

Are H-2 Workers Covered Under the Payroll Protection Program (PPP)?

Since the PPP was first announced, employers have been uncertain whether to include H-2A or H-2B workers in determining eligibility and payroll. AmericanHort and others have sought formal guidance from Treasury and SBA on this question. On April 26, the following guidance has been provided:

33. Question: Is there existing guidance to help PPP applicants and lenders determine whether an individual employee's principal place of residence is in the United States?

Answer: *PPP applicants and lenders may consider IRS regulations (26 CFR § 1.121- 1(b)(2)) when determining whether an individual employee's principal place of residence is in the United States.*

The IRS tax code reference in the answer above reads as follows:

26 CFR § 1.121- 1(b)(2) Principal residence. In the case of a taxpayer using more than one property as a residence, whether property is used by the taxpayer as the taxpayer's principal residence depends upon all the facts and circumstances. If a taxpayer alternates between 2 properties, using each as a residence for successive periods of time, the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence. In addition to the taxpayer's use of the property, relevant factors in determining a taxpayer's principal residence, include, but are not limited to -

- (i) The taxpayer's place of employment;
- (ii) The principal place of abode of the taxpayer's family members;
- (iii) The address listed on the taxpayer's federal and state tax returns, driver's license, automobile registration, and voter registration card;
- (iv) The taxpayer's mailing address for bills and correspondence;
- (v) The location of the taxpayer's banks; and
- (vi) The location of religious organizations and recreational clubs with which the taxpayer is affiliated.

Analysis

We believe that the Treasury/SBA guidance provided in FAQ #33 essentially affirms the ability for an employer of H-2A or H-2B workers who are in residence in the U.S. for more than 6 months (more than 180 days) to include such workers for the purpose of determining PPP eligibility and payroll. Please be aware that this guidance does not constitute a "blanket inclusion" of such workers, but rather, should be considered on a worker-by-worker basis. Employers are encouraged to document multiple factors listed above in the regulation. For H-2A workers, documenting at least several of these factors may not be difficult, since housing is furnished by the employer, and the employer may have payroll records that would document if the employee has a bank in the U.S.

We interpret the guidance stating that PPP applicants and lenders **may consider** the referenced section of the tax code does not compel consideration; rather, it appears to leave the matter to the applicant's discretion. Finally, this general interpretation is not intended to substitute for competent legal/tax advice specific to your circumstances.

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