<sup>5</sup> See 26 USC 36B(c)(1)(C), referring to 26 USC 7703. See also *Diaz v. Comm’r, T.C. Memo. 2004-145* (2004) (explaining that the exception that allows married taxpayers with “nonresident spouses” to claim “Head of Household” status does not apply when taxpayers are seeking tax credits that define “marriage” based on 26 USC §7703.) Married H-2A workers whose spouses are nonresidents, and who are *not* claiming the ACA tax credit, may be able to file using Head of Household status. 26 USC §2(b)(2)(B).

<sup>6</sup> See 26 USC §2(b) for “Head of Household” definition. For the “temporary absence” regulation, see 26 CFR 1.2-2(c).

“In addition to a passport, examples of acceptable documentation include: national identification card (showing photo, name, current address, date of birth and expiration date); civil birth certificate; foreign driver's license; or visa. A complete list of acceptable documentation can be found in the Form W-7 Instructions (PDF).

“An ITIN is also only available for a dependent if the dependent is a resident of the United States, Mexico, Canada, South Korea or India. “If the dependent is a minor, the documentation must establish the relationship between the dependent and the representative signing the application on the dependent's behalf. Such documentation could include a birth certificate, adoption papers, or other court-appointed papers showing legal guardianship.”<sup>7</sup>

### **Q: Can an H-2A Worker's Family Members Abroad Obtain Coverage under the ACA?**

A: No. Family members abroad cannot obtain health coverage under the ACA. However, if they meet the IRS definition of ‘dependent’ then the H-2A worker can count them in his family size in his health insurance application, which may increase the size of a tax credit he may receive to help him afford his own health coverage. Only individuals living abroad in certain countries (including Mexico) can be claimed dependents on a tax return.

### **Q: Does an H-2A Worker Qualify for Any Exemptions from the Requirement to Get Health Coverage?**

A: Maybe. Several exemptions to the requirement to purchase insurance may apply:

- If an H-2A worker does not earn enough in wages to have to file taxes at all, he is exempt.
- If an H-2A worker is only here in the U.S. and uninsured for less than three months, he may be eligible for the “short coverage gap” exemption (or he may not be a “resident alien” and thus not have to file taxes at all).<sup>8</sup>
- If the lowest cost “Bronze” plan available to him would cost more than 8% of his household income, he is also exempt. Those H-2A workers who for some reason cannot file “married filing jointly” and must file “married filing separately” should investigate whether they are eligible for this “affordability” exemption to the ACA.

In the circumstances listed above, the worker should apply for an exemption using **IRS Form 8965**. Certain other exemptions may apply, including one for “hardship.” A worker who plans to apply for the “hardship” exemption needs to fill out an application for the hardship exemption through the Department of Health and Human Services, not on his tax return.<sup>9</sup> HHS will provide an exemption certificate number to fill in on the worker's tax return.

### **Q: Where Can I Find More Information about H-2A Workers, Taxes, and the ACA?**

- Legal Aid of North Carolina – Farmworker Unit has lots of practical tax-filing tips and information for H-2A workers, in Spanish, found in their H-2A Booklet, available [here](#).
- Several IRS Publications contain relevant information:
  - Publication 5144: Federal Income Tax and FICA Withholding for Foreign Workers with an H-2A Visa
  - Publication 851: Resident and Nonresident Aliens
  - Publication 857: Individual Taxpayer Identification Numbers (ITIN) – Form W-7
  - Publication 519: U.S. Tax Guide for Aliens
- The National Immigration Law Center: “Frequently Asked Questions: Immigrants, Taxes, and the Affordable Care Act,” November 2014, found [here](#).
- Farmworker Justice: “The Affordable Care Act and H-2A Workers: Frequently Asked Questions,” and “The Affordable Care Act and You: A Guide for H-2A Workers,” available [here](#).
- North Carolina Justice Center: “Immigrants in North Carolina and the Affordable Care Act,” available [here](#).

<sup>7</sup> IRS Publication 857, “Individual Taxpayer Identification Number (ITIN)- Form W-7,” available at: <http://www.irs.gov/taxtopics/tc857.html>

<sup>8</sup> If the worker does not meet the definition of a “resident alien,” then he must file taxes using an 1040-NR (non-resident) tax form.

<sup>9</sup> The hardship exemption application can be found online at <https://marketplace.cms.gov/applications-and-forms/hardship-exemption.pdf>.