



**PennState Law**

Center for Agricultural and Shale Law  
M. Sean High – Staff Attorney

# **Immigration and Seasonal Labor: Understanding the H-2A Agricultural Guest Worker Program**

**Penn State Ag Council**

**October 19, 2017**



## **Presentation Overview**

- **H-2A Program**
  - **Eligibility**
  - **Responsibilities and Obligations**
  - **Process**
- **Other Temporary Worker Programs**
- **Proposed Legislation (H-2C?)**



## **Introduction** **Background**

- **U.S. farmers struggle to find willing and qualified workers**
- **Federal response: create Temporary Agricultural Guest Worker program (H-2A)**



## **Introduction** **Authority**

- **Immigration and Nationality Act as amended by the Immigration and Control Act of 1986**
  - **U.S. Dept. of Labor oversees labor certification**
  - **U.S. Dept. of Homeland Security (through U.S. Citizenship and Immigration Services) oversees admission**



## **Eligibility for H-2A**

### **What must employers demonstrate?**

- **Agricultural work “temporary or seasonal nature”**
- **Not enough “able, willing, and qualified U.S. workers available”**
- **H-2A workers will not adversely affect wages and working conditions of similar U.S. workers**



## **Eligibility for H-2A** **Who May Apply?**

- **Agricultural Employers**
- **Agricultural Associations**
- **H-2A Labor Contractors**
- **Agents**



## **Eligibility for H-2A** **Temporary of Seasonal Employment**

- **Temporary employment = no longer than 1 year**
- **Seasonal Nature = tied to event or pattern**
  - **Short annual growing cycle**



## **Responsibilities and Obligations** **Job Opportunity**

- **Opening may not be result of strike or lockout**
- **Must be full-time (35 hours per week)**
- **Must guarantee  $\frac{3}{4}$  of contract**
- **Must make payroll deductions**
- **Must provide earnings statement**
  - **Maintain records for 3 years**





# **Responsibilities and Obligations**

## **Wage Rate**

- **Must pay highest wage rate at the time work performed:**
  - **Adverse Wage Rate**
  - **Prevailing Wage Rate**
  - **Federal Minimum Wage Rate**
  - **State Minimum Wage Rate**
  - **Note: piece rate must be at least prevailing wage rate**



# **Responsibilities and Obligations** **Job Opportunity**

- **Must provide free housing**
- **Must provide 3 meals a day or facilities that allow workers to prepare food**
- **Must provide free workers compensation**
- **Must provide free use of tools/equipment**



# **Responsibilities and Obligations** **Transportation**

- **Transportation to place of employment (from home to farm)**
- **Transportation from place of employment**
- **Transportation between housing and worksite**



## **Responsibilities and Obligations** **Recruitment of Workers**

- **May not give preferential treatment to H-2A workers**
  - **Must give U.S. workers same benefits, wages, and working conditions**
- **No recent or future layoffs**
  - **Within 60 days of date of need, may not layoff U.S. workers**



## **Responsibilities and Obligations** **Fifty Percent Rule**

- **Must hire all qualified U.S. workers until 50% of contract has expired**
  - **Exempt if no more than 500 man-days of agricultural labor used during any calendar quarter of the preceding year**
- **During 50% period, must keep job opportunity open for any qualified U.S. worker**



## **H-2A Process**

- **Must submit job order approval to SWA serving intended area**
  - **15 day filing window (between 75-60 calendar days)**
- **After job order approval, SWA will post job and refer qualified/eligible U.S. workers through 50%**
- **Submit application documents to ETA Chicago NPC (no less that 45 calendar days before date of need)**



## **H-2A** **Process**

- **Positive recruitment**
- **Newspaper advertisement**
- **Recruitment report**
- **Contact former U.S. workers**
- **Certify housing**



## **H-2A Process**

- **Determination 30 calendar days before date of need**
- **Approved Certification**
  - **Fee of \$100 plus \$10 per certified worker (\$1,000 max)**
- **Petition US Citizenship and Immigration Services**
- **Prospective workers apply to U.S. DOS at U.S. embassy or consulate for visa**





## **H-2A Compliance**

- **Retain H-2A documents and records for 3 years**
- **Authorized officials from all levels of the government may conduct inspections regarding applicable labor laws and regulations**
- **May be debarred from the program for 3 years**



# **Other Temporary Worker Programs** **Overview**

- **H-2B**
  - Temporary nonagricultural jobs
  - Landscapers, food processing, hotels, and resorts
- **H-1B**
  - Occupations require highly specialized knowledge and bachelors degree or higher
  - Science, engineering, and information technology



## **H-2A in Practice** **Employer Complaints**

- **Too much bureaucracy/red tape**
- **Not enough visas (2016: 134,000 H-2A visas issued)**
- **Burdensome requirements**
  - **Transportation**
  - **Housing**
  - **Food**
  - **High wages**



## **Proposed Legislation**

### **H-2C?**

- **Agricultural Guestworker Act of 2017 (“Ag Act”)**
- **Sponsor Judiciary Chairman Bob Goodlatte (R-VA)**
- **Would make available 500,000 visas annually**
  - **Returning workers not counted against annual limit**
- **10,000 green cards made available annually for experienced workers**



## **Proposed Legislation** **H-2C?**

- **Administered by USDA**
- **Allows experienced unauthorized workers to participate legally (will not count towards annual limit)**
- **Allows initial stay to be 36 months**
  - **Subsequent work periods 18 months**



## **Proposed Legislation** **H-2C?**

- **Wages = higher of state/local minimum wage or 115% of federal minimum wage**
- **Option to provide housing and transportation**
- **Ensure workers return home**
  - **10% of wages placed in trust fund**
  - **Only access at U.S. embassy or consulate in home country**



## **Conclusion**

### **H-2A**

- **Detailed rules and regulations**
- **Does not always meet industry needs**
- **Legislative action**



# Resources

**M. Sean High – Staff Attorney**

**Phone: (814) 865-5017**

**Email: [mzh177@psu.edu](mailto:mzh177@psu.edu)**

**The Center for Agricultural and Shale Law**

**Web: [www.pennstatelaw.psu.edu/casl](http://www.pennstatelaw.psu.edu/casl)**

**Blog: [www.pennstateaglaw.com](http://www.pennstateaglaw.com)**