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Protecting Migrant Rights Across Borders

# Visa Pages: U.S. TEMPORARY FOREIGN WORKER VISAS

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**H-2A VISA**

Updated August 2023

The H-2A nonimmigrant visa program allows employers to hire foreign workers for temporary or seasonal agricultural jobs when they cannot find enough U.S. workers.

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## EXECUTIVE SUMMARY:

The H-2A nonimmigrant visa program allows non-U.S. citizens to work in the U.S. in temporary or seasonal agricultural jobs when no U.S. workers are available and as long as the wages and working conditions of U.S. workers are not adversely affected by the employment of foreign workers. Employers must first apply to the U.S. Department of Labor (USDOL) for temporary labor certification affirming that the job is temporary or seasonal in nature, and that U.S. workers are not available for the job. Employers then petition the U.S. Department of Homeland Security (DHS) for permission to hire foreign individuals as H-2A nonimmigrants. After the approved work period ends, the worker must leave the United States. The H-2A visa does not include an option for H-2A workers to become lawful permanent residents or citizens. An H-2A visa only permits temporary agricultural work for a specific employer for a fixed period, less than one year. Common H-2A jobs include tending to tobacco; pruning and picking fruit; planting and harvesting vegetable row crops; working in nurseries, greenhouses, on cattle ranches, and herding sheep. There is no annual limit of H-2A visas available each fiscal year. In 2022, the U.S. Department of State issued 298,336 H-2A visas, quadruple the number issued ten years ago (74,192 in 2013).

The H-2A program includes many worker protections to ensure fair and safe conditions, including those related to contracts, wages, housing, and transportation. Employers must offer H-2A workers the highest of the following: the Adverse Effect Wage Rate (AEWR), prevailing hourly wage rate, the prevailing piece rate, or the federal or state minimum wage. Payment must be made at least every two weeks in most cases. Employers are also required to provide safe and clean housing for H-2A workers at no cost. H-2A workers are entitled to inbound and outbound transportation costs between their homes and the worksite. Before H-2A workers arrive in the United States, employers must provide a job-specific contract detailing the terms and conditions of employment, written in a language the worker understands. This contract must describe job duties, wages, work hours, and other relevant provisions.

Even with these specific worker protections, the H-2A visa program has faced criticism and concerns due to cases of worker abuse, exploitation, and human trafficking. H-2A workers often rely on labor contractors or recruiters to connect them with job opportunities, who often charge illegal recruitment fees. These fees can leave workers in debt and vulnerable to exploitation. Many H-2A workers have claimed that employers pay less than promised wages, change the agreed upon terms and conditions of employment, and require them to work in unsafe conditions. Lack of effective oversight, limited enforcement of program rules and general labor law, and often unavailable access to

legal remedies increase the vulnerability of H-2A workers. Addressing these flaws in the H-2A program needs a comprehensive approach that enhances enforcement, improves oversight, eliminates recruitment fees, and provides access to legal remedies when there is abuse.

## I. H-2A VISA

The H-2A nonimmigrant visa program allows employers to hire foreign workers for temporary or seasonal agricultural jobs.<sup>1</sup> Participation in the H-2A program is contingent on the employer's demonstration that it tried to locate and hire U.S. workers but was unable to do so. Employers, employer associations (also known as grower's associations), and labor contractors initiate and control the H-2A visa process by applying to the U.S. government for permission to hire foreign workers for the temporary jobs. The process involves multiple state and federal government agencies, including state-level workforce agencies or state-based departments of labor, the U.S. Department of Labor, the U.S. Department of Homeland Security, and the U.S. Department of State. From start to finish the process may take several months.

The employer may begin lining up foreign workers at the same time it is applying for job certification and permission to hire. Once the U.S. government approves the employer, the workers apply for the work visa and may be asked to personally appear at the designated U.S. consulate abroad for an interview. Employers often use a hiring agent, third party recruiter, or another entity to help the workers with their individual visa applications.

An H-2A visa only permits temporary agricultural work for a specific employer for a fixed period, which initially is less than one year.<sup>2</sup> After the approved work period ends, the worker must leave the United States.<sup>3</sup> There is no path to permanent legal status or citizenship associated with the H-2A visa. If the worker quits or is fired, the visa is no longer valid, and the worker must leave the United States.

