Agricultural Labor Working Group
House Committee on Agriculture
Interim Report
November 7, 2023

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Introduction

As Members of the House Committee on Agriculture, we are responsible for the authorization and oversight of federal policies critical to supporting farmers, farmworkers, ranchers, foresters, rural communities, and consumers. We also have a duty to be voices in Congress on issues and policies impacting the livelihoods of these constituencies, even if legislative jurisdiction rests in another committee or committees.

An urgent challenge facing the agricultural sector is producers' lack of access to an adequate workforce. This has been a problem for decades, and it continues to worsen. Farmers in the U.S. are already reeling from record-high production costs that have translated into thin margins. The inability to find and hire workers is only exacerbating this negative trend.

In the summer of 2023, the House Committee on Agriculture formed the Agricultural Labor Working Group (ALWG) to identify the issues causing the lack of available domestic workforce, the impact this has on our nation's domestic food supply, and the potential solutions to address this critical challenge. The ALWG has been engaged in a rigorous agenda and has received input from numerous stakeholders, employers, and workers around the country with a specific focus on the H–2A visa program for non-immigrant agricultural workers.

Previous efforts to reform the H–2A program have been largely unsuccessful. But that does not mean the effort is over. In the coming months, the ALWG will utilize the information contained in this report, as well as past and future testimonials and information, to develop a final list of policy recommendations to refer to the committee of jurisdiction: the House Committee on the Judiciary.

This report is a summary of what we have heard from various stakeholders, the current state of affairs, and the bevy of issues that farm employers and workers face when utilizing the H–2A program. This report is intended to be a politically neutral document to inform policy makers rather than advocate for particular policy solutions. This report will:

- Detail the many complexities and burdens employers and workers face that make the H–2A program more difficult to comply with and administer.
- Cover the pros and cons of the possibility of expanded access to the H–2A program for various sectors, as well as impediments to hiring workers in a timely manner.
- Describe the cost burden employers face and how participation in the program will impact labor expenses and profitability for producers as well as discuss the types of wage possibilities for domestic and foreign workers which may reflect regional and national economic trends.
- Discuss the working and living conditions of H–2A workers, and their relationship with producers that use the program.
- Reference testimonials from farmers, producers, employers, workers, and stakeholders from across the country who have contributed to our ALWG survey.
- Provide a detailed accounting of problems with the H–2A program and the negative impacts these issues are having on our domestic food supply.

Food security is a national security issue. A large threat to America's food supply is an unstable workforce available to deliver safe, affordable, and abundant food. This issue deserves the focused attention of the House Committee on Agriculture and the broader Congress and is a necessary undertaking to ensure the success of the agricultural industry for years to come.

Agriculture is a complex industry and workforce challenges rarely have one simple solution. The final report produced by the ALWG may result in a range of options to address each problem that will be identified in this interim report. As such, the role of the ALWG is not to craft a single piece of legislation, but rather to provide a well-researched suite of recommendations and potential solutions that can be incorporated into subsequent legislative efforts, or endorsements of ongoing efforts.

First Roundtable—History of Ag Labor and H–2A Reform in the United States

When: Tuesday, July 13, 2023
Panelists:

- Kristi Boswell—Agricultural Policy Counsel—Alston & Bird
- Lynn Jacquez—Principal—CJ Lake, LLC

Overview of Roundtable—Ms. Boswell and Ms. Jacquez, two leading experts in the agricultural labor and non-immigrant visa policy space, provided a general overview and history of the H–2A visa program. This included a history of non-immigrant agricultural labor in the U.S. and efforts to reform non-immigrant visa programs and the H–2A program in recent years. It also included a general overview of the administration of the current program through its three federal administering agencies: Department of Labor (DOL), Department of Homeland Security (DHS), and Department of State (DOS), alongside state level agencies responsible for various procedural, substantive, and enforcement determinations. The panelists briefly touched upon some of the challenges employers (mainly farmers) face due to a U.S. domestic labor shortage and the cost of participating in the H–2A program.

History of Non-Immigrant Agricultural Labor in the United States

The idea of foreign labor dates back to the 1800s, with open borders and the Alien Contract Labor Program encouraging employers to recruit immigrant workers directly with private contracts governing the terms of employment.

Temporary, non-immigrant programs were initially conceived to address labor shortages impacting agriculture during World War I (WWI), World War II (WWII), and the Korean War. The Mexican Labor Program, also called the Bracero program, was negotiated with Mexico for West and Southwest U.S. agriculture during 1917–1921 (WWI) and 1942–1964 (WWII & Korean War). Enacted in the 1940s, the British West Indies (BWI) program was negotiated with Britain for East Coast U.S. agriculture.

1952 brought the enactment of the Immigration and Nationality Act (INA). This law created categories for permanent immigration based on family or employer sponsorship, and categories of non-immigrants or temporary admissions, of which, category (h)(2) was for temporary foreign workers—a single sentence in the law.

While regulations on transportation and housing had always been conditions of government-sponsored, foreign labor programs, increased union activity in the 1960s in the agricultural sector helped develop the regulatory concept of an "adverse effect wage rate". This led to the termination of the Mexican Labor Program in 1964, which had peaked in 1956, when 445,000 Mexican workers were admitted to the U.S.

Spearheaded by President Carter's Immigration Reform Select Committee, and propelled by the Reagan Administration's priority of advancing expanded temporary worker program initiatives as a method to control unlawful entry and improve border integrity, Congress tackled immigration reform. The product was the 1986 Immigration Reform and Control Act, the last major piece of immigration reform legislation in the United States. It contained four distinct programs for agricultural workers:

- Special Agricultural Workers (SAW)—legal status for current workers;
- Replenishment Agricultural Workers (RAW)—replenishment worker program for the West triggered by a domestic worker shortage determination;
- Codified H–2A (legacy BWI) and adopted the existing regulatory scheme with "adverse effect on wages and working conditions" as statutory; and
- Transition program: BWI to H–2A.

When the 1993 Ag Labor Commission issued a finding of no labor shortage in agriculture, as previously anticipated worker attrition did not occur, the RAW program was not implemented. As such, by 1994, the only remaining ag labor program was H–2A, which was never intended to address labor needs for all agricultural sectors and geographic regions.

Despite multiple attempts from the House and Senate to pass various reforms to the H–2A program (reforms that would have addressed, in some capacity, wages, pathways to legal status, seasonality reform, at-will visa portability, employer compliance, and more) no meaningful legislation has ever been close to being signed into law.

United States Domestic Agricultural Labor Shortage

U.S. farmers traditionally accessed the H–2A program for the purpose of hiring for seasonal and perishable commodity industries, because seasonal planting and harvesting periods require a temporary workforce surge extending beyond the availability of domestic workers. However, employers in every aspect of the food supply chain increasingly highlight the challenge of recruiting sufficient domestic workers for the thousands of food production jobs available outside of surge times.

2023 has marked a high-point for domestic agricultural labor shortages; a situation which has been made more dire due to the increase in the regulatory cost burden of utilizing H–2A labor on the farm.

This is not a new issue. For example, as far back as 2012, the North Carolina Growers Association sought to fill 7,008 jobs through the H–2A program. Only 143 domestic workers applied for and actually showed up for the jobs, and only 10 completed the growing season. From 2007 to 2010, only about 50 out of the 290,000 net increase in unemployed North Carolinians, due to the Great Recession, chose agricultural jobs.

This situation is country-wide, as evidenced by employer responses to the 2023 ALWG Survey.

ALWG Survey Background—The House Committee on Agriculture posted a survey on their website to gather submission responses from stakeholders, producers, and workers on their experiences utilizing the H–2A program, and more broadly, their experiences with agricultural workforce issues. 820 responses were recorded and the average length of time to complete the survey was 52 minutes. The answers remain anonymous and are aggregated for internal use by members of the ALWG, unless otherwise outlined for supporting detailed information in this report. The scope of the 26 questions included:

- Organizational questions (name, state, background as employer/worker/stakeholder);
- Impact of the availability of domestic labor;
- Experience using or not using H–2A labor;

- Issues with utilizing H–2A program for employers (cost, administrative delays, effect on business, eligibility, *etc.*);
- Issues for workers (worker protections, wages, conditions of labor, *etc.*); and
- Other suggestions that Congress or the Administration should consider or address.

Question #5 asked respondents to "classify their interest in agricultural labor issues." 720 responses were from employers (farmer, rancher, processor, *etc.*); 42 responses were from employees or other interested parties; 58 selected 'other'.

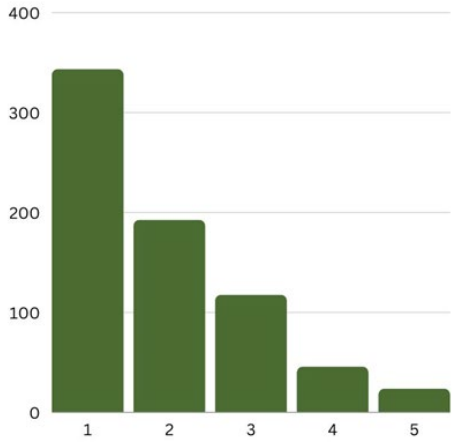
Of the employers, Question #6 asked employers to "describe themselves" and to "select all that apply to their operation":

- Row Crop Producer (245)
- Specialty Crop Producer (327)
- Livestock Producer (153)
- Dairy Producer (185)
- Processor (40)
- Other (101)

Question #7 asked: "Please describe your experience finding workers for your business/operation:

- 1 = Very difficult to find and retain employees;
- 5 = Very easy to find and retain employees."

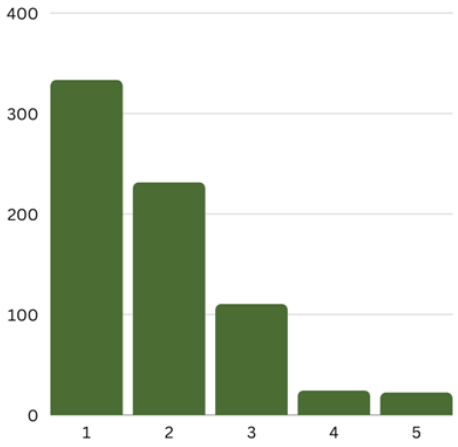
Average Rating: 1.91



Source: House Committee on Agriculture

Question #8 asked: "In your opinion, how is the availability of labor impacting food security?

- 1 = Having a severe and negative impact on our nation's food supply;
- 5 = Not having much of an impact."



Source: House Committee on Agriculture

Average Rating: 1.85

When asked to provide their perspective on agricultural labor issues, many responded with similar sentiments that domestic labor was inadequate.

