

# American Specialty Agriculture Act

American growers of labor-intensive fruits, vegetables and horticultural specialties need to hire hundreds of thousands of seasonal agricultural workers each year to tend and harvest their crops. However, American workers with better options choose not to perform this labor. While there is no numerical limit to the number of H-2A temporary agricultural work visas available, the Department of Labor estimates that almost half of hired crop workers are illegal immigrants. Why? In 2008, the Department of Labor found that the vast majority of growers “find the H-2A program so plagued with problems that they avoid using it altogether.”

An agricultural guestworker program needs to be fair to everyone it impacts – including growers, American farmworkers, guestworkers and consumers. It must provide growers who want to do the right thing with a reliable source of legal labor. It must protect the livelihoods of American workers. It must protect the rights of guestworkers. And it must keep in mind the pocketbooks of American families.

The American Specialty Agriculture Act eliminates the problems plaguing the H-2A program and institutes an H-2C program that will be responsive to the needs of American specialty growers. And it does so without the fraud-ridden mass amnesty for illegal immigrant farmworkers that failed us in 1986.

## **REPLACEMENT OF THE LABOR DEPARTMENT WITH THE AGRICULTURE DEPARTMENT**

- Most growers share the assessment of the late agricultural economist James Holt that there is “a culture of hostility toward the program and program users within the Department of Labor.” The American Specialty Agriculture Act relies on the Agriculture Department to administer the H-2C program rather than the Labor Department. We can expect that the Agriculture Department will be much more understanding of the unique labor needs of growers than the Labor Department ever was.

## **ATTESTATION-BASED**

- One of the biggest complaints that growers have with the H-2A program is the mounds of red tape and bureaucratic obstacles that they have to overcome before they can receive needed farmworkers. James Holt said that the program “require[s] an extremely labor intensive, paper intensive process for individually processing, recruiting on and adjudicating every single one of the . . . applications certified.”

The Bush Administration tried to streamline the process by making it “attestation-based” – just like the H-1B program for high-skilled workers. The Bush Labor Department implemented “an attestation-based process by which employers, as part of their application, would attest, under threat of penalties . . . they have complied with all applicable program requirements. . . . The Department would also institute a new auditing process to verify that employers have, in fact, met their responsibilities . . . .” Unfortunately, the Obama Administration rescinded these changes.

The American Specialty Agriculture Act makes the H-2C program attestation-based to reduce red tape for growers. However, it contains strong protections for American workers, such as requiring that growers recruit for domestic workers in the area of employment and not lay-off domestic workers and replace them with H-2C workers.

### **AFFORDABLE WAGE RATE FOR GROWERS**

- Growers have long complained of the tremendous expense of the H-2A program largely caused by the required “adverse effect” wage rate for foreign H-2A workers. Currently, this wage rate varies from \$8.97 to \$12.01 per hour. After factoring in other program expenses, such as housing for H-2A workers, processing fees and transportation costs to and from their home country, Lee Wicker of the North Carolina Growers Association estimates that program users have to pay from “\$11 to \$14, \$15” an hour for H-2A workers. One North Carolina Christmas tree grower exclaimed that “I know now why they call it the ‘Adverse Effect’ wage rate—because it certainly is ‘Adversely Effecting’ my family farm.” When H-2A growers have to compete against growers employing illegal immigrants who might make the minimum wage or less, they are put at an unfair competitive disadvantage.

The American Specialty Agriculture Act requires growers to pay H-2C workers the occupational prevailing wage in their locality – just as do most other temporary work visa programs.

### **WORKABLE HOUSING REQUIREMENT**

- The H-2A program requires that growers provide free housing to H-2A workers. This can be extremely expensive and burdensome for growers, especially when they need to maintain housing that H-2A workers only use for a few weeks each year. The American Specialty Agriculture Act allows growers to provide either housing or a housing voucher payable to a landlord.

## FAIR TRANSPORTATION REIMBURSEMENT POLICY

- The H-2A regulations provide that a grower must reimburse an H-2A worker for the transportation costs from the worker's home to the place of employment only if the worker completes 50% of the work contract period. The 11<sup>th</sup> Circuit ruled in Arriaga v. Florida Pacific Farms, L.L.C. that despite the clear wording of the regulations, H-2A employers have an independent responsibility under the Fair Labor Standards Act to reimburse workers for these transportation costs in the first workweek to the extent that they would otherwise effectively lower the workers' weekly wages below the minimum wage. As Lee Wicker has stated, "[i]f the money is reimbursed upon arrival, the financial incentive for the worker to remain on the farm is removed—and guess where the workers will be . . . gone."

