



The H-2A Temporary Foreign Agricultural Worker Program: An Inherently Flawed Program that Harms Farmworkers

Each year, workers from Mexico and other countries leave their homes to harvest crops and perform other agricultural work in the United States through the H-2A program. The H-2A temporary foreign agricultural worker program permits agricultural employers who anticipate a labor shortage to apply to hire foreign workers on temporary work permits to fill temporary or seasonal agricultural jobs. There is no cap on the number of workers who may be brought in on H-2A visas.

The H-2A program is growing rapidly. Agribusiness employers' complaints that the H-2A program is unworkable and overly bureaucratic are primarily due to a dislike for government oversight and the modest protections that are critically important in safeguarding U.S. workers' jobs and labor standards. Despite employer complaints, the program has spread geographically and tripled in size in the last decade: from about 86,000 worker positions certified in FY 2009 to almost 258,000 in FY 2019. From FY 2018 to FY 2019, several states saw increases in program usage, including an increase of 23% in California, 10% in Florida, 9% in Michigan and Kentucky, 7% in Louisiana, 6% in New York and 5% in Washington. Georgia, which dropped from first to second place in H-2A usage, saw a decrease of 9% to 29,480 approved H-2A jobs in FY 2019.

The H-2A program requires that employers show that they have tried and are unable to find U.S. workers to meet their labor needs and that bringing in guestworkers will not adversely impact the wages and working conditions of U.S. workers. Unfortunately, the H-2A program labor market test and its basic protections are inadequate to protect the jobs, wages and working conditions of U.S. workers, and also do not protect foreign workers from exploitation. The modest H-2A program protections can be traced to lessons learned from the notoriously abusive Bracero guestworker program.

The H-2A program includes the following protections:

- 1. Wages** must be at least the higher of: (a) the local "prevailing wage for the particular job;" (b) the state or federal minimum wage, (c) the agreed-upon collective bargaining rate; or (d) the "adverse effect wage rate" (AEWR). Each year the DOL sets the AEWR for each state based on findings from USDA surveys of employers, using the average hourly wage of nonsupervisory field and livestock workers.
- 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"** gives a job preference to U.S. workers. It requires H-2A employers to hire any qualified, eligible 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 work 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 guarantees income for migrants who travel long-distances.

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. Employers must provide free **housing that meets federal and state standards** for their workers.
7. Employers must provide **workers' compensation insurance** for occupational injuries even when a state exempts agricultural employers from its workers' compensation law.
8. A prohibition on charging workers **recruitment fees**.

The H-2A program is inherently flawed. Workers in the H-2A temporary foreign agricultural worker program have often paid significant sums to recruiters to obtain jobs, visas, and transportation. They expect to work hard at jobs for which American workers are unavailable. They expect to be provided with livable housing and safe working conditions. And they expect to earn enough to return home and feed themselves and their families. Yet when they arrive in the United States, many H-2A workers find a much harsher reality. 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 may be the experience of many guestworkers. Because H-2A workers are only allowed to work for a single employer and must leave the country when the job ends, most H-2A workers will work to the limits of human endurance to keep their employers happy and are too fearful of retaliation to speak out about harsh or illegal working conditions. All of these factors make H-2A workers extremely vulnerable to abuse and discrimination.

At the same time, the dependent status of H-2A workers leads to discrimination against U.S. workers by many H-2A employers. Often employers prefer guestworkers over U.S. workers because of their dependence on their employer for their ability to work and remain in the United States and the fact that they are unable to seek out better wages or working conditions. Other factors cause employer preference for H-2A guestworkers: 1) the H-2A employer does not pay Social Security or Unemployment Tax on the guestworkers' wages, but must do so on the U.S. workers' wages, saving about 10% per worker; (2) H-2A workers are excluded from the principal federal employment law for farmworkers, the Migrant and Seasonal Agricultural Worker Protection Act; and (3) employers are able to discriminate on the basis of gender, age and other factors. H-2A workers are virtually all young men because anti-discrimination laws are not enforced abroad. The H-2A program is fundamentally flawed and rampant violations of workers' rights are endemic.

Solutions: The principal solution to our broken immigration system in agriculture is immigration reform that provides a path to citizenship for current undocumented farmworkers and their families. If future farmworkers from abroad are needed, they and their family members should be afforded stronger protections than are in the H-2A program, more effective enforcement of protections, and 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.