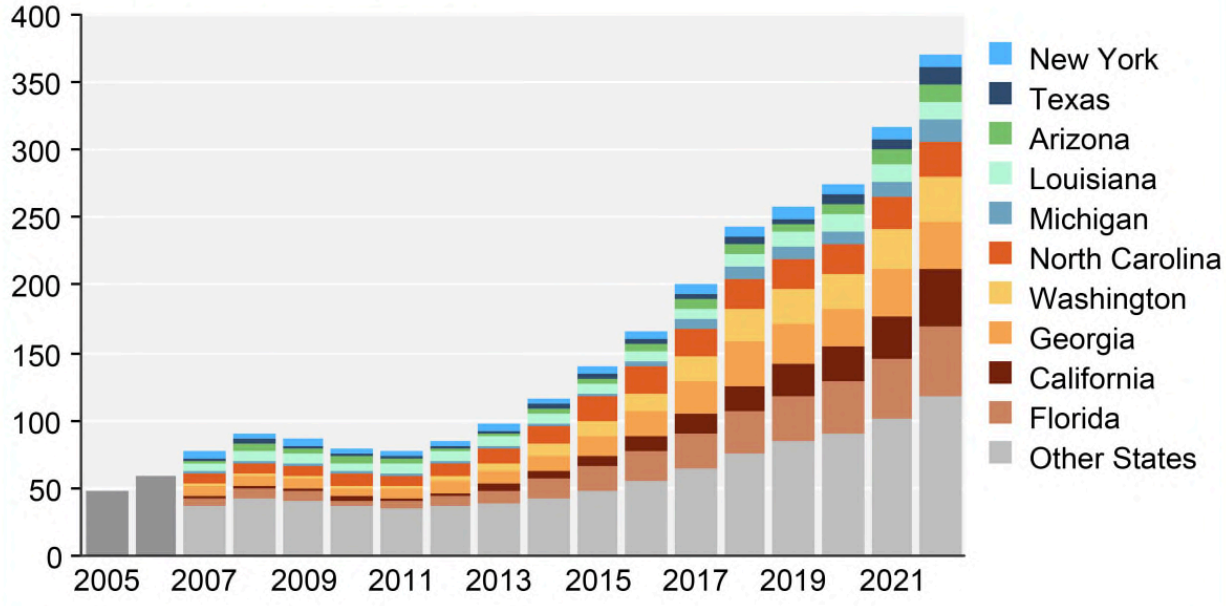
> *"H–2A has been a life ring for farmers. Today, domestic workers have become specialized in other workforces and have left the farming community, making it difficult to find local workers interested in field work. H–2A allows us to bring in the needed workforce temporarily."*
>
> *"You cannot look at Ag labor without addressing the need for international workers. While I'm able to utilize domestic workers, I'm only hiring for 15–20 positions across our entire farm. I'm also fortunate to live near a university and close to a populated area. When farms are more remote their chance to recruit good employees domestically greatly decreases."*
>
> *"My farmers would prefer to employ local American citizens; however, it is virtually impossible to find local citizens that want to do field/farm work. The farmers feel trapped into having to use H–2A workers."*
>
> *"As much as everyone, from the small farmer to corporate farmers, wants and tries to hire and maintain domestic workers, retention is so low. Recruitment is even more difficult."*
>
> *"Production ag and processing facilities cannot staff their businesses adequately with domestic workers. Non-native workers are the backbone of the US ag industry."*
>
> *"Disappointed that we can't even find part-time help from the kids that take ag classes in a rural area."*

The Current Status of Agricultural Labor and the H–2A Program

Currently, there are about 1.2 million full-time equivalents (FTE) for on-farm employment. 70% are foreign born, and approximately 50% are working in undocumented status. Given this

reality, it is not surprising that there has been exponential growth in the H–2A program. The DOL certified over 371,000 positions in 2022, up from about 48,000 certified positions in 2005. The top states for utilizing the H–2A program in 2022 were Florida, California, Georgia, Washington, North Carolina, Michigan, Louisiana, Arizona, Texas, and New York.

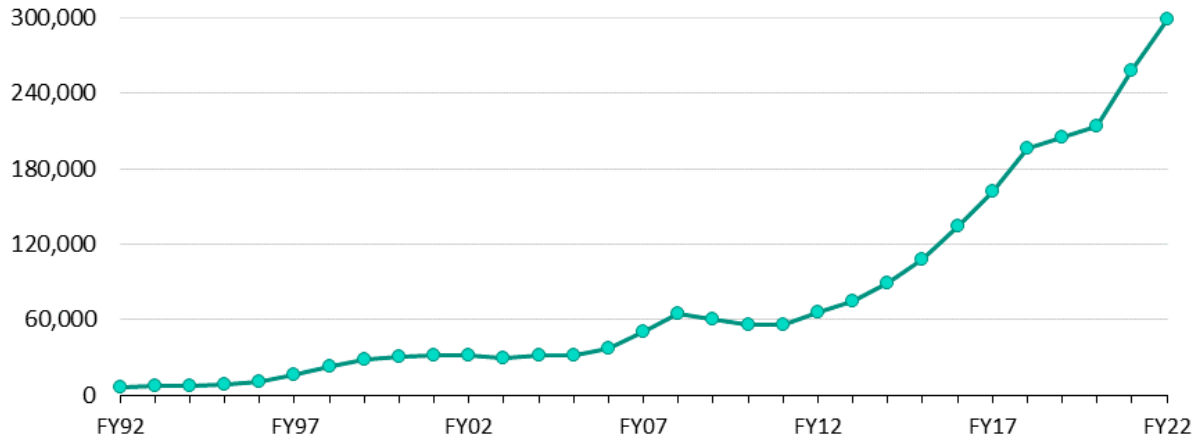
U.S. H-2A (temporary agricultural employment of foreign workers) positions certified by State, fiscal years 2005–22



Note: State-level data are not available for fiscal years 2005–06. Individual States identified in the chart were the top 10 in the number of H-2A jobs certified in fiscal 2022. About 80 percent of job certifications result in visas being issued to H-2A workers—some employers do not follow through to hire H-2A workers and some workers fill two certified jobs.
Source: USDA, Economic Research Service using data from U.S. Department of Labor, Office of Foreign Labor Certification.

Source: Economic Research Service Farm Labor

Further, the number of H–2A visas issued is not subject to a statutory numerical limit and has grown steadily over the last 30 years. Recent years have seen a relatively sharp increase. The number of visas issued went from 70,000 in 2017 to around 300,000 in 2022.

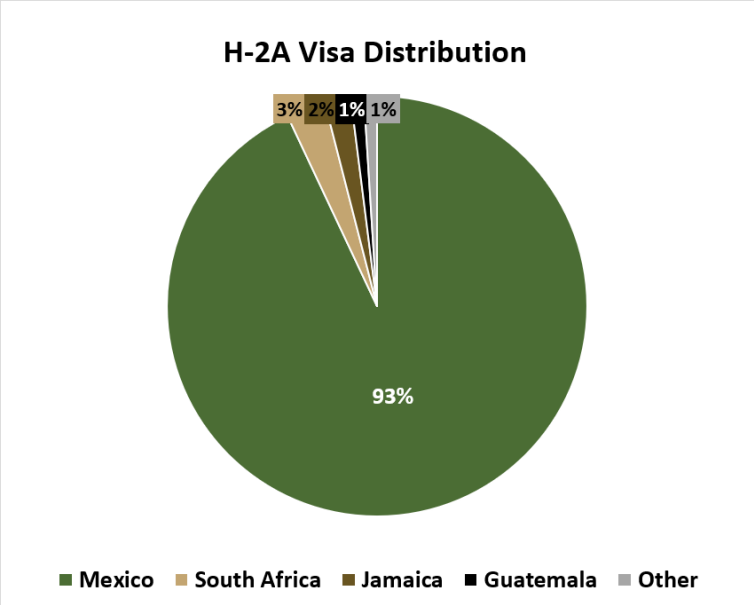


Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.

Estimates vary for how the agricultural workforce is defined and the factors that are taken into account for the size of the H–2A program relative to the larger agricultural workforce in the U.S. In FY 2021, estimates indicate that H–2A workers filled about 125,000 year-round equivalent jobs, or 11% of the 1.2 million FTE jobs in U.S. crop agriculture.

Visa issuances are not always the most accurate indicator of how many critical jobs a H–2A worker holds when he or she is in the U.S. because some H–2A workers who enter the U.S. on a visa in one fiscal year and extend their stay into the next fiscal year to perform new employment are not issued a new visa. Another example is that some workers who are issued a visa may be denied at a port of entry, and that data is not updated.

Finally, while H–2A visas can be issued to workers from 86 approved countries, in 2021, 99% of visas were issued to citizens of just four countries: Mexico (93%), South Africa (3%), Jamaica (2%, and Guatemala (1%). The other 1% of countries include El Salvador, Honduras, and Nicaragua, among others.



Definition of Agricultural Labor or Services

In order to qualify for the H–2A program, the listed job must be: (1) seasonal or temporary in nature, and (2) meet the definition of agricultural labor or services as defined in the statute and regulations. It is important to note that some sectors many consider as agriculture are not included,

as the nature of these jobs are not considered subject to a season, or they do not meet the definition requiring the commodity to be in an "unmanufactured state." This includes dairy workers, meat packers and processors, livestock marketers, and foresters. Many of these producers do not qualify for the non-agricultural H–2B program either because of the seasonality requirement.

Department of Labor regulations (20 C.F.R. § 655.103(c)) govern the current definition of Agricultural labor or services use the below authority:

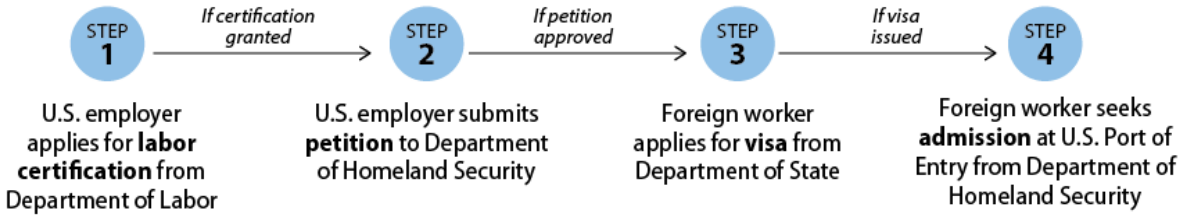
> Agricultural labor or services, pursuant to 8 U.S.C. 1011(a)(15)(H)(ii)(a), is defined as:
>
> - Agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g). (i) For the purpose of paragraph (c) of this section, agricultural labor means all service performed:
>   - (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;
>   - (2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;
>   - (3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;
>   - (4)(a) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;
>   - (4)(b) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed.
>
> - Agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C. 203(f);
>   - Agriculture. For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of

