



The H-2A Temporary Agricultural Guestworker Program: An Inherently Flawed Program

The H-2A agricultural worker program is a foreign labor certification program that permits agricultural employers who anticipate a labor shortage to apply to hire workers from other countries on temporary work permits to fill agricultural jobs that last ten months or less. To bring in H-2A guestworkers, employers must first show that they have tried and are unable to find U.S. workers to meet their labor needs. They must also show that bringing in guestworkers won't adversely impact the wages and working conditions of US workers. There is no cap on the number of visas that the government will grant in a year.

Although the H-2A program includes some basic requirements to protect U.S. workers from negative effects on their wages and working conditions, as well as to protect foreign workers from exploitation, it fails to protect these vulnerable workers. The modest H-2A protections, most of which date back to the Reagan Administration, can be traced to lessons learned from the notoriously abusive Bracero guestworker program. Even with these protections, violations of the rights of U.S. workers and guest workers by H-2A program employers are rampant and systemic. **The H-2A program contains the following protections:**

1. **Wages** must be at least the higher of: (a) the local "prevailing wage;" (b) the state or federal minimum wage, (c) the agreed-upon collective bargaining rate; or (d) the "adverse effect wage rate" (AEWR), which is the average wage of nonsupervisory field and livestock workers as determined by a USDA survey.
2. **Recruitment** obligations require employers to use the Interstate Employment Service system and private-market methods, known as "**positive recruitment**," to locate U.S. workers.
3. 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. 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.
4. 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.
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. Prohibition on **recruitment fees**

The H-2A program is rife with abuse and results in discrimination against US workers. Despite the H-2A program's modest wage and labor protections for U.S. and foreign workers, the program is

rampant with abuse, as revealed in numerous exposés and the Farmworker Justice report, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*. Social and geographic isolation, lower than advertised wages, less work than promised, dirty and dilapidated housing, dangerous working conditions, and even forced labor or slavery typify the experience of many guestworkers.

The program's inherent flaws also result in employer preference for H-2A workers over US workers. Hundreds of thousands of US citizens and lawful permanent residents work in agriculture and depend on these jobs. Once employers invest in the H-2A program, however, many US workers interested in the jobs are turned away or otherwise treated unfavorably in the workplace because U.S. workers are often viewed as insufficiently compliant compared to the H-2A workforce. H-2A workers typically arrive indebted, having paid illegal recruitment fees to secure their jobs; are tied to an employer for an entire season; and must leave the country when the job ends, all of which make the workers desperate to keep their employers happy and extremely vulnerable to abuse. Further, H-2A workers never earn the opportunity to become permanent legal immigrants no matter how many seasons they work here. Additionally, H-2A employers do not pay Social Security or unemployment taxes on the guestworkers' wages, but must do so on the US workers' wages, which creates another incentive to avoid hiring US workers. H-2A workers also are excluded from the principal federal employment law for farmworkers, the Migrant and Seasonal Agricultural Worker Protection Act. Finally, employers are able to handpick their H-2A workers—they are virtually all young men—often resulting in discrimination in hiring against US women and older farmworkers.

An example of H-2A employer's preference for H-2A workers over domestic workers is the 2011 Equal Employment Opportunity Commission [lawsuit](#) against the Georgia grower Hamilton Growers, Inc. The EEOC found that the company engaged in national origin discrimination against American workers, which included firing US workers while retaining Mexican H-2A workers, assigning the US workers to less favorable job assignments, and assigning them tasks where they earned less money.

The H-2A program is growing every year. The H-2A program has no limit on the number of H-2A visas that can be issued per year. Despite many employer complaints about the H-2A program and the DOL, the program has more than doubled in size in recent years: from about 48,000 worker positions certified in FY 2005 to about 117,000 worker positions certified in FY 2014—an increase of over 140%. From FY 2013 to FY 2014, several states saw significantly large increases in program usage, including an increase of 17% in North Carolina, 35% in Florida, 44% in California, and 45% in Washington.

Farmworker Justice opposes any changes to the H-2A program rules that would lower wages or reduce worker protections for H-2A workers and domestic workers in corresponding employment. The solution to our agriculture labor needs is comprehensive immigration reform that provides a path to citizenship for the 11 million undocumented immigrants in the US that includes farmworkers and their families. If future farmworkers from abroad are needed, they and their family members must be afforded stronger protections and should have a meaningful opportunity to become immigrants and citizens. An above-board agricultural labor relations system will lead to better working conditions, less employee turnover and higher productivity, all of which will help ensure a prosperous agricultural sector. The entire food system will benefit by responding to consumers' increasing interest in the conditions under which their fruits and vegetables are produced. The people who cultivate and harvest our fruits and vegetables should not be deprived of our nation's economic and democratic freedoms.