



## **The Bush Administration's Shameful Legacy for Farmworkers: Midnight Regulations on the H-2A Guestworker Program**

Shortly before leaving office, the Bush Administration finalized midnight regulation changes to the H-2A agricultural guestworker program. The changes are devastating for farmworkers and contravene our nation's most basic labor and immigration policy concepts. The changes went into effect on January 17, 2009.

By statute, the H-2A guestworker program permits agricultural employers to hire temporary workers from abroad only in circumstances of a verifiable labor shortage. To receive permission to hire foreign workers, employers must first prove that there is an inadequate supply of domestic labor and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers. These safeguards are necessary to keep U.S. workers' wages from sliding downward, and to protect foreign workers, who, out of desperation, may be willing to accept substandard wages and working conditions. U.S. workers cannot effectively compete against foreign workers willing to work for any wage, under any conditions. Over the years, a series of modest protections have been built into the H-2A guestworker program to protect the domestic labor force from unfair competition and to protect vulnerable foreign workers from exploitation. Now, the Bush Administration's midnight regulations will reverse more than 60 years of minimal protections for farmworkers under guestworker programs.

The final rules issued by the Department of Labor contain hundreds of pages of regulatory changes and ineffectual explanations for DOL's actions. The changes are pernicious, and cannot be justified by current market conditions or the needs of agricultural growers. Following are examples of some of the worst provisions and their ramifications:

### **New H-2A Regulations Reduce Government Oversight and Enforcement Despite Widespread Abuse in the Program.**

- The new rules violate the H-2A statute by eliminating labor certification, which is required by the statute, and replacing it with "attestation," a fundamentally different process. The H-2A statute requires employers seeking permission to use temporary foreign labor to obtain from DOL a "certification" that there is a shortage of U.S. workers and that the employer is offering competitive wages and working conditions. Previously, employers had to submit proof of compliance with the certification criteria, including the claim of a domestic labor shortage. DOL's role was one of active oversight and review of these requirements, including the scrutiny of job terms. For example, DOL would assess whether productivity standards were reasonable and legitimate, or had been applied as a device to deter U.S. workers from applying for work. Under the previous

law, DOL also had to work with employers to create a plan to recruit U.S. workers that was appropriate for the crop, geographic area, time of year, and other market conditions. This intervention by DOL in the employer application process was meant to prevent unfair competition and illegal working conditions, and was integral to the meaning of “labor certification.”

Under the new rules, employers submit no proof of compliance with program requirements, and DOL and state workforce agencies are not permitted any real scrutiny of applications. Instead, employers check off a few boxes on a standard form and promise to comply with the law. If the application is complete and filed on time, then DOL must approve it *even where* there is evidence outside of the application that suggests that program requirements have not been met (*e.g.* where U.S. workers who worked for the same employer in past seasons were not actually advised of the job.) Rather than the real certification process required by law, DOL’s oversight will be reduced to after-the-fact “audits” of a limited number of approved employers. This illegal elimination of government oversight of employer applications invites abuse. Workers’ rights in the H-2A program are already routinely violated -- greater enforcement is needed, not less.

- Minimal oversight of employer applications and reduced worker protections could result in a massive expansion of the guestworker program. There is no annual visa cap.
- The new rules allow DOL to overrule local state agencies that object to the terms and conditions of an employer’s job offer to U.S. workers because the terms are not consistent with local practices and would harm U.S. farmworkers. Ironically, the Bush Administration claimed to favor deregulation and state control yet allowed the federal government to act as a super human resources department, ignoring state agencies that are the real experts in local practices and the local job market and whose job it is to protect U.S. workers.

### **The New H-2A Regulations Slash Farmworker Wages, and Reduce and Eliminate Other Workers’ Benefits.**

- Despite the fact that farmworkers are among the lowest paid workers in our country, the new H-2A regulations drastically lower their wages. Under the previous law, DOL required H-2A employers to offer workers at least the average regional hourly wage for farmworkers as determined by the USDA Farm Labor Survey. Although this survey’s results were low because of the presence of a large number of undocumented workers, DOL decided to lower the wage rates even further by switching to the Bureau of Labor Statistics’ Occupational Employment Survey, which does not even survey farms, but surveys farm labor contractors, the lowest paying employers of farmworkers. DOL will now also allow employers to pay one of four “wage levels” —most employers will likely pay the lowest level, which is the average wage received by the lowest-paid one-third of farmworkers in a geographic area (*i.e.*, the 16th percentile). The only real floor is the state or federal minimum wage even though many farmworkers currently earn more.