The American Specialty Agriculture Act rejects Arriaga and ensures that a grower only have to reimburse an H-2C worker for the transportation costs from the worker's home to the place of employment if the worker completes 50% of the work contract period

### ELIMINATION OF "50%" RULE

- The current "50% rule" requires that growers provide employment to U.S. workers who apply until 50% of the H-2A worker's work contract period has elapsed. The Bush Labor Department realized that:

[T]his creates substantial uncertainty for [growers] in terms of managing their labor supply and labor costs during the life of the contract. In many situations, it appears the employer does not substitute the U.S. worker arriving under the 50 percent rule for the existing H-2A worker, but rather retains both workers and incurs the added expense in order to prevent further disruption to work flow resulting from dismissing an H-2A worker and sending that worker home. Anecdotally, employers report that the majority of the U.S. workers who are hired under the 50 percent rule remain on the job for less than the term of the H-2A contract. This means that if an employer immediately dismisses an H-2A worker when a U.S. worker is hired under the 50 percent rule, that action could result in the employer being short of labor if and when the U.S. worker leaves the job early. In any case, the concern that new workers may arrive well into the harvest cycle and create the type of disruption described above can serve as a serious disincentive for employers to participate in the H-2A program.

The American Specialty Agriculture Act does not contain a 50% rule.

## **REFORMED EMPLOYMENT GUARANTEE**

- The H-2A program requires that a grower guarantee to offer H-2A workers work for at least three-fourths of the workdays of the period the work contract is in effect. The American Specialty Agriculture Act reduces this guarantee for the H-2C program to a more reasonable half of the workdays of the period the work contract is in effect.

## **AVAILABILITY OF PROGRAM TO DAIRIES**

- Currently, dairies and certain other agricultural producers cannot use the H-2A program because they employ their workers year-round and the H-2A program is only available for work “of a temporary or seasonal nature”. The American Specialty Agriculture Act does not require that qualifying work be of a temporary or seasonal nature.

## **DISCOURAGEMENT OF FRIVOLOUS LITIGATION**

- Growers who use the H-2A program are constantly subject to abusive and frivolous litigation by H-2A workers and amnesty advocates who seek to scare growers away from using the H-2A program. The American Specialty Agriculture Act addresses this abuse through two means:
  - The Labor Department has not been allowing growers to include contract provisions with H-2A workers requiring the use of binding arbitration and mediation. Lee Wicker states that “[g]rowers and workers should be required to resolve legal issues through mediation and arbitration. Growers sign contracts all the time that contain mandatory mediation arbitration agreements. If it is okay for farmers, then it should be okay for farmworkers.” The bill allows growers to include binding arbitration and mediation in contracts with H-2C workers.
  - The bill provides that the federally-funded Legal Services Corporation (“LSC”) may not sue a grower on behalf of an H-2C worker unless mediation has been attempted through the Federal Mediation and Conciliation Service to assist the parties in reaching a resolution of issues in dispute. In addition, the LSC cannot provide legal assistance to a former H-2C worker who is no longer present in the U.S.

## **ASSURANCE THAT H-2C WORKERS RETURN HOME**

- It has been said that there is nothing so permanent as a “guestworker”. This comment was made in reaction to the experience of European countries that instituted large-scale guestworker programs because of post-World War II labor shortages. Even after ending the programs, these countries were never able to get the guestworkers to return home and the nations are living to this day with the troubled legacies of the programs.

It is crucial to assure that H-2C workers return home at the end of their contracts and do not remain illegally in the U.S. The American Specialty Agriculture Act accomplishes this goal through three means:

- The H-2C program is designed for temporary stays by worker in the U.S. and thus the bill does not allow H-2C workers to bring family members with them. The single largest factor in determining whether a guestworker will actually return home is the presence of family members. The process of putting down “roots” is greatly accelerated when spouses accompany guestworkers, and further accelerated if children are present, especially U.S.-born children. If we want the H-2C program to remain a true guestworker program, workers must be on their own. H-2C workers can freely visit their families in their home countries as frequently as they wish and can spend as much time as they want with their families at the conclusion of each visa term.
- As European countries have come to realize, extended presence alone can lead guestworkers to begin to put down “roots” and begin to view the country of work as their permanent home. Commentators have said that “while migrants typically begin as target-earners with strong social, cultural and even economic ties to their home communities, this orientation gradually changes over time. . . . With more and more time spent abroad, migrants also begin to acquire social and personal ties which increasingly bind them to the host society.” Thus, the bill requires that H-2C workers return home after 10 months of work.
- Growers petition for H-2C workers and must promptly alert the Department of Homeland Security if workers have abandoned employment. The Department shall remove any H-2C workers who violate the terms of their status.

#### **NUMERICAL CAP**

- The H-2C program allows up to half a million foreign workers a year to receive H-2C visas. This should be more than enough to make up for a loss of illegal immigrant workers. Philip Martin, professor of agricultural and resource economics at the University of California, Davis, estimates that American specialty crop growers hire about 800,000 individual farmworkers each year for less than 150 day periods. The U.S. Department of Labor’s National Agricultural Worker Survey reveals that 48% of seasonal agricultural workers admit to being illegal immigrants. Even if real percentage of illegal workers is 60%, half a million H-2C workers more than meets the need.