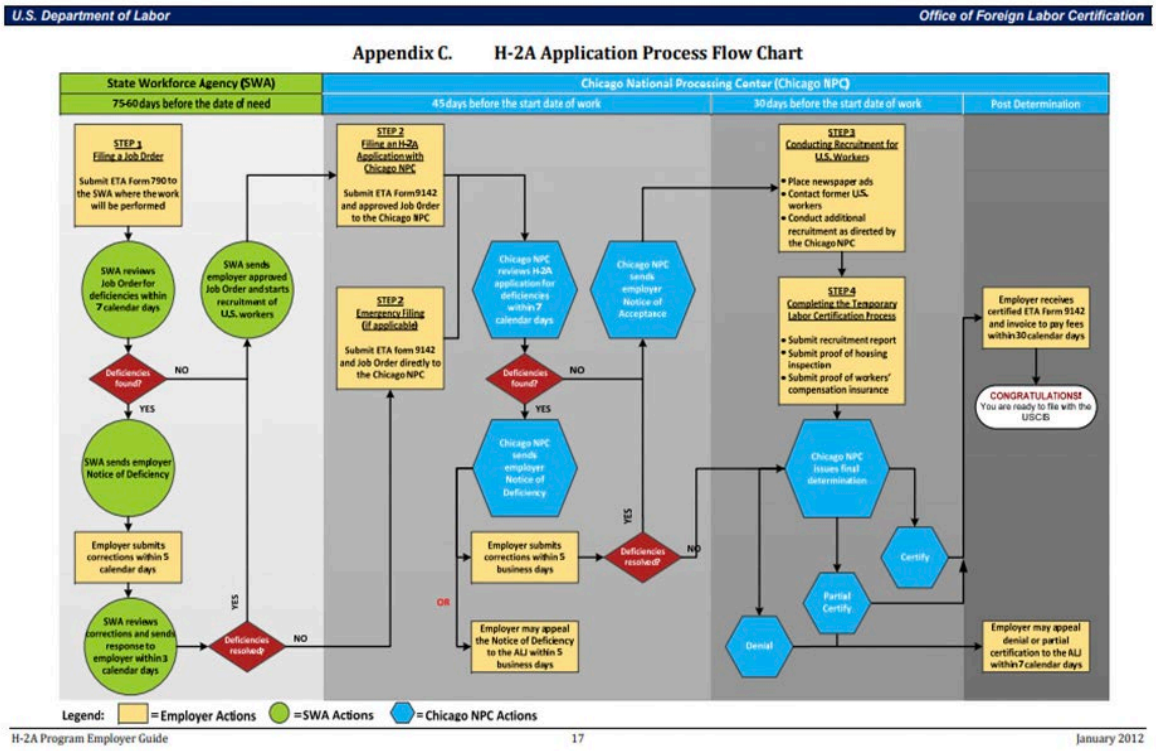
any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Current Process

By regulation, employers are required to begin the process of acquiring H–2A labor around 60–75 days before the Date of Need. Employers may hire a lawyer, agent, or Farm Labor Contractor because of the tedious process. The Government Accountability Office (GAO), as far back as 2012, noted that the "complexity of the H–2A program poses a challenge for some employers" because it "involves multiple agencies and numerous detailed program rules that sometimes conflict with other laws."

The H–2A program is primarily administered by the DHS's U.S. Citizenship and Immigration Services (USCIS), DOL's Employment and Training Administration (ETA), and the DOS. There are four basic steps to bringing H–2A labor to the U.S. for employment, as outlined below:





Source: U.S. Department of Labor H-2A Temporary Agricultural Program

Basic Standard Process:

1. The farmer applies for a domestic job order with the local State Workforce Agency.
2. The farmer applies for a temporary labor certification with DOL's Chicago National Processing Center.
3. Chicago National Processing Center provides the farmer with its final determination on whether the farmer can recruit foreign workers.
4. If approved, the farmer completes an H–2A visa petition with USCIS.
5. Foreign workers apply for the H–2A visa with DOS and complete consulate interviews.
6. Approved foreign workers travel to the worksite and arrive on the start date with an arrival/departure record.

Recruitment and DOL Labor Certification—The GAO called this portion of the process a "time consuming, complex, and challenging" experience that "imposes a burden on H–2A employers that is not borne by employers who break the law and hire undocumented workers." As part of the recruitment process, employers must demonstrate that there are not enough U.S. workers who are able, willing, qualified, and available to fulfill the position, and that hiring H–2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Employers must first notify and submit job orders to State Workforce Agencies (SWAs). SWAs are state-run entities that help unemployed domestic workers and guarantee that job offers comply with H–2A regulations and inform unemployed Americans about the job opportunities.

The job posting is circulated through an interstate employment system. Employers positively recruit until the Date of Need. Employers must accept eligible referrals of U.S. workers who apply for the job, and also contact any former U.S. employees at their last known contact address. Further, the employer must continue advertising and hiring all qualified domestic worker referrals for 50% of the length of the contract, even after H–2A workers join the farm for other positions. H–2A employers must also guarantee a total number of hours (at the Adverse Effect Wage Rate (AEWR)), equal to at least 75% of the workdays in the contract period, even if it finishes early.

If too few workers apply for available jobs, DOL will again review the jobs and certify the farmer to hire foreign workers for the remaining positions. DOL cannot require a prospective H–2A employer to submit a labor certification application more than 45 days before the employer's Date of Need for workers. DOL must also issue a labor certification no later than 30 days before the Date of Need if the employer has complied with all pre-hire guidelines. If DOL grants the labor certification, the farmer pays fees of $100 plus $10 per worker, up to $1,000 total.

Petition and Granting of Visas—While employers continue recruiting domestic workers, they petition USCIS to admit foreign workers and pay a $460 fee per petition. USCIS will conduct a third duplicative review (after the SWA and DOL reviews) of the jobs. USCIS has a 15-day deadline to review but may surpass the deadline if it needs additional information from the employer, thereby delaying the process. If USCIS approves a petition, workers may apply for visas. Employers pay a $190 visa fee, which USCIS later reimburses if the worker finishes at least half of the contract.

DOS enters as part of the visa approval process. To receive visas, H–2A workers must demonstrate that they do not intend to live in the U.S. permanently, either illegally or legally. If a DHS petition is approved, foreign workers who are abroad can go to a U.S. embassy or consulate to apply for an H–2A non-immigrant visa from DOS. Once approved, the worker is issued a visa that he or she can use to apply for admission to a U.S. port of entry. If admitted, via Customs and Border Protection (CBP) screening, the worker can commence employment on the work start date.

Interviews—As part of the visa process, most applicants must be interviewed, unless the interview requirement is waived (note that DOS consular officers have the authority to waive in-person interview requirements stemming from authorities granted due to the COVID–19 pandemic until December 31, 2023). The INA authorizes consular officers to waive non-immigrant visa interviews in certain cases. It also authorizes the Secretary of State to waive visa interviews upon a determination that such a waiver is "in the national interest of the United States" or is "necessary as a result of unusual or emergent circumstances."

Other major requirements of the program include covering the cost of housing for all H–2A employees, as well as the transportation for them from their home country to the place of employment. More on these provisions below.

Adverse Effect Wage Rate

CRS Report: (AEWR) Methodology for Temporary Employment of H–2A Nonimmigrants in the United States

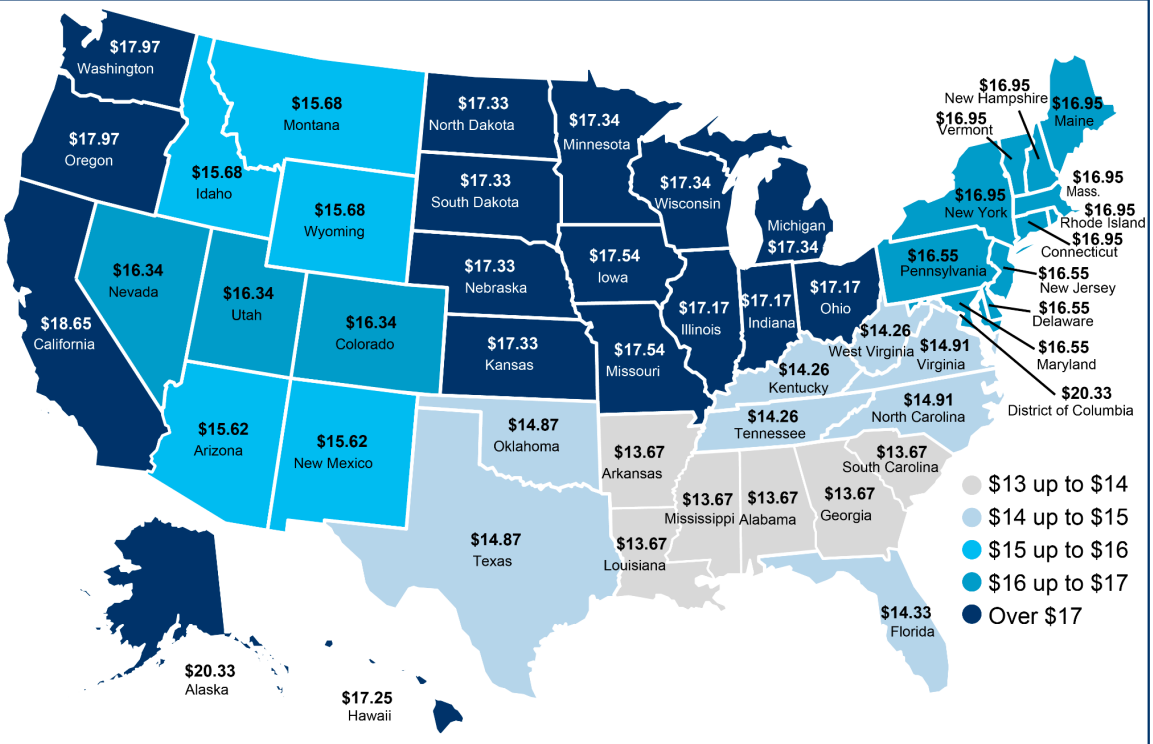
As described above, prior to filing a visa petition with DHS, a prospective H–2A employer must apply to DOL for labor certification. Before approving a labor certification application, DOL must determine that:

1. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services for which an employer desires to hire temporary foreign workers (H–2A workers); and
2. The employment of the H–2A workers will not adversely affect the wages and working conditions of workers similarly employed in the United States (*e.g.,* by lowering wages).

The INA does not specify a method by which the Secretary of Labor is to make these determinations. To ensure there are not sufficient U.S. workers who are qualified and available to perform the work, DOL requires employers to advertise and engage in positive recruitment of U.S. workers for the H–2A job opportunity, and to offer U.S. workers terms and working conditions that are not less favorable than those offered to H–2A workers. To guard against adverse effects on similarly employed U.S. workers, DOL requires employers to offer wages at or above the highest of five wage levels:

1. The adverse effect wage rate (AEWR);
2. The applicable prevailing wage rate;
3. An agreed-upon collective bargaining wage rate;
4. The federal minimum wage rate; or
5. The applicable state minimum wage rate.

Adverse effect wage rates (AEWR), 2023



Source: USDA, Economic Research Service using data from U.S. Department of Labor, Office of Foreign Labor Certification (OFLC), as of March 30, 2023.

Source: Economic Research Service Farm Labor

Methodology—DOL regulations govern the offered wage rate and provide the methodologies for determining AEWRs and prevailing wage rates. For most H–2A workers, the applicable wage rate is the AEWR. The AEWR is a state-level, hourly rate for non-range occupations (typical farmworker jobs) that is calculated using wage data collected through the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) and the Bureau of Labor Statistics' Occupational Employment and Wage Statistics (OEWS) survey. A monthly AEWR is used for range occupations, which commonly involve the herding or production of livestock on the range and under certain working conditions.