The H-2A visa allows temporary agricultural employment when U.S. workers are not available for the job. Therefore, the H-2A program is designed to allow foreign workers only when employers certify that no qualified U.S. workers are available, specifically after employers' search for U.S. workers and offer the same benefits. Petitions for H-2A

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<sup>1</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(a); and 20 C.F.R. § 655.1300(a)(1)(i).

<sup>2</sup> 8 C.F.R. § 214.2(h)(5)(iv)(A).

<sup>3</sup> The time to depart after expiration of the approved petition or contract period depends on the type of visa. See 8 C.F.R. § 214.2(h)(5)(viii)(B) (30 days for H-2A workers); 8 C.F.R. § 214.2(h)(10) (10 days for H-2B workers); and 8 C.F.R. § 214.2(h)(2)(v) (special rules apply to H-2A workers).

workers are granted only after the U.S. Department of Labor determines that hiring foreign workers at the wages and terms the employer is offering will not adversely affect the wages and working conditions of similarly employed U.S. workers in the geographic area of the employer's operations.

The H-2A program is built on a detailed set of statutory and regulatory protections intended to ensure that U.S. workers receive a preference in hiring and that the admission of the foreign workers will not depress the wages and conditions of domestic farmworkers in the area. Because foreign workers from poverty-stricken nations usually are willing to accept substandard wages and job terms, the regulations and labor certification system are designed to safeguard current wage levels and standards of domestic workers. The regulations also operate to protect the guestworkers from employers seeking to pay wages and offer job terms below these benchmarks. The U.S. Department of Labor (USDOL) oversees these requirements for employers, in conjunction with state workforce agencies. The U.S. Department of Homeland Security (DHS) handles the employer's petition for the visas, and the U.S. Department of State (DOS) issues the visas to individual workers. Each agency has its respective procedural and substantive rules governing the admission of foreign workers through the H-2A program.

## A. HISTORY OF AGRICULTURAL GUESTWORKERS IN THE U.S.

The H-2A nonimmigrant visa has its beginnings in earlier guestworker programs. Previously, both the Bracero and the early H-2 schemes allowed U.S. agricultural employers to import foreign workers. Understanding the background of guestworker programs contextualizes the current H-2A program.

### 1. WORLD WAR II GUESTWORKER PROGRAMS

Foreign worker programs began in earnest during World War II (WWII) as the labor market tightened due to military enlistment.<sup>4</sup> Thus began two separate agricultural guestworker programs: the Braceros, operating initially in the Southwest U.S. with migrant labor from Mexico, and the importation of temporary laborers from the Caribbean who primarily worked in Florida and along the eastern seaboard.

#### A) BRACERO PROGRAM - MEXICO

During WWII, the U.S. Secretary of Agriculture negotiated with the Mexican government to fill the U.S.'s apparent farm labor need with Mexican nationals.<sup>5</sup> Between 1942 and

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<sup>4</sup> Hahamovitch, C. (2013). *No Man's Land: Jamaican Guestworkers in America and the Global History of Deportable Labor* (pp. 22-49). Princeton University Press.

<sup>5</sup> Hahamovitch, 2013, p. 42; 7 U.S.C. §§1461, et seq. (repealed 1997); Garcia, R.J. (2006). Labor as Property: Guestworkers, International Trade, and the Democracy Deficit. *Journal of Gender, Race & Justice*, 10(1), 27-66.

1964, under what was known as the “Bracero program,” hundreds of thousands of Mexican farmworkers were admitted to the U.S. and worked mostly in California and other Southwestern U.S. states. The terms of their admission were annually negotiated between the U.S. government and the government of Mexico. Initially, the U.S. Farm Security Administration guaranteed various employment benefits for the workers, covering wages, housing, and a work guarantee.<sup>6</sup>

After World War II, each employer was supposed to contract directly with the workers and continue the earlier benefits, including fair wages, clean and safe housing, and at least one month of work.<sup>7</sup> Most Braceros, however, did not know that they were entitled to contracts or that they had any right to fair wages and benefits, complicating the enforcement of those rights.<sup>8</sup>

In 1964, after 22 years and 4.5 million workers, the U.S. terminated the Bracero program.<sup>9</sup> However, the Bracero program is much more than an historical footnote. Many of the current H-2A regulations have their genesis in the terms included in the Bracero workers’ contracts, several of which were interpreted by federal and state courts in the decades during which Braceros entered the U.S.