- For the first time since the program's creation, U.S. workers could be paid less and receive fewer benefits than H-2A workers who are working for the same employer and doing the same job. Implausibly, DOL claims that this sort of intentional discrimination in wages and benefits does not harm U.S. workers.
- The H-2A program for decades has required employers to reimburse workers for their long distance travel costs to the place of employment upon completing the first half of the season, and then to pay their way back home if they complete the season. DOL now only requires employers to pay the costs of transportation for H-2A workers to and from the U.S. consulate or port of entry, even though workers often live far from these locations and are recruited where they live, not near these locations. This change will only drive foreign workers further into debt and make them more vulnerable to exploitation than they already are.
- Under the Federal Fair Labor Standards Act, employers are required to pay their workers minimum wages that have not been subjected to unlawful deductions. Although DOL did not notify the public that it intended to take any action on the issue, in the final rule Preamble, DOL harshly criticized the conclusion that has been reached by numerous courts that employers may not effectively reduce the minimum wages of their H-2A workers and other migrant workers by forcing them to bear their own transportation and visa costs. This statement contradicts previous guidance issued by DOL on the same subject and has already been cited by employers who are facing legal action for failing to pay their workers the minimum wage.
- The H-2A law requires that the housing provided to H-2A workers by a grower be inspected prior to DOL's approval of the grower's application for workers. DOL's new rules include two gaping loopholes. One creates an exception to the statutory requirement that housing must be inspected before certification can be made. The second will permit substitution of rental or public accommodations for certified housing in the event that housing becomes unavailable through no fault of the employer. This allows employers to claim that they face an emergency unavailability of housing and must put the farmworkers up in a decrepit former motel or substandard mobile homes.
- For the first time, H-2A workers could be charged for worker's compensation insurance. Under the new rules, state worker's compensation law is applied first, and the H-2A program requirement of free coverage only applies if the law of the given state does not mandate coverage. However, coverage under state law is not necessarily free, and the application of state law could result in H-2A workers bearing much of the cost of worker's compensation insurance, despite their meager wages. In fact, in its explanation of this policy change, DOL cites a commenter from the state of Washington who noted that under their state law, the worker could be required to pay 50 percent of the premium. DOL has also eliminated the requirement that employers submit proof of worker's compensation coverage with their applications. Instead, they can just attest that they have it.

**Despite Record Unemployment and Job Loss, the New H-2A Regulations Deny U.S. Workers Access to Needed Jobs by Reducing Growers' Obligations to Recruit and Hire U.S. Workers.**

- DOL has changed the recruitment rules so that employers claiming a labor shortage will not have to engage in meaningful recruitment of U.S. farmworkers and the state job service agencies will not be permitted to be effective in referring job applicants to H-2A employers. Further, DOL has eliminated the requirement that employers engage in what is known as “positive recruitment” in known and historic areas of farm labor supply if those areas have agricultural employers looking for farmworkers for comparable work. In other words, despite their claim to be free market supporters, the Administration’s officials are, by regulation, ending competition among employers.
- Further, DOL will allow H-2A employers to invest and engage in extensive recruitment efforts abroad without requiring the same kind and degree of recruitment in the United States. This allows employers to claim that they can’t find any U.S. workers while not making any real effort, and, at the same time, engaging in huge recruitment campaigns in Mexico, Guatemala, Thailand and other nations, in order to find cheap and exploitable guest labor.
- For years, the H-2A program has protected the rights of U.S. workers to H-2A jobs by giving them preference to these jobs for the first half of the work contract period (commonly referred to as “the 50% rule”). DOL guts this protection by eliminating it over a five-year period, during which time workers will only have a 30-day preference. This change means that U.S. workers applying for an H-2A job lasting 9-10 months will be ineligible for the job after the first 30 days, even if they have always worked for that employer. Many agricultural jobs have peak seasons and a need for increased numbers of workers long after the initial 30 days. This is another example of how the new rules shield H-2A employers from free market competition by permitting them to use guestworkers when U.S. workers are available.
- Similarly, employers will be able to turn away eligible and interested U.S. workers as long as they have offered the job to at least as many U.S. workers as the number of requested H-2A workers. This is true even if the employer still has many jobs to fill. This provision simply makes no sense, especially in a time of economic crisis and hardship for many U.S. workers.
- U.S. workers wishing to work for any H-2A employer (a grower, grower association, or labor contractor) could be required to bind themselves to the employer for up to ten months, even if the work involves different crops, growing seasons and far-off locations. This is not how the farm labor market currently operates. Rather, workers are free to find the highest paying job, from crop-to-crop or location-to-location, and employers must continue to compete by providing decent wages and working conditions. Yet, DOL claims that requiring H-2A employers to compete on these same terms would place them at a “competitive disadvantage.” In fact, the opposite is true. The rule places growers who hire *U.S. workers* at a competitive disadvantage, and turns U.S. workers who would work for H-2A employers into indentured servants.

- DOL will continue to allow employers to “prove” that U.S. workers are unavailable by relying largely on unanswered newspaper ads, even though employees, advocates and state agencies all agree that newspaper ads are meaningless and ineffective, because farmworkers do not find jobs through newspaper ads. DOL also removes the affirmative requirement that employers contact unions, farmworker groups and other entities in order to recruit workers, insisting instead that these organizations “should pay attention to newspaper advertisements and SWA job orders.” This is only one example of DOL adopting rules that bear no relation to actual industry practices.
- DOL states that it has no jurisdiction to regulate recruitment in a foreign country, but will require H-2A growers to promise to prohibit their labor recruiters from charging fees to workers. While this may sound like a good idea, the rule is really a backhanded attempt to allow employers to escape liability for the huge fees that guestworkers are paying and will continue to pay for the opportunity to obtain H-2A jobs. Employers will claim that they cannot be legally responsible for the fees, since they told their recruiters not to charge them. This is a farce.

The Bush Administration’s changes to the H-2A program are illegal and morally wrong. DOL should be protecting workers’ rights, not terminating them, especially in this time of economic crisis. **Congress must act immediately to stop these harmful changes.**

A solution to the farm labor crisis already exists. The AgJOBS farmworker immigration bill is a bipartisan, labor-management compromise which would provide an earned legalization program and reform the H-2A program in balanced and fair ways that workers and employers agreed to after years of conflict.