In the FLS, USDA asks survey respondents their gross wages for four reference weeks over the course of the year. This may include overtime, hazard pay, bonuses, performance incentives, and any other payment that was calculated as wages for that reference week. This inflates the base hourly rate before adding these types of extra compensation for the following year. This inflated average rate then applies to all workers, elevating the minimum wage floor for all H–2A and corresponding U.S. workers.

Many farmers feel that DOL's reliance on the FLS puts the AEWR on an upward escalator that becomes more disconnected from reality each year. The average AEWR has grown about twice the rate of inflation since 2001. In some states, the AEWR increased 23% in 2019 alone. Conversely, many labor representatives feel that the extremely valuable work H–2A employees perform warrants a higher, competitive wage not only to ensure domestic workers are not deterred from taking these jobs, but also because the strenuous work put in by H–2A employees to help yield our nation's food supply merits high compensation for their labor.

Additionally, the FLS survey methodology ignores differences between localities, detailed job types, skills, and experience. Both the H–2B non-agricultural and H–1B skilled worker programs determine wages for local areas for specific occupations and permit some private surveys to help determine wage rates. Currently, the lowest AEWR is more than $5/hour and the highest AEWR is more than $10/hour in excess of the federal minimum wage paid to domestic workers.

Range Occupations—For H–2A program purposes, range occupations involve the herding or production of livestock, which is performed on the range for more than 50% of the workdays in the work contract period, and generally require the workers to be on-call 24 hours per day, 7 days per week. DOL provides a monthly AEWR, given the unique nature of such occupations, which makes the recording of work hours difficult.

Non-Range Occupations—These hourly rates are determined using data collected through the FLS for workers who perform tasks covered by occupations included in the FLS field and livestock workers (combined) category.

This category contains jobs with the following Standard Occupational Classification (SOC) titles (further definitions, skill requirements, and tasks available are available via the Occupational Information Network):

- Graders and Sorters, Agricultural Products (45–2041);
- Agricultural Equipment Operators (45–2091);
- Farmworkers and Laborers, Crop, Nursery, and Greenhouse (45–2092);
- Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093);
- Packers and Packagers, Hand (53–7064); and
- Agricultural Workers, All Other (45–2099).

Other Non-Range Occupations—If the job includes tasks outside of these six job classifications, the wage rates are determined using data collected through the OEWS survey. For example, AEWRs for the farm supervisors or managers, heavy truck drivers, farm construction workers, and logging workers are based on OEWS survey data of the statewide annual average hourly wage rate for the specific SOC code. If the OEWS survey does not report a statewide annual average hourly wage for the SOC code, the AEWR is the national annual average hourly wage reported by the OEWS survey. The OEWS produces wages for over 800 occupations. If a job order includes duties that would be considered FLS and OEWS, then the highest wage rate will apply.

For example, if an H–2A job opportunity in California is classified as both a first-line supervisor of farming workers with an OEWS-based AEWR of $25.29, and an agricultural equipment operator with an FLS-based AEWR of $18.65, the prevailing AEWR is $25.29, even if the worker spends the majority of their time as an agricultural equipment operator.

Other States/Territories—The FLS excludes Alaska, D.C., and all U.S. Territories. The AEWR for workers in Alaska, D.C., Guam, Puerto Rico, and the U.S. Virgin Islands is the statewide or territory-wide annual average hourly gross wage in the state or territory (for occupations with the above SOC codes) as reported by the OEWS survey; or, if such a wage rate is not reported by the OEWS survey, the AEWR is the national annual average hourly gross wage as reported by the OEWS survey. The FLS and OEWS surveys do not collect data from American Samoa and the Northern Mariana Islands, therefore an AEWR is not calculated.

AEWR Publication Schedule—DOL publishes separate notices of AEWR adjustments in the *Federal Register* for rate adjustments based on FLS and OEWS data, meaning employers need to adjust their AEWR once, sometimes twice per year depending on what kind of labor contracts they have established.

DOL intends to publish FLS-based AEWRs on or about January 1, and OEWS-based AEWRs on or about July 1.

If the adjusted AEWR remains the highest of the five wage rates considered by DOL (*i.e.,* AEWR, applicable prevailing wage rate, an agreed-upon collective bargaining wage rate, the federal minimum wage rate, or the applicable state minimum wage rate) and the adjusted AEWR is higher than the previous AEWR, then the employer must pay at least the updated AEWR upon the effective date of the rate as published by DOL in the *Federal Register.* If the updated AEWR is lower than the wage rate guaranteed on the H–2A job order, the employer must continue to pay at least the guaranteed rate.

Analysis and Testimonials

It is important that we again note that DOL labor certification is intended to demonstrate that H–2A workers will not "adversely affect" U.S. workers. It should further be noted that the DOL has continuously raised H–2A minimum wages to encourage U.S. workers to apply, but USDA economists have concluded that "farm labor supply in the United States is not very responsive to wage changes."

Farmers are increasingly concerned about their inability to afford foreign workers due to regulation. Many have cited the AEWR methodology and overall cost structure as the number one issue facing their farms, thereby preventing them from using the H–2A program. The ALWG stands ready to further investigate the current AEWR methodology utilized by the DOL and will seek to understand if additional changes need to be recommended to ensure long-term affordability of the H–2A program for employers, without negatively affecting the wage rates of workers, and additionally, their protections on-farm.

Question #17 of the ALWG Survey asks: "If you had to prioritize, what is the number one issue you would like to see Congress or the Administration address to make the H–2A program work better for your operation?" 240 out of 356 responses mentioned wages or cost, including the following:

"Wage increases are the number one issue for the vast majority of H–2A users. Yearly increases in the 8–10% range make it more difficult to justify any price increase that would be associated with such an increase in the cost of labor."

"Slow the increase of the AEWR—it does not accurately reflect what ag employers are paying staff as the data from the surveys used aggregates all pay, including bonuses, and is inflated by the AEWR already in effect; the AEWR also doesn't take into account that the people receiving this pay also are receiving free housing and transportation at the expense of the employer, benefits that are not necessarily common in other industries."

"US farmers need a single H–2A wage rate that is affordable, transparent, and predictable. Do away with surveys and set geographic based wages that are capped and cupped at 2.5% tied to ECI or CPI. The AEWR is out of control, National avg has increased 32% over 5 years, 7% just last year. Furthermore, there have been recent annual increases in Colorado of 22% and Florida 15% in a single year. Specialty crop producers labor cost can range from 35–60% of production cost, increases like these are putting farmers out of business and driving up food costs."

"If the people of the US want to buy apples at $4.99 to $5.99 a pound, then keep raising the rates, but I'm pretty sure no one can afford that rate at a sustainable level—the whole cost of the program is steep, we spend $500,000 for a 32-bedroom home, pay for transit, give housing and then pay the top Ag wage in the US."

"We started H–2A as a legal option to retain a workforce in 2016. This was then planting asparagus & apples, both long term crops. We have incurred annual labor rate costs from $10.18/ hr. to now $17.34/hr. with the near same amount of market value or pricing for our crops. It does not work; it is unsustainable that the government wants cheap food supply on the backs of American growers and employers but will increase labor rates for foreign workers?"

"US workers must also pay Social Security and have State and Federal taxes withheld. H–2A workers pay no taxes plus housing and travel and utilities are furnished by the employer. Total wage cost is about $20 per hour."

"The current cost of H–2A labor in Michigan is $17.34/hour compared to the state minimum wage of $13.03. This disparity is exacerbated when you take into account that we provide housing for H–2A employees. They have no rent or mortgage and no utilities (water, electric, trash)."

"AEWR—Georgia farmers saw a 14% year-over-year increase in the Adverse Effect Wage Rate effective for 2023. This increase to a $13.67 AEWR is estimated to cost Georgia producers over $120 million in increased wages in 2023 alone. This raise even applied to growers who had already contracted for workers at the previous AEWR of $11.99. Labor remains the largest cost for fruit and vegetable growers and no business can effectively plan and budget for the future facing the risk of unexpected double digit increases to their largest cost center."

Second Roundtable—Accessibility Challenges in Agricultural Labor and H–2A

When: Wednesday, July 19, 2023
Panelists:

- Julie Anna Potts—President & CEO—North American Meat Institute
- Dave Tenny—Founding President & CEO—National Alliance of Forest Owners
- Dr. Claudia Larson—Senior Director of Government Relations—National Milk Producers Federation
- Luke Hale—Director of Government Affairs—Livestock Marketing Association

Overview of Roundtable—The definition of agriculture excludes much of animal agriculture. Forestry services primarily participate in the H–2B non-agricultural visa program, which is subject to caps, because H–2A's housing regulations cannot apply to forestry industry work contracts. Certain industries do not fall under the definitions of "seasonal" and "temporary" work. The panelists focused on two primary topics: how panelists' industries (dairy, forestry, processors, marketers) currently utilize non-immigrant labor, and how panelists' industries would benefit if to the H–2A program is expanded. They also discussed seasonality definitions and temporary agricultural labor. While this roundtable featured four witnesses to speak about accessibility challenges for their individual sector, it was not intended to be exclusive and the ALWG recognizes that there may be other agricultural or affiliated sectors that could make the case for and would benefit from broader utilization of the H–2A program.

Seasonality and Length of Visa

Depending on the type of work the employer needs, temporary or seasonal agricultural work can occur on farms, plantations, ranches, nurseries, ranges, greenhouses, orchards, or other similar locations. *Seasonal* work is when an employer needs more help than typically required because work is tied to a certain time of year by an event or pattern, like a short annual growing cycle. Temporary work lasts no longer than one year.

A single work contract can be no longer than 10 months, with the maximum period of stay being three years if H–2A workers are finding new contracts within 30 days of their expiring contracts. There is a "touchback" requirement as well, meaning workers are required to return home for three months after three years of contracts. The average length of a contract is six months, and most foreign workers return home annually.

Under current statutory and regulatory definitions of agriculture, many sectors usually classified as agriculture do not qualify to apply for H–2A labor. This includes livestock producers, including cattle, pork, turkey, poultry, *etc.,* the dairy industry, processors of meat, poultry, and pork, as well as livestock marketers, and foresters.

The Case for Dairy

Dairy farms have traditionally included family members as employees. Recently however, many operations have also employed non-family members, with the current estimate being roughly 40% of all dairy farms having non-family member employees. As dairy operations continue to

grow in the U.S., fewer family members remain on the farm. Thus, the expectation is that the need for non-family member employees will increase.

The majority of the non-family member workforce on dairy farms is immigrant employees. Despite typically paying competitive wages and providing employee benefits, dairy farmers have a difficult time finding domestic workers. Estimates currently place immigrant employees as roughly 70% of non-family employees. There is a clear trend projecting an increase in the percentage of immigrant employees within the dairy workforce.