#### B) CARIBBEAN WORKERS AND H-2 PROGRAM LEGISLATIVE HISTORY

While the Bracero program was being established, the agriculture industry in Florida extensively lobbied the U.S. government for agricultural workers from the Caribbean.<sup>10</sup> The U.S. Department of State negotiated terms with the British Secretary for the Colonies for a labor importation program. The Caribbean guestworker scheme was modeled after the Bracero program, requiring a certain wage, free transportation, housing, and a work guarantee.<sup>11</sup> In 1943, employers obtained permission to hire workers specifically from Barbados and the Bahamas.<sup>12</sup> Around the same time, employers in the Northeast began importing Jamaican workers, and within a few years Florida employers started hiring Jamaican workers to cut sugarcane.<sup>13</sup> The terms of the workers’ contracts were negotiated annually between the U.S. employers and a consortium of Caribbean nation

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<sup>6</sup> Morgan, K.L. (2004). Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush’s Proposed Immigration Reform Plan. *Berkeley La Raza Law Journal*, 15(2), 129-130.

<sup>7</sup> Morgan, 2004; Bracero History Archive. (2021). *About*. Retrieved April 4, 2023, from <http://braceroarchive.org/about>.

<sup>8</sup> Mize, R. L. Jr. (2005). Reparations for Mexican Braceros? Lessons Learned from Japanese and African American Attempts at Redress. *Cleveland State Law Review*, 52(1), 273-295.

<sup>9</sup> Koestler, F. (2015, September 29). *Bracero Program*. Handbook of Texas Online, Texas State Historical Association. Retrieved April 4, 2023, from [tshaonline.org/handbook/entries/bracero-program](https://tshaonline.org/handbook/entries/bracero-program).

<sup>10</sup> Hahamovitch, 2013, pp. 22-49.

<sup>11</sup> Hahamovitch, 2013, pp. 44-45.

<sup>12</sup> Wilkinson, A. (1989). *Big Sugar: Seasons in the Cane Fields of Florida*, (pp. 144-147). Alfred A. Knopf.

<sup>13</sup> Wilkinson, 1989, pp. 144-147. For a detailed discussion of the genesis and onset of Jamaicans working in U.S. agriculture, see: Hahamovitch, 2013, pp. 50-66.



governments participating in the program. Over the years, the vast majority of Caribbean guestworkers (and all the workers employed outside of the Florida sugarcane industry) have been from Jamaica.

The Caribbean scheme was the actual precursor to the contemporary H-2 temporary foreign worker programs, eventually codified by the U.S. Congress in the Immigration and Nationality Act (INA) of 1952.<sup>14</sup> Both agricultural and non-agricultural temporary workers were included in the original H-2 program established under the INA.<sup>15</sup> In 1986, the Immigration Reform and Control Act (IRCA) codified several of the substantive provisions that were previously included only in the H-2 regulations. In addition, the 1986 statute separated the H-2 program into the current H-2A (agriculture) and H-2B (non-agriculture) sub-classifications.<sup>16</sup>

## B. DURATION OF AN H-2A VISA

H-2A visas are valid for the time period in the approved work contract, which must be less than one year, but can be extended for up to 12 additional months.<sup>17</sup> The maximum time period any H-2A worker may be continuously present in the U.S. is 3 years.<sup>18</sup> After that time, the worker must leave for an uninterrupted period of 3 months before seeking readmission to the U.S. on another H-2A visa.<sup>19</sup>

## C. H-2A JOBS

H-2A workers perform a wide range of agricultural jobs, as defined by the Fair Labor Standards Act (the FLSA) and the Internal Revenue Code. Common examples include tending to tobacco; pruning and picking fruit such as berries, apples, and melons; planting and harvesting onions and other vegetable row crops; detasseling corn; working in nurseries, greenhouses, on cattle ranches, and herding sheep.<sup>20</sup>

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<sup>14</sup> U.S. Congress. (1952, June 27). Immigration and Nationality Act (ch. 477), 8 U.S.C. § 1101 et seq.

