

## **FACT SHEET: The H-2A Temporary Agricultural Guestworker Program**

### What is the H-2A Program?

The H-2A program is a guestworker program that allows agricultural employers to bring in foreign workers for temporary or seasonal agricultural work when they are unable to find domestic workers to fill their labor needs. Employers can only bring in workers if doing so will not adversely affect the wages and working conditions of US workers. In order to fulfill this requirement of protecting the wages and working conditions from adverse effects and because of lessons learned from past failed guestworker programs such as the Bracero program, modest labor protections have been included in the H-2A program.

### Are H-2A workers immigrants?

No. H-2A workers are temporary non-immigrant workers and have no path to citizenship no matter how long they work in the US. They are allowed in the US only for a limited period of time, generally less than 10 months, and then required to go back to their home countries before they may return (the sheep herder program, an exception to the requirement that jobs be temporary and seasonal, allows workers to stay for up to three years).

### Who Are H-2A Workers?

Most H-2A workers are young men from Mexico, but H-2A workers come from around the world, including South Africa, Thailand, and Peru. There are very few women or older workers in the program, as employers use the program to “hand-pick” their ideal workforce. Age and sex discrimination are common in the H-2A program.

### Where are H-2A Workers Employed?

In 2010, about 80,000 H-2A workers were employed throughout the country in seasonal agricultural labor. H-2A workers are employed in North Carolina tobacco, New York apples, Louisiana sugarcane, and Florida citrus, and in other crops in every state in the US. North Carolina growers import more H-2A workers than any other state, employing more than 8,000 in 2010. For the most recent H-2A data, see [FLCdatacenter.com](http://FLCdatacenter.com).

### When Can Employers Participate in the H-2A Program?

Growers may employ H-2A workers only if two conditions are met:

- (a) there are not enough U.S. workers who are “able, willing, qualified and available to perform work at the place and time needed,” and
- (b) the wages and working conditions of workers in the United States will not be "adversely affected" by the importation of guest workers.

Under this labor certification process, the growers must show a need for temporary foreign workers before the Government grants approval and issues H-2A visas. At the most basic level, the H-2A labor certification program requires employers to provide DOL with a detailed "job offer." A labor certification process differs from a "labor condition attestation" process like the H-1B program for

specialty occupations and distinguished fashion models. Under the latter program, employers generally announce that they need foreign workers, promise to comply with applicable laws, receive permission to hire foreign workers with minimal governmental oversight, and are not subject investigation for labor law violations until after the hiring has occurred and someone files a complaint. Labor attestation – mere promises with little oversight -- is not appropriate for an industry with rampant violations of such basic employer obligations as the federal minimum wage.

### Are there H-2A Substantive Protections for US and foreign workers?

The H-2A law and regulations contain several substantive protections that protect U.S. workers from adverse effects associated with the hiring of temporary foreign workers and protect vulnerable foreign workers from exploitation. However, these protections are not strong enough, and all too often they are unenforced. The current protections for workers include:

1. **Wages** must be at least the highest of: (a) the local labor market's "prevailing wage" as determined by DOL and state agencies; (b) the state or federal minimum wage, and (c) the "adverse effect wage rate" ("AEWR"), which is which is intended to prevent against the depressing effect of guestworkers on prevailing wages.
2. **Recruitment** obligations require employers to use the interstate Employment Service system (a joint system of the federal government and state workforce agencies) and private-market methods of recruiting workers, known as "**positive recruitment**," to locate U.S. workers.
3. The **three-fourths minimum work guarantee** requires that employers provide recruited workers with employment opportunities for at least three-quarters of the number of hours in the job offer or pay for any shortfall (with exceptions for Acts of God). This provision protects against over-recruitment designed to drive down wages and assures migrants who travel long-distances that the job will be worth the trip.
4. The "**fifty percent rule**" is the principal job preference mechanism for U.S. workers. It requires H-2A employers to hire any qualified U.S. worker who applies for work until one-half the season has ended, even if a temporary foreign worker must be discharged or transferred (which rarely, if ever, happens, according to a Congressionally-required study in 1990). Due to the nature of seasonal work, many farmworkers arrive after the first day of the season, and many farms do not need their full labor force until later in the season.
5. Workers who complete half the season at an H-2A program employer must be reimbursed for the **transportation and subsistence costs** associated with traveling to the place of employment. Those who complete the full season must be paid for their transportation costs of returning home.
6. H-2A employers must provide **housing** for their workers at no cost to the worker. The housing must meet federal and state safety standards.
7. Employers soliciting H-2A workers must provide **workers' compensation insurance** for occupational injuries (but not health insurance coverage).
8. Employers must disclose job terms to foreign workers by the time they apply for their visa, in a language the worker understands, so the workers know what their job terms will be.

## Worker Abuses

H-2A workers are tied to a single employer and are dependent on their employers for continued and future employment. Because H-2A workers often arrive heavily indebted having paid high recruitment fees in their home countries, they are desperate to work and will often work to the limits of human endurance. These conditions, combined with the temporary, non-immigrant status of H-2A workers, render H-2A workers vulnerable to abuse and exploitation, and make US workers susceptible to displacement, as employers often prefer H-2A workers because of their desperation.

Sadly, the protections written into the H-2A program have not prevented unscrupulous H-2A employers from exploiting their workers and most workers are too fearful to enforce the protections available to them. Once employers decide to use the H-2A program, there are financial incentives to reject U.S. workers who apply for jobs. The employer does not pay Social Security or the Unemployment tax on the guestworkers' wages, but must do so on the U.S. workers' wages. In many cases, H-2A employers find excuses not to hire U.S. workers who seek jobs or to impose conditions on them that cause them to quit or be fired. In addition to discrimination issues, abuses such as wage theft, exorbitant recruiter fees, safety and health violations, and unsanitary housing have long been features of the H-2A program. Legal services attorneys have filed thousands of cases over the years on behalf of H-2A clients. And there have been a number of exposés over the years about the H-2A program and the failure of the U.S. government to prevent and adequately punish violations of the law by the employers. These reports include the award-winning series, "Desperate Harvest," by Leah Beth Ward in *The Charlotte Observer* (October 31-November 2, 1999), Barry Yeoman, "Silence in the Fields," *Mother Jones* (Jan.-Feb. 2001); Michael Blanding, "Invisible Harvest," *Boston Magazine* (October 2002); and Southern Poverty Law Center's, "Close to Slavery" (2007).