Even with increasing numbers of non-family member employees, the dairy industry is still understaffed. Similarly, to all of American agriculture, dairy is in a decades-long labor crisis. Unlike many other agricultural sectors, dairy operations cannot use the H–2A program. These jobs include milking cows, feeding, and tending to the cows' daily needs, taking care of the cows' life cycle and medical needs, daily maintenance and operation of dairying equipment, machinery, and facilities, among others.

Because dairy farmers cannot use the H–2A program, they do not have access to a guest worker program to supplement their domestic workforce. Meaning they have no employee pool to turn to when they are short-staffed, which is now the normal condition under which they must operate. Dairy operations across the country are making business decisions under the assumption that they may not have the employees they need.

Allowing dairy producers to use the H–2A program would provide them with access to an employee pool they currently cannot access. While this will not address the domestic labor crisis, it will provide dairy operators with the option to hire H–2A employees to supplement their domestic workforce.

The Case for Processors

Access to a stable, reliable workforce is the most pressing day-to-day challenge facing the processing industry, which includes cattle, poultry, pork, sheep, and types of aquaculture. This was the case before the COVID–19 pandemic, and it remains an acute challenge.

Unlike many other manufacturing sectors, meat processing relies heavily on human labor. Animals, particularly cattle, are different sizes, with different muscle and fat characteristics. Today, the human eye is still necessary to make judgements about the precise cuts that are needed.

Allowing processors to have access to the H–2A program, provided that additional worker safeguards are put in place to address the unique hazards of the industry, could be an impactful reform. The jobs at packing and processing facilities are not considered "agricultural labor" as the term is defined in the statute outlined above, meaning processors are not eligible to participate in the H–2A program. Additional reforms to recognize the year-round labor needs of many in agriculture merit further consideration, including for processing. The seasonal component to the H–2A program could evolve to meet the current labor needs of the industry.

Processors are the harvest stage of the livestock industry, making them essential to the livestock industry and the food supply. The "supply chain," as the name implies, relies on the strength of each link. Labor problems in the processing sector hampers production and drives up costs. Efforts to address agricultural labor reform could consider both the production and processing sectors.

While other indirect means of enhancing domestic agricultural labor should also be considered such as processors implementing apprenticeship programs or partnerships with community colleges to educate skilled technicians to maintain and repair vital equipment, expanding access to the H–2A program for processors could help solve some short-term workforce problems. In

addition, this expansion could likely benefit the rural communities where processors predominantly operate by providing child care, housing, and other rural economic needs.

The Case for Livestock Marketers

Livestock auction markets provide an open forum of competitive bidding for producers to sell their livestock. Many of these markets are located in rural communities and serve as the lifeblood for local commerce on sale days when buyers, sellers, and onlookers come to town to attend those sales. More than 40 million head of livestock move through auction markets each year, and staffing a workforce to facilitate operations requires investment in time and training for employees to handle the animals carefully and properly.

Typically, markets hold weekly sales that are only one or two days out of the week. While there is maintenance and other duties, the majority of work is done on sale days when markets are receiving, sorting, auctioning, and arranging transportation for after the animals are sold. The need for adequate staffing on sale days is critical to the survival of these small businesses. With the majority of the work being done in a portion of the week, it has become more difficult to procure the workforce needed.

The INA provides broad discretion to regulators in determining the eligibility of those providing agriculture services (8 U.S.C. 1101). However, the line for eligibility has been drawn to exclude those that do not own the agriculture commodity (29 CFR 501.3(1)(i)(F)). Livestock auction markets are not eligible to participate in the H–2A program because they do not own the animals. Rather, they serve as an agent selling the livestock on behalf of farmers and ranchers.

Ironically, while the service they provide to producers and buyers excludes them from eligibility, the program expressly grants eligibility to operations needing additional labor to send or receive animals from markets (29 CFR 501.3(2)). It is evident that there is an understanding of the need for supplemental labor in situations involving livestock market services, as well as the fact that the need can be seasonal, aligning with the purpose of the program.

The labor force in rural America is shrinking and without H–2A eligibility, the alternatives available are not logistically feasible or financially viable given the unique operations of auction markets. In many cases, livestock markets could partner with one another in the area and pool labor resources if they were eligible. This could resolve some of the issues with intermittent labor needs during the week, but could likely only be useful if participation was permitted on a yearly basis and not just seasonal.

The Case for Forestry

The forestry sector relies on seasonal H–2B guest workers because there are not enough interested U.S. workers to fill these short-term, remote, and itinerant jobs. Each year, H–2B guest workers plant more than 1.3 billion trees on more than 2.5 million acres of land following harvests or other natural disturbances, like wildfire. These reforestation efforts are vital to ensuring long-term forest sustainability and protecting our domestic wood supply. Additionally, these H–2B workers directly support 2.5 million American jobs that depend on private, working forests.

According to the panelists, the forestry industry utilizes the H–2B program rather than the H–2A program primarily due to the H–2A program's housing requirements. First, the remoteness of U.S. forests generally means there is not enough OSHA-approved housing in those areas to meet the rigorous demands of the H–2A program. Second, the locations of forest planting are oftentimes

in response to unplanned natural disasters, which does not allow for the pre-planning and maintenance of OSHA-approved housing. Third, H–2B forestry workers are constantly moving to multiple job sites in a season, sometimes at far distances, meaning that no H–2B worker would occupy any lodging for a significant length of time.

The H–2B program provides for these needs. Employers are allowed to pay for adequate, available lodging near planting areas. This specifically allows H–2B workers the benefit of keeping their prevailing wages rather than expending them on accommodation. This exception to the housing requirements means H–2B workers can find accommodation to fit their work needs rather than being prohibited by regulations from working in a remote area because no such accommodation is available.

The H–2B program is challenging for the forestry sector because it is subject to a limited and complex two-stage annual cap. The year starts with a 33,000-worker visa allowance. If all of these slots are filled by June 30, then a second batch of 33,000 are released, bringing the yearly total to 66,000. The forestry sector needs up to 20,000 H–2B workers a year, split between the spring and fall. Every year the forestry sector faces two very real threats: (1) that other H–2B dependent industries will not request their quotas to hit the 33,000 half-year cap, which would create a shortage of workers in the fall, and (2) that too many H–2B applications will be filed and the industry will not secure the workers needed for industry needs. This is consequential for planning.

The forestry sector could utilize the H–2A program if it made allowances for the itinerant nature and unique housing needs of forestry work sites. Practical leniency in the housing requirement could help forestry employers access the H–2A program and secure necessary workers for the U.S. forestry sector.

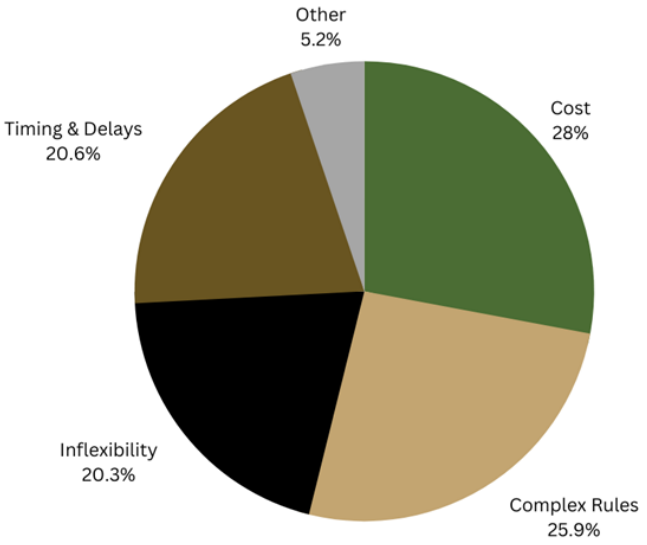
Third Roundtable—Current Complexities of the H–2A Program

When: Thursday, July 27, 2023
Panelists:

- John Walt Boatright—Director of Government Affairs—American Farm Bureau Federation
- Mary Nowak—Director of Government Affairs—National Council of Farmer Cooperatives
- John Hollay—Director of Government Relations—International Fresh Produce Association
- Layla Soberanis—Senior Government Relations Representative—National Farmers Union

Overview of Meeting—In addition to the administrative process, this meeting focused on challenges and complexities facing agricultural employers participating in the H–2A program, including how DOL and DHS regulations are shaping the future of the program. A total of eight new rulemakings have been adopted or proposed in one year. The common theme from this meeting was pushing for congressional action on labor priorities, otherwise farmers risk losing their farms.

Question #12 of the ALWG Survey asked: "What are the primary issues that you have experienced with the H–2A program?" Cost, complex rules, inflexibility, and timing delays were specifically noted.



Source: House Committee on Agriculture

Cost Challenges for Small and Medium Employers

Cost Impact—The panelists expressed concern that the March 30, 2023, DOL final rule on AEWR calculation adjustments, outlined in the First Roundtable discussion above, has led to significant increased costs. These new cost adjustments mean an increase of approximately $10,000–$20,000 per worker before factoring in the costs for transportation, food, housing and associated inspections, visa fees, and the possibility of hiring an agent or lawyer to help with process or audits. Potentially leading to higher per-worker cost if the higher OEWS rate AEWR is the prevailing wage. In cases of on-farm employment, agricultural employers are either going to take a major hit to their revenue stream, or be unable to afford these cost adjustments.

The bottom line, according to the panelists, for some small and medium growers is one of the following options to choose from:

1. Sell a portion or all of the farm to a larger, more profitable landowner or operator, or to a corporate land-owning entity;
2. Move operations abroad, where labor and regulation are more affordable, therefore moving the U.S. closer to becoming a net-importer of agricultural products; or
3. Run out of revenue stream and have the farm go under.

None of these options are acceptable to the Working Group.

Other cost challenges were discussed with the panelists that could arise depending on the situation of the employer, including joint-employer contracts and prevailing wages.

