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Summary of the H-2A Program

The H-2A Temporary Foreign Agricultural Worker Program

by Bruce Goldstein, Farmworker Justice Fund, Inc.

The H-2A temporary foreign agricultural worker program has been criticized, rightly, for its failure to protect vulnerable foreign workers, and affected U.S. farmworkers, from abuses. Nonetheless, there are significant protections in the law and regulations that some agricultural employers have been lobbying vigorously to eliminate.

A Labor Certification Program to Protect US Citizens and Immigrants from Abuses

The H-2A program is a foreign labor certification program that permits agricultural employers who anticipate a labor shortage to apply for permission to hire temporary foreign labor. Under the law, employers must request a certification from the Department of Labor of that:

(a) there are not sufficient U.S. workers who are able, willing,

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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 similarly employed will not be "adversely affected" by the importation of H-2A workers.

8 U.S.C. §1188(a)(1); 1101(a)(15)(H)(ii)(A); 20 CFR Part 655.

Thus, the employers must show that there is a labor shortage and that the wages and working conditions will not undercut the job terms of U.S. citizens and immigrants who hold those jobs.

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. 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 programs, 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

The Job Offer Requirement: An Enforceable Contract

At the most basic level, the H-2A labor certification program requires employers to provide DOL with a detailed "job offer." 20 C.F.R. §§ 655.100(a); 655.101(b)(1). Some agricultural employers are demanding an end to this requirement, but it serves several valuable purposes.

First

Substantive Protections for Workers

The 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.

Wages must be at least the highest of: (a) the local labor market's "prevailing wage" for a particular crop as determined by DOL and state agencies; (b) the state or federal minimum wage, and (c) the "adverse effect wage rate" (the "AEWR"). 20 C.F.R. § §

655.102(b)(9). DOL's current AEWR methodology is only minimally protective because it is based on USDA's findings of the prior year's average regional hourly wages for agricultural and livestock workers. In theory, however, the AEWR alleviates the foreign workers' depressing effect on prevailing wages. Agribusiness has been lobbying to end the AEWR and lower the H-2A program wage rates.

The **three-fourths minimum work guarantee** requires that employers provide recruited workers with employment opportunities for three-quarters of the number of hours in the job offer or pay for any shortfall (with exceptions for Acts of God). § 655.102(b)(6). This provision protects against over-recruitment designed to drive down wages and ensures long-distance migrants that jobs will exist.

The "**fifty percent rule**" is the principal job preference regulation. 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 (which rarely happens).

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.

H-2A employers must provide or pay for **housing** for their workers. By statute, the employers need only provide housing for the family of a worker if it is the "prevailing practice" in the local area to do so. H-2A workers are always single men, however.

Recruitment obligations under the H-2A statute and regulations require covered employers to use the interstate Employment Service system and private-market methods of recruiting workers, known as "**positive recruitment,**" to locate U.S. workers. 8 U.S.C. § 1188(b)(4). As users of the Employment Service to circulate their job offers, H-2A employers are subject to DOL's job service regulations, 20 C.F.R. Parts 653 and 658.

Workers' compensation

The Operation of the Program

The H-2A program has grown

rapidly since the mid-1990's to about 45,000 jobs, a quarter of which are in one state, North Carolina. Historically, the H-2A (formerly H-2) program was dominated by the Florida agribusinesses which brought in Jamaican citizens to hand-cut sugar cane, but it mechanized the harvest a few years ago. Jamaican workers are still hired to pick apples in New York and New England. There are also several thousand sheepherders, some of them from Peru, hired in several states in the West. Now, the majority of H-2A workers comes from Mexico.

Despite employers' complaints about the allegedly heavy burdens of the H-2A system, DOL rejects very few applications for temporary foreign workers and once in the program, growers tend to stay. The December 1997 report on the H-2A program by the U.S. General Accounting Office concluded that 99% of employers' applications are approved. The sugar and apple growers used the program continuously for over 50 years even though many years have witnessed domestic labor surpluses. Moreover, DOL subsidizes the H-2A growers by charging fees estimated at only $400,000 for a program that apparently costs about $15 million (as of 1997).

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 and regulations 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), the Human Rights Watch Report, *Unfair Advantage* (2001)(the chapter on the North Carolina H-2A system), Barry Yeoman, "Silence in the Fields," *Mother Jones* (Jan.-Feb. 2001); and Michael Blanding, "Invisible Harvest," *Boston Magazine* (October 2002). Links to these items and others about the H-2A program are available on our website under "Guestworker Links."