

NISKANEN

C E N T E R

IMMIGRATION POLICY BRIEF

H-2A Temporary Agricultural Worker Visas

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Introduction

The agricultural sector of the economy generated \$375.7 billion of output in 2016, making it one of the largest industries in the United States.² Farms across the country depend on a workforce that is able to perform difficult physical labor, often on a temporary or seasonal basis. U.S. workers are largely unwilling to seek agricultural employment, and as a result, many growers turn to the H-2A Temporary Agricultural Worker Visa program to meet their labor needs.

In FY 2016, 134,368 H-2A visas were issued, the most in a single year since the program was created in 1986.³ Usage varies significantly across states, relative to the size of their agricultural sectors. States with smaller agricultural sectors, like Alaska and Rhode Island, may only see a handful of H-2A worker requests. Conversely, employers in Florida and North Carolina requested over 20,000 H-2A workers to support their large farming sectors in FY 2016.⁴

The H-2A was not the first agricultural guest worker program implemented in the United States. From 1942 to 1964, the Bracero Program served as the primary vehicle for U.S. growers to

¹ With significant input from Niskanen's Immigration Dept. intern Jeff Mason.

² U.S. Bureau of Economic Analysis, "Gross Output by Industry." Available at: <https://www.bea.gov/iTable/iTable.cfm?ReqID=51&step=1#reqid=51&step=51&isuri=1&5114=a&5102=15>.

³ Bureau of Consular Affairs, "Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards): Fiscal Years 2012 - 2016." Available at: <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXVIB.pdf>.

⁴ Office of Foreign Labor Certification, "Annual Report: 2016." Available at: https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf.

recruit temporary workers. At its height in the late 1950s, over 400,000 braceros came to legally work in the United States every year.⁵ Agricultural workers were also eligible to work legally under the temporary worker—H class visa—created by the Immigration and Nationality Act (INA) of 1952, although this program was primarily used for nonagricultural workers.⁶ That changed in 1986, when the H program was split into the H-2A agricultural and H-2B non-agricultural temporary worker programs by the Immigration Reform and Control Act, creating the categories still in use today.

Despite rising usage, employers have identified serious concerns with the H-2A program that can make it difficult and costly to use. A 2012 Government Accountability Office report found that the Department of Labor (DOL) failed to process 37 percent of H-2A employer applications within the statutory approval deadline of 30 days prior to when the worker was scheduled to begin working.⁷ Seven percent of applications were approved less than 15 days prior to the job start date, which left employers with an extremely limited window to file additional required paperwork with the Department of Homeland Security and for workers to secure visas from the State Department.

Such bureaucratic delays can result in millions of dollars in losses for U.S. farms, given the time-sensitive nature of agricultural production. For example, a computer system failure at the State Department in 2015 left thousands of H-2A workers stranded outside of the United States, costing California growers an estimated \$500,000 to \$1 million *per day* for the duration of the delay.⁸ If employers continue to have reason to doubt the ability of the H-2A program to fulfill their labor needs in a timely and efficient manner, their incentive to employ legal workers falls, while the incentive to employ undocumented workers rises.

In recent years, members of both parties have expressed interest in reforming the H-2A program. In June 2016, 102 members of Congress sent a bipartisan letter to DOL and U.S. Citizenship and Immigration Services (USCIS) suggesting measures that would help prevent future delays and make the program easier for employers to use.⁹

⁵ Marc R. Rosenblum, et al., “Mexican Migration to the United States: Policy and Trends,” Congressional Research Service, June 2012. Available at: <https://fas.org/sgp/crs/row/R42560.pdf>.

⁶ Bipartisan Policy Center, “10 things you need to know about: Temporary Worker Visa Programs,” November 2015. Available at: <https://bipartisanpolicy.org/wp-content/uploads/2015/11/BPC-Immigration-Temporary-Workers.pdf>.

⁷ Government Accountability Office, “H-2A Visa Program: Modernization and Improved Guidance Could Reduce Employer Application Burden,” September 2012. Available at: <http://www.gao.gov/assets/650/648175.pdf>.

⁸ Miriam Jordan, “Visa Glitch Stalls Workers, Straining U.S. Farms,” *Wall Street Journal*, 15 June 2015. Available at: <https://www.wsj.com/articles/visa-glitch-stalls-workers-straining-u-s-farms-1434411601>.

⁹ Rep. Dan Newhouse, et al., letter to Sec. Thomas Perez and Dir. León Rodríguez, 10 June 2016. Available at: <https://wstfa.org/wstfa-assets/uploads/H-2A-Improvement-Project-Letter-6-10-16.pdf>.