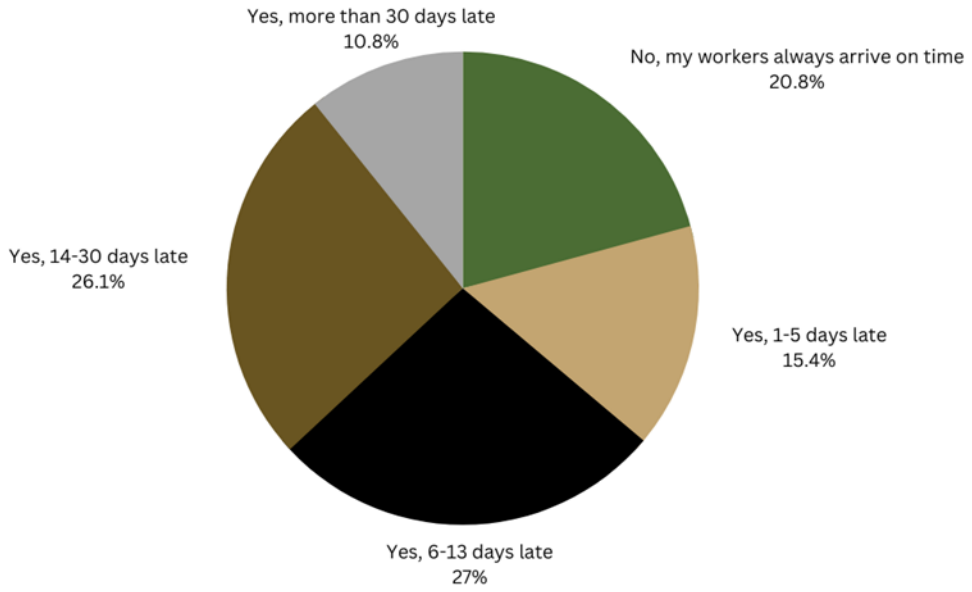
Joint-Employers—An employer may intend to enter into a contract of becoming a joint-employer with one or more other growers. There are a number of benefits to allowing an employer to enter a joint employer relationship. This provides greater access to the H–2A program for small employers, for cost-sharing between employers, and more fulfilling job opportunities for workers. DOL has recently placed restrictions on the ability to be joint employers, specifically that each employer has only part-time employment needs, possibly reducing the cost-benefit of entering into a joint-employer contract.

Prevailing Wages—Surveys are conducted by state agencies with broad discretion in methodology and occurrence, including key definitions such as what constitutes crop activity. The state calculated prevailing wage is conducted based on standards established by DOL and must be approved by the agency. These standards were revised in the October 2022 H–2A Final Rule, reducing the statistical thresholds required for a survey to be considered valid. DOL's stated purpose for these revisions was to increase the number of surveys conducted by states.

Currently, Washington State is the only state that routinely conducts prevailing wage surveys to establish wage rates through the H–2A program. However, some surveys are small and may not accurately reflect the regional wage rates for the crop activities in question. In Washington State, a number of cases with a prevailing wage has ended up being higher than the AEWR for specific crop activities in recent years, despite the AEWR being applied to over 92% of job contracts.

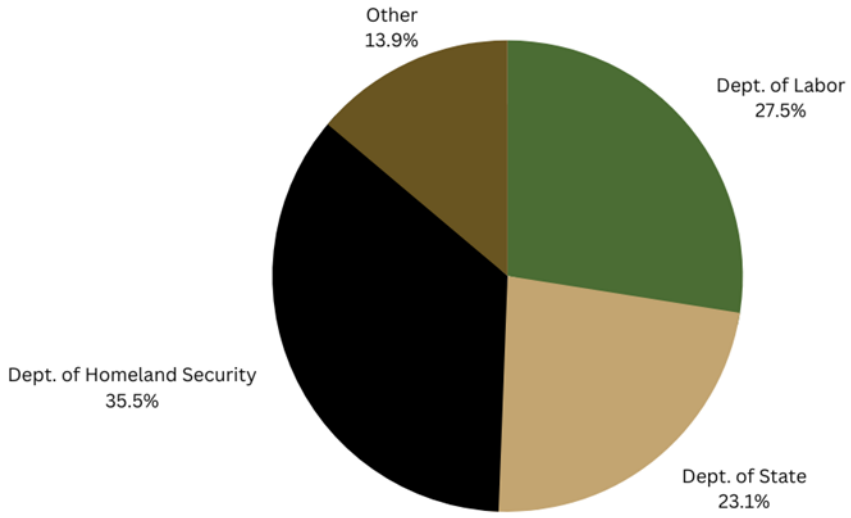
Timing and Delays

Question #13 on the ALWG Survey asked: "Have you experienced workers arriving after the requested start date as a result of administrative delays?"



Source: House Committee on Agriculture

Question #14 on the ALWG Survey asked: "If you have experienced delays in the arrival of workers, which agency (or agencies) were the cause for the delay?"



Source: House Committee on Agriculture

Certification of Labor Need Paperwork—Labor certification is just one part of the current arduous H–2A administrative review process. While oftentimes it runs smoothly, for more complex farming operations, it can just mean more paperwork.

For example, the SWA approves a job order. DOL certifies a temporary labor need for up to 10 months for a specific job order. If there are multiple Dates of Need or Job Need, farmers must receive multiple labor certifications annually, thus increasing the amount of paperwork.

USCIS Reliance on U.S. Postal Service (USPS)—One process that is continuing to cause delay and difficulty for employers is USCIS' reliance on the USPS to communicate important information to employers about their H–2A visa applications. Common issues include never receiving or having been delayed in receiving a 797B approval notice, Requests for Further Evidence (RFE) for the prospective employee, or Intent to Deny (ITD) application notifications that the USCIS sends out to employers via USPS during the H–2A visa application process. To make it worse, the information employers are providing to USCIS is the same information they will provide to DOL (and subsequently DOS), making the process duplicative and allowing for multiple chances for the employer to fail on an application. This delays H–2A workers arriving in the U.S. to begin their work. In many cases, because the correspondence was never received, employers miss important deadlines for responding and must reapply, costing more money and time.

When an H–2A visa (I–129 application) is approved, the employer receives an email from the USCIS with the 797B approval notice, which the H–2A worker uses when applying for his or her entry through DOS. Even though the H–2A worker now has the receipt number to begin the entry process, there are some countries, like South Africa, that require a hard copy of the receipt to be submitted with their visa application at the port of entry. Those applicants are delayed weeks in applying for entry as the applicant waits for the hard copy to be delivered by the USPS.

Most non–H2A USCIS applications, communication, and documentation are submitted through a USCIS online account. However, USCIS requires all H–2A applications and the farmers' additional correspondence be submitted through the USPS or another mail carrier. Further USCIS communication with the employer is through USPS as well. USCIS has the technical capacity to upload approval receipts, RFEs, and ITDs to the secure portal for the applicant to access, as most other government agencies do, but it currently does not. Instead, it continues to utilize USPS to deliver this important information during the visa approval process.

Question #15 of the ALWG Survey asked: "If you have experienced delays in the arrival of workers, please provide an estimate and description of the cost of these delays to your operation." Among the 250 responses:

> *"Cost us some produce loss from being over ripe and left in the field. Several thousand dollars. Our application was in San Francisco on someone's desk. Then was sent by USPS instead of electronically. I had to resort to calling my state representative to make inquiries on my behalf."*
>
> *"Workers habitually arrive 15–30 days past the contract start date due to holdups with the state DOL in Delaware. We have had to make choices regarding pushing plantings later for lack of employees which in turn causes our rootstocks to be much smaller at the time of propagation, and therefore setting us up for low quality budding = less trees we are able to sell. Easily this is costing us $5000 to $8000 a season."*

"The workers who were a month late because of delays forced us to delay planting, which cost us a minimum of 30 days of sales of tomatoes, one of our largest crops. These delays can cost us upwards of $250,000+."

"I waited 7 weeks for my crew one year! If it wasn't for other farms letting me share their transient workers, I would have had a disaster. The US Dept of Labor told me to "Just plant the crop when they get there."

"We have missed the critical planting window on our farm in TX several different years that has cost us 50–100 bu./acre in yield ($250–$500/acre). In some years, we've had to switch from higher yielding crops like corn to lower yielding crops like grain sorghum due to missing the early planting window. This can lead to $400–800/acre in revenue losses. Due to the unreliability of when our workers will get approved, we cannot plan ahead on booking airline or ground transportation. We have to wait until the last minute to buy airline tickets, which leads to extra transportation costs of $500–$1,000 per employee. We have also started hiring 10–20% more H2A workers than we anticipate we might need and bringing them over 1–2 months sooner than we actually need to make sure we aren't left without sufficient workers. This adds 15–20% to the cost of our labor on top of the crop losses we've experienced in the past."

"This is difficult to quantify. But last year we had to abandon a block of fruit because the workers' late arrival kept us from harvesting on time and the apple maturity was too advanced. That was about 2,000 bushels of fruit. We're a small farm, so that block alone was about 5% of our fruit. Gone, zero, no income."

"Typically have problems with delays when we don't obtain contracts directly and go through a labor contractor. When we obtain directly, delays cost us between $5k–$10k per day. If we're waiting for labor during harvest, it can cost as much as $100k per day due to getting the crop harvested on time."

"Arrival delays have forced the few year-round non-H2A employees we have, and owners to work nights, weekends, and double shifts to harvest crops that could not wait for help to arrive. We have had fruit drop on the ground and become wasted when the short harvest window began to pass."

Fourth Roundtable—Labor Perspectives of the H–2A Program

When: Wednesday, September 20, 2023
Panelists:

- Haley Nicholson—Deputy Legislative Director—United Food and Commercial Workers International Union
- Shannon Lederer—Director of Immigration Policy—American Federation of Labor and Congress of Industrial Organizations
- Andrea LaRue—Managing Partner—NVG LLC
- Alexis Guild—Vice President of Strategy and Programs—Farmworker Justice
- Daniel Costa—Director of Immigration Law and Policy Research—Economic Policy Institute

Overview of Meeting—This meeting focused on the need to bolster worker protections and ensure appropriate DOL rules are implemented to guarantee the H–2A program is meeting the goals of worker protection. Foreign agricultural workers participating in the H–2A program are critically important parts of the American food supply system. Without them, agriculture producers would be unable to plant, harvest, or provide enough food for Americans to eat or to export. Sadly, according to testimony from organized labor leaders, labor conditions can be far less than adequate on some farms, and workers have faced physical, emotional, economic, and sexual abuse or threats at the hands of their employers or fellow workers. This session also discussed the recent DOL rules and how these rules could lead to better protections for workers and higher wages. Further, the roundtable participants discussed how larger immigration and citizenship questions are a necessary part of the holistic discussions in solving the agricultural labor issue.

Background

There are approximately 1.2 million farm workers. According to the federal government, about half of farm workers are either citizens or lawful permanent residents. National estimates indicate that non-supervisory farm workers who are not part of the H–2A program have annual mean and median personal incomes in the range of $17,500 to $19,999, with the mean and median total family income in the range of $20,000 to $24,999. Because the H–2A wage rate is based on the average farm worker pay rate, the low wages paid to non-H–2A workers significantly affects the H–2A population. Panelists also noted that under federal law, farm workers do not have a right to overtime wages or the right to join a union.

Working Conditions and Recruitment

Labor advocates are concerned about the difficult conditions that all farm workers, including H–2A workers, may experience. One metric that defines the difficulty of agricultural work is the rate of heat deaths. Heat-related deaths for farm workers is 35 times higher than other industries. Additionally, field sanitation is not always provided leading to workers urinating or defecating in the fields. In agriculture, occupational death and injury rates are disproportionately high, when compared to other physically demanding labor occupations. Finally, it is deeply concerning that

out of the 40% of farm workers who are women, interviews suggest that as many as 80% of them have experienced harassment on the job.

Concerning the H–2A population, labor leaders are particularly concerned about H–2A recruitment practices. Because of the structure of the program, which requires employers to provide transportation, housing, and food in some instances, workers coming into the U.S. through the H–2A visa program often feel bound to their employers. Workers can find themselves in dangerous work conditions or experiencing harassment from employers or fellow workers, and given their unique living and working situations, this can lead to fear of reprisal for speaking-out. Reports have also indicated that in some instances, potential H–2A workers have been preyed on by unscrupulous brokers, recruiters, and employers who claim workers must pay exorbitant fees to work in the U.S.

Replacement of Domestic Workers

Witness testimony indicated a concern that the H–2A program has been displacing domestic workers in greater numbers recently. This assertion is based on a 2022 DOL Wage and Hour Division enforcement action in Mississippi where African American workers were illegally displaced in favor of H–2A workers from South Africa who were trained by the displaced workers. Witnesses were also concerned that the H–2A program may allow employers to preference foreign male workers over domestic female workers, as evidenced in one Washington State Attorney General investigation into a mushroom farm's operations. Finally, witnesses pointed to a 2012 Georgia incident in which the Equal Employment Opportunity Commission entered into a consent decree with a fruit and vegetable farmer who was alleged to have engaged in racial discrimination against American workers, mainly African American workers, in favor of Mexican workers.

Enforcement

DOL Wage and Hour Division—This is the office within DOL that conducts audits of H–2A farmers and fines those who fail to comply with regulations. This office is necessary to enforce compliance with the program's strict regulations and protect workers from wage theft, threats to safety, fraud, wrongful termination, or other listed violations. Oftentimes, however, employers believe they are subject to audits that are overly costly or intrusive in furtherance of prosecuting extremely minor infractions.

Analysis and Testimonials

Question #24 on the ALWG Survey asked: "If you are a current or former H–2A employee, do you believe the worker protections in the H–2A regulations protect workers?"

- Yes (68)
- No (41)

Question #25 asked: "If you are an H–2A employee or domestic farmworker, do you believe H–2A workers and non-H–2A workers have similar or the same protections under the law?"

- Yes (70)

- No (48)

Responses to Questions 24 and 25 indicate that for the majority of H–2A employees, worker protections are functioning as intended, reflecting the fact that the vast majority of farms and participants in the program run above-board operations where the system works as intended. But the number of negative responses also indicates there may be gaps, whether in the law, federal regulation, state implementation, or on-farm practice in worker protections that warrant further investigation by the ALWG.

Question #26 asked to "provide for additional information and perspective on agricultural labor issues or any other information that might be of assistance to the ALWG". Some of the responses are as follows:

"Without our migrant workforce the US would become a starving country."

"Need to treat immigrants that perform critical work on our farms, like humans."

"A lot of supervisors in the fields treat H2A workers really badly. H2A workers, due to fear, do not report."

"These workers are indispensable to the Wisconsin dairy industry, and I believe they should have equal safety as non-H2A workers, as well as compensation that is fair (meet at least minimum wage standards)."

"H2A Workers:

1. *Ensuring no charges on H–2A recruitment of workers in Mexico for H–2A employment opportunities.*
2. *Outdated regulations related to housing and field sanitation standards.*
3. *Employers primarily resorting to H–2A programs without initially testing the local labor market through local job orders to recruit U.S. workers.*
4. *Inadequate worker protections in cases of joint employment, where Farm Labor Contractors (FLCs) may close one business and open another, often resulting in fines to the FLC rather than the farmer.*
5. *Farmers choosing to engage FLCs instead of directly participating in the H–2A program, possibly to ensure that FLCs bear the fines rather than the farmers."*

"The H–2A program is greatly abused by big ag producers and needs a major overhaul to protect employees, who are regularly abused by wage theft, for example, and threats of calling in immigration if employees complain or have an issue with employers."

Fifth Roundtable—Producer Perspectives of the H–2A Program

When: Wednesday, September 27, 2023
Panelists:

- Chalmers Carr III—President & CEO—Titan Farms, Ridge Spring, South Carolina
- Carlos Casteneda—Casteneda & Sons, Inc. & Mission Labor, Inc., California
- Sue Leggett—Leggett Farming Partnership, Nashville, North Carolina

Overview of Meeting—Panelists provided their perspective of utilizing the H–2A program on their operations. They described some of their workers as "family," and commented on having seen the program grow and change over the years, but never to an extent quite this drastic with eight new rulemakings finalized or initiated under the current Administration. Carr is one of the nation's largest H–2A private employers and has been participating in the program for 25 years with a 96% retention rate amongst his employees. Casteneda is the son of a California farm laborer and has been a farm labor contractor for years, primarily helping with the advising and processing of H–2A applications for farm employers. Leggett and her husband are first generation family farmers who rely on H–2A labor to grow and harvest sweet potatoes, tobacco, cotton, soybeans, peanuts, and strawberries. This roundtable spent time discussing the complexity and cost of specific regulations such as housing requirements and the new wage rules, and an overarching concern that the program is on a path to becoming unworkable for employers. A common theme and objective of these three panelists was advocating for leaving broader immigration reform efforts separate from H–2A and pursuing more narrowly tailored agricultural labor reforms in the short-term.

Housing

DOL Wage and Hour Division H–2A Housing Standards

Among other statutory labor certification requirements, by statute, employers must provide workers with housing that meets specific regulatory standards. The regulations require that housing must be provided at no cost to H–2A workers and to those workers in corresponding employment who are not reasonably able to return to their residences within the same day. H–2A employers may house workers in temporary labor camps they own or control, or they may use rental or public accommodations, such as hotels or motels.

H–2A employers that use hotels, motels, or other similar public accommodations to house workers, must ensure that those accommodations meet certain essential health and safety concerns and are responsible for compliance with all the applicable standards, including cleaning standards.

Where local health and safety standards for rental and/or public accommodations exist, all of those local standards will apply. If, however, the local standards do not address any of these essential concerns, then any state standards addressing those concerns will apply. If neither local nor state standards address any of these concerns, the relevant OSHA standards will apply.

- Square Footage and Storage Facilities:
    - Each room where workers sleep must contain at least 50 square feet per person. Ceilings must be at least 7 feet high. (29 CFR 1910.142(b)(2))

- Each room where workers sleep must have beds, cots, or bunks, as well as storage facilities such as wall lockers for clothing and personal items. Beds or similar facilities must be at least 36 inches apart, both side-to-side and end-to-end, and must be at least 12 inches off the floor. If double-deck bunk beds are used, they must be at least 48 inches apart, both side-to-side and end-to-end. Minimum clearance between the lower and upper bunk must be at least 27 inches. Triple-deck bunks are prohibited. (29 CFR 1910.142(b)(3))
- At least 100 square feet per person must be provided in a room where workers cook, live, and sleep. (29 CFR 1910.142(b)(9))

- Sufficient and Sanitary Cooking and Kitchen Facilities:
  - When an H–2A employer using rental or public accommodations chooses to meet its meal obligations by providing free and convenient cooking and kitchen facilities to workers, the following concerns must be addressed:
    - Where stoves are shared, they must be provided in a ratio of at least one stove per 10 persons or one stove per two families. Sanitary facilities must be provided for storing and preparing food. (29 CFR 1910.142(b)(10))
- Heating, Cooking and Water Heating Equipment:
  - All heating, cooking, and water heating equipment must be installed in accordance with State and local ordinances, codes, and regulations. If the housing is used during cold weather, adequate heating equipment must be provided. (29 CFR 1910.142(b)(11))
  - An adequate and convenient water supply, approved by the appropriate health authority, must be provided in each housing location for drinking, cooking, bathing, and laundry purposes. (29 CFR 1910.142(c)(1))
  - A water supply is considered adequate if it can deliver 35 gallons per person per day to the housing location at a peak rate of 2 1/2 times the average demand required each hour of the day. (29 CFR 1910.142(c)(2))
  - The distribution lines must be able to supply water at normal operating pressures to all fixtures when operated at the same time. (29 CFR 1910.142(c)(3))
  - One or more drinking fountains must be provided for every 100 occupants. If the number of occupants is between 101 to 200, an additional drinking fountain is required, and so on. Common drinking cups are prohibited. (29 CFR 1910.142(c)(4))
- Adequate and Sanitary Toilet, Laundry, Handwashing, and Bathing Facilities:
  - Toilet facilities adequate for the capacity of the housing facility must be provided. (29 CFR 1910.142(d)(1))
  - An adequate supply of toilet paper must be provided in each bathroom. (29 CFR 1910.142(d)(9))
  - Bathrooms must be kept in a sanitary condition and must be cleaned at least daily. (29 CFR 1910.142(d)(10))
  - Laundry, handwashing, and bathing facilities must be provided in the following ratio: one handwashing sink per family or one per six persons in shared facilities; one shower head for every 10 persons; one laundry facility for each 30 persons. (29 CFR 1910.142(f)(1))

    - Bathroom floors must be of smooth finish but not slippery materials; they must be waterproof. Floor drains must be provided in all shower baths, shower rooms, or laundry rooms. (29 CFR 1910.142(f)(2))
    - An adequate supply of hot and cold running water must be provided for bathing and laundry purposes. (29 CFR 1910.142(f)(3))
    - Every service building must be provided with equipment capable of maintaining a temperature of at least 70 degrees Fahrenheit during cold weather. (29 CFR 1910.142(f)(4))
    - Facilities for drying clothes must be provided. (29 CFR 1910.142(f)(5))
    - All service buildings must be kept clean. (29 CFR 1910.142(f)(6))
- Sufficient Lighting:
    - Where electricity is available, each habitable room must be provided with at least one ceiling-type light fixture and at least one separate floor- or wall-type convenience outlet. Laundry and toilet rooms and rooms where people congregate must contain at least one ceiling- or wall-type light fixture. Light levels in toilet and storage rooms must be at least 20 foot-candles 30 inches from the floor. In other rooms, including kitchens and living quarters, light levels must be at least 30 foot-candles 30 inches from the floor. (29 CFR 1910.142(g))
- Refuse disposal:
    - Garbage containers must be kept clean. (29 CFR 1910.142(h)(2))
    - Garbage containers must be emptied when full, and at least twice a week. (29 CFR 1910.142(h)(3))
    - Effective measures must be taken to prevent animals, insect vectors, and pests from residing in or infesting the facility. (29 CFR 1910.142(j))

Further, employers are required to provide each H–2A employee with three meals per day, at no more than a DOL-specified cost, if providing cooking and kitchen facilities where workers can prepare their own meals is not possible. The regulations also require that if providing meals, they meet nutritional standards.

Although the H–2A employee should not be subject to substandard or otherwise unhealthy living conditions, the panelists expressed that employers being required to pay for, and comply exactly with all rules and regulations listed above, is costly and time consuming. Housing accounts for nearly a quarter of H–2A cost and inflates total compensation far above the non-H–2A wage rate. Additionally, growers often face local policy, financing, and zoning restrictions, as well as "NIMBY"-like arguments opposed to farm worker housing in their communities, which makes participation in the program more challenging.