Current Policy

H-2A program policy is set primarily by Section 218 of the INA and 20 Code of Federal Regulation (C.F.R.) 655 Subpart B, which govern worker petition filings, workers' rights, employer obligations, and other key areas. Other minor provisions related to the program do exist, but are not discussed in this policy brief.

In order to file a petition for H-2A workers, an employer must submit a foreign labor certification to DOL that affirms:

- There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor;
- The employer made positive recruitment efforts to hire qualified U.S. workers;
- The wages and working conditions of comparable U.S. workers would not be adversely affected by the utilization of H-2A workers; and
- The nature of the work is truly temporary or seasonal.

After the foreign labor certification has been approved by DOL, petitioners must file an I-129 Form with USCIS. Once a petition has been approved by USCIS, the prospective worker can apply for an H-2A visa from the State Department. Only nationals of a specific list of countries provided by USCIS are eligible to participate in the program.

Once in the United States, employers must meet a series of obligations regarding compensation and treatment for their workers, which include:

- Providing housing, transportation, and food for workers and their families;
- Paying a wage that is the highest of the adverse effect wage rate, prevailing hourly wage, or the federal or state minimum wage; and
- Provide workers' compensation insurance when necessary.

Various proposals have been introduced over the years to reform the agricultural guest worker program, although none have been adopted. In the 115th Congress, such proposals include Illinois Democratic Rep. Luis Gutierrez's Agricultural Worker Program Act of 2017 and Virginia Republican Rep. Bob Goodlatte's AG Act.¹⁰

Gutierrez's bill would legalize the many undocumented agricultural workers by granting them legal status and work authorization, along with a path to citizenship. While not a direct reform of

¹⁰ H.R.2690 - Agricultural Worker Program Act of 2017. Available at: <https://www.congress.gov/bill/115th-congress/house-bill/2690>. H.R.4092 - AG Act. Available at: <https://www.congress.gov/bill/115th-congress/house-bill/4092>.

the H-2A program, the legalization of hundreds of thousands of currently undocumented agricultural workers would have significant implications for the program.

Goodlatte's bill would replace the H-2A program with the H-2C program, which expands the scope of eligible work to encompass year-round agricultural and horticultural work, which includes dairies, aquaculture, and forestry. The bill also modifies the wage requirements for the program and includes mandatory departure provisions to preserve the temporary nature of the visa. The AG Act also allows for the legalization of some currently undocumented agricultural workers. As of December 2017, Goodlatte's bill has been marked up in the House Judiciary Committee and no action has been taken on Gutierrez's bill.

Proposed Changes to Current Policy

Worthwhile changes to current H-2A policy must make the program easier for a wider range of employers to use and more responsive to the tight schedules common to agricultural production. Additionally, reform to the H-2A program cannot ignore the significant presence of undocumented agricultural workers. Suggested changes to the program include:

- Allowing H-2A workers to change employers within the United States to provide improved labor security for farms. As growing and harvesting seasons for some agricultural products end, others begin. Providing H-2A workers the freedom to change employers within a 3-year period acknowledges the seasonal nature of agricultural production, but can also prevent delays in worker visa processing that can cost farms thousands of dollars. It also acts as a safeguard for workers who are vulnerable to employer abuse.
- Granting a grace period regarding the work start date for employees. Granting employers the flexibility to set a work start date early would help ensure their workers arrive on time, even in the face of minor processing delays.
- Expanding the scope of the H-2A program to include dairies, forestry, aquaculture, and meat processing would help to prevent labor shortages in these sectors. Currently, DOL does not allow employers to use the H-2A program for these sectors because the work is typically not seasonal.
- Establishing a path to legalization for workers meeting acceptable criteria gives an agricultural guest worker program the teeth to effectively combat undocumented immigration. A large number of undocumented agricultural workers have been in the United States for many years, and some have citizen family members. These workers may also have long-standing relationships with specific employers that should be recognized.

- Providing for an emergency disaster worker program that allows for prioritized processing of additional labor for help with rebuilding, clean-up, and forestry efforts in states that declare disasters.

Conclusion

As it stands currently, the H-2A program is overly burdensome to use and requires employers to chance losing millions from lost agricultural production due to bureaucratic failings.

Implementing the policy changes described above would help disincentivize undocumented immigration while encouraging more agricultural employers to hire legal workers. A flexible and easy-to-use H-2A program is beneficial for both agricultural workers and employers. If Congress is serious about curbing undocumented immigration and promoting economic growth, a substantial H-2A reform is in order.