Transportation

Employers must provide the following transportation for H–2A workers, as outlined in DOL's Final Rule effective November 14, 2022:

- Provide or pay for inbound transportation and meals from the worker's country of origin, or reimburse the worker once 50% of the work contract has elapsed (in practice, workers are typically reimbursed for transportation costs within one week to comply with FLSA minimum wage requirements (*Arriaga v. Fla. Pac. Farms, LLC*);

- Provide or pay for return transportation and meals when the work contract is completed; and
- Provide transportation to/from the worksite and employer-provided housing.

Employer-provided transportation must comply with all applicable vehicle standards as outlined through DOL and U.S. Department of Transportation (DOT) regulations and standards in 29 CFR §500.105, be properly insured, and be operated by licensed and qualified drivers.

Rules and Regulations

A total of eight new rulemakings have either been proposed or have been finalized in this Administration. The major rule, being the March 30, 2023 DOL H–2A Final Wage Rule on the updated AEWR methodology.

DOL H–2A Program Final Rule—*Effective Date: November 14, 2022*—This 500+ page final rule addresses a number of issues and provides major updates, including updates to the joint employer regulation. All joint employers will now be liable for any violations, including if the violation only occurs on one of the farms or if only one joint employer has awareness of the violation. Joint employers will not be permitted to share housing for workers, nor workers themselves above a 34-hour per week threshold.

Housing certification will remain for one year. State and local standards will control rental accommodations as long as it does not impede OSHA labor camp standards. As outlined in the housing guidelines above, if kitchen equipment is not offered as a part of housing, three meals per day must be provided instead, subject to new nutrition guidelines according to USDA, the National Institutes of Health, and other relevant agencies. Housing violations will result in back wages, Civil Monetary Penalties (CMPs), or debarment from the H–2A program.

As outlined in the transportation guidelines above, this rule adds the requirement that employers include the type of transportation used for inbound, outbound, daily to worksite, and if any transportation will be provided for errands and other purposes.

USCIS Fee Schedule and Changes Proposed Rule—*Comments closed March 13, 2023, awaiting Final Rule*—This Rule imposes additional costs for farmers utilizing H–2A workers, due to USCIS's expanded humanitarian programs and asylum claims, higher demand, staffing shortages, and longer processing times.

- New I–29 fee of $1,090 (currently $460)
- Asylum Program fee ($600)
- New Total Fee: $1,690

OSHA Walk-Around Proposed Rule—*Comments due October 30, 2023*—Currently, OSHA compliance safety and health officers (CSHOs) conduct worksite inspections ('walk-arounds') as part of their investigation of safety complaints or pursuant to certain OSHA programs. Current regulations allow employees to select a representative of their choosing to accompany the CSHOs on such inspections, as long as the representative is also an employee of the relevant employer. If employees want to select a third-party to represent them on a walk-around, that person must have specialized safety knowledge pursuant to the operation of employment.

This Rule will allow H–2A workers and/or their representatives to select an individual to accompany OSHA inspectors on facility walkarounds. This individual does not have to be an

employee of the employer being inspected, and the Rule will be in effect regardless of the union status of the workplace. Specifically, the Rule invites anyone who "will make a positive contribution," rather than just technical or safety specialists, to observe and review the place of employment.

DOL Overtime Proposed Rule—*Comments due November 7, 2023*—This Rule seeks to alter overtime pay regulations in the Fair Labor Standards Act by increasing the minimum salary about 55% from $35,568 to $55,068. Further, it implements automatic increases to the threshold every three years. These automatic increases are tied to the 35th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region. A similar Rule was attempted during the Obama Administration but was blocked by court action.

DOL Worker Protection Proposed Rule—*Comments due November 14, 2023*—DOL proposes several changes with the expressed purpose of protecting workers that could potentially affect agricultural use of the H–2A program.

First, DOL has proposed to make AEWR updates effective on publication in the *Federal Register,* eliminating the 14-day window for employers to update their payroll systems.

Second, DOL is proposing to mandate the discontinuation of services to agents and attorneys, as well as the actual employer, joint employers, farm labor contractors, agricultural associations, and any successor in interest if one of the eight bases for discontinuation is met. An individual will receive a mandate of discontinuation of services when DOL or a SWA receive a notification of a final determination that includes a violation of any employment related law (state, federal, or local agencies, including health agencies). The proposal does not distinguish between the severity of infractions (minor, intermediate, severe) or the frequency of violations (first, second, *etc.*). For even small infractions, a SWA could issue a discontinuation of service to an agent or contractor stopping every client of that agent or contractor from the H–2A program.

Third, the proposed Rule reduces the period, from 30 calendar days to 14 calendar days, after a Notice of Debarment for an employer to file rebuttal evidence of employer wrongdoing. The Notice of Debarment will now become effective at the conclusion of the 14th calendar day.

Fourth, DOL is also proposing to codify its single employer test, which would determine if multiple, separate employers are acting as one. It will force employers to file separate applications for the Agency to review and determine temporary or seasonal needs. It is DOL's assessment that codifying the definition of single employer will prevent employers from using their corporate structures to circumvent statutory and regulatory requirements of seasonal or temporary work.

Finally, DOL is proposing an expansion of labor organizing rights under this Rule. The proposal requires employers to provide, at the request of a labor organization, the names and contact information of all H–2A workers and workers in corresponding employment who are employed at the places of employment on their H–2A application, within one week of the request. Additionally, guests must be allowed in employer-provided housing, including representatives from labor organizations. If housing is not publicly accessible, labor organizations would have access to employer property for up to 10 hours per month without explicit invitation.

DHS Worker Protection for H–2 Programs Proposed Rule—*Comments due November 20, 2023*—DHS proposes to incorporate policies that will address current aspects of the program that may unintentionally result in exploitation or other abuse of those seeking to come to the U.S. as H–2A and H–2B workers. DHS intends to build upon existing protections against prohibited payments or other assessment of fees and/or salary deductions by employers in connection with recruitment and/or employment, and otherwise add more protections for workers.

This Rule includes the ability to deny or revoke a petition for a final determination of violation of any employment-related law. Also, the Rule offers "whistleblower protection" similar to what already exists in law for H–1B workers.

DHS proposes "grace periods": H–2 workers would receive up to 10 days prior and 30 days following the expiration of the petitions' validity period to seek new employment or prepare to go home. If the worker ceases employment or the petition is revoked, the worker would have a grace period of 60 days, or the petition end date, whichever is sooner.

OSHA Heat Proposal—*Currently awaiting Proposed Rule*—On October 27, 2021, OSHA published an Advanced Notice of Proposed Rulemaking for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings.

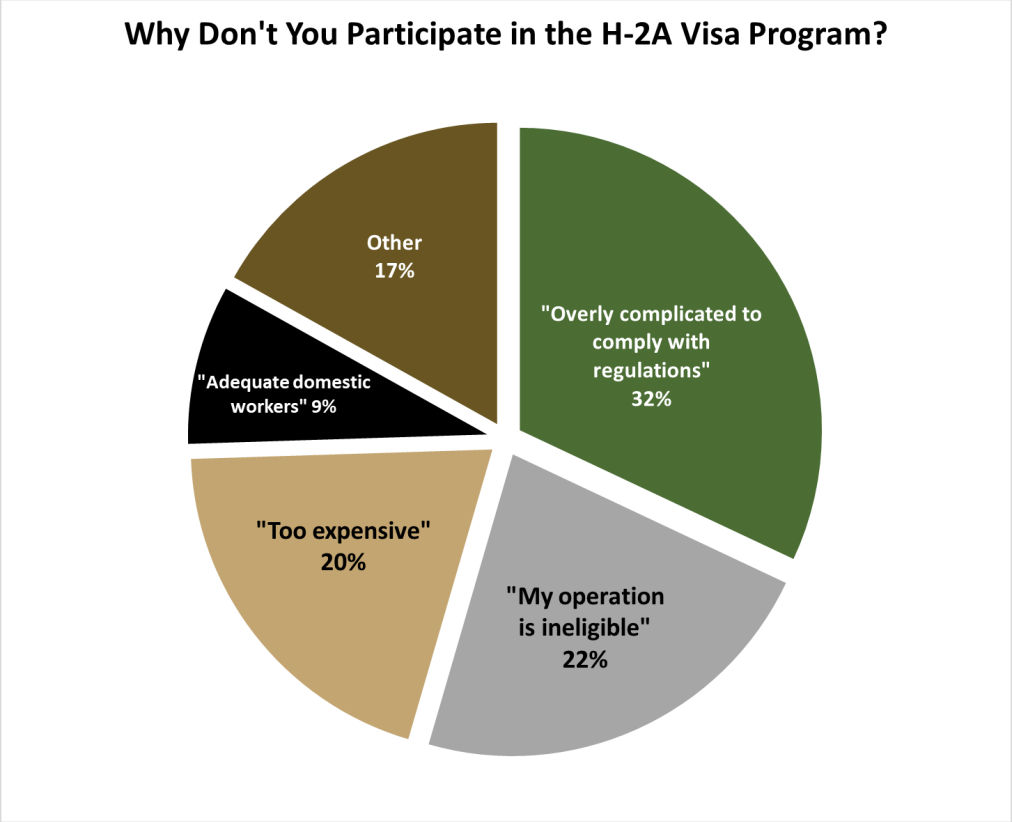
OSHA is beginning the process to consider a heat-specific workplace standard. A Small Business Advocacy Review Panel will convene to hear from small entity representatives. The panel will consist of representatives from OSHA, the U.S. Small Business Administration's Office of Advocacy, and the Office of Information and Regulatory Affairs (OIRA).

Conclusion

According to USDA's Economic Research Service, agriculture, food, and related industries contributed roughly $1.264 trillion to U.S. gross domestic product (GDP) in 2021, a 5.4% share. The output of America's farms contributed $164.7 billion of this sum—about 0.7% of U.S. GDP. Any significant or trending hit to the labor supply on our nation's farms will sound sirens on a food supply shortage, meaning grocery prices will increase.

Given the high costs and regulatory complexities of the H–2A program, farmers use it as a last resort. As outlined in this report, there are barriers to utilizing the H–2A program. Despite its shortfalls, the H–2A program is still an integral part of the agricultural workforce when domestic workers are unavailable.

Question #20 of the ALWG Survey asked: "What is preventing you from using H–2A?"



The ALWG recognizes that domestic labor shortage in agriculture is something that must be addressed in a bipartisan manner through congressional action and legislation, numerous agency support systems, and incentives. This is largely accomplished through a five-year reauthorization of a Farm Bill, yearly agriculture appropriations packages, and administrative action from the White House, USDA, and related agencies. We must ensure there is a viable, affordable, and easy-to-use alternative to the lack of a domestic workforce, which is undoubtedly found with the H–2A program.

As outlined in this report, there are many takeaways and challenges to reforming the H–2A program: cost and wage structure, regulation, accessibility, administrative delays, *etc.* We hope

that Members of Congress, administrative agencies, interested stakeholders, and the general public will find this interim report informative and comprehensive. The ALWG will utilize this report as a basis of discussion in the coming months for recommending bipartisan solutions to reforming the H–2A program, which will be detailed in a final report.

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