<sup>15</sup> Bruno, A. (2006). *Immigration: Policy Considerations Related to Guest Worker Programs*. Congressional Research Service Report for Congress. Retrieved April 4, 2023, from <https://trac.syr.edu/immigration/library/P333.pdf>.

<sup>16</sup> Immigration Reform and Control Act of 1986, Public Law No. 99–603, 100 Stat. 3359, 8 U.S.C. § 1101. For a detailed history of guestworkers leading up to the modern H-2A program, see: Holley, M. (2001). Disadvantaged by Design: How the Law Inhibits Agricultural Guestworkers from Enforcing Their Rights. *Hofstra Labor & Employment Law Journal*, 18(2), 581-583.

<sup>17</sup> 8 C.F.R. §§ 214.2(h)(5)(viii)(C), (15)(ii)(C); see also 20 C.F.R. § 655.103(d).

<sup>18</sup> 8 C.F.R. § 214.2(h)(15)(ii)(C).

<sup>19</sup> U.S. Citizenship and Immigration Services. (2022, November). *H-2A Temporary Agricultural Workers*. U.S. Department of Homeland Security. Retrieved April 4, 2023, from <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers>; 8 C.F.R. 214.2(h)(5)(viii)(C).

<sup>20</sup> Office of Foreign Labor Certification. (2022). *H-2A Temporary Agricultural Program - Selected Statistics, Fiscal Year (FY) 2019*. U.S. Department of Labor, Employment and Training Administration. Retrieved April 4, 2023, from [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A\\_Selected\\_Statistics\\_FY2019\\_Q4.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2019_Q4.pdf).

## DIGGING DEEPER: DEFINITION OF AGRICULTURE

H-2A workers are only supposed to do jobs in agriculture, as defined by the Fair Labor Standards Act (the FLSA) and the Internal Revenue Code.<sup>21</sup> The FLSA defines agriculture, or farming, in the following way:

*...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 section 1141j(g) of Title 12), 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.*<sup>22</sup>

Regulations governing the FLSA divide this definition of agriculture into two categories: primary agriculture and secondary agriculture.<sup>23</sup> Primary agriculture is the cultivation and tilling of soil, and growing and harvesting any agricultural commodity.<sup>24</sup> Secondary agriculture is “performed either by a farmer or on a farm as an incident to or in conjunction with ‘such’ farming operations.”<sup>25</sup> It includes “[a]ssembling, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing” fruits and vegetables, but it does not include processing of fruits and vegetables from their natural state.<sup>26</sup> Some, but not all, work performed on a farm in the employ of someone other than the farmer or farm operator (such as a labor contractor) can be considered agriculture depending on the nature of the work.<sup>27</sup> Work performed for one employer with commodities produced off-site by another farm is outside of the FLSA’s definition of agriculture, unless the purchase is to offset a shortage in the employer’s own stock.<sup>28</sup> Other examples of tasks not considered to be agriculture are mowing lawns, gardening, and construction work around an employer’s home on the farm, repair and maintenance work at a farm store, peeling and slicing apples for pie, constructing amusements, and working at a holiday festival.<sup>29</sup>

<sup>21</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also U.S. Department of Labor v. North Carolina Growers Association, Inc., 377 F.3d 345, 349, n.3 (4th Cir. 2004).

<sup>22</sup> 29 U.S.C. § 203(f).

<sup>23</sup> 29 C.F.R. § 780.105(a).

<sup>24</sup> 29 C.F.R. § 780.105(b).

<sup>25</sup> 29 C.F.R. § 780.105(c).

<sup>26</sup> *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1188 (10th Cir. 2004), quoting 29 C.F.R. § 780.151(b). For example, the “making of cider from apples” is specifically described as processing rather than agricultural production. 29 C.F.R. § 780.117(a).

<sup>27</sup> Construction of livestock enclosures by employees of outside contractors (rather than the farmer) is agriculture under the FLSA. *Luna Vanegas v. Signet Builders, Inc.*, 2021 WL 3571484554 F. Supp. 3d 987, 993 (W.D. Wis. 2021).

<sup>28</sup> 29 C.F.R. § 780.141. See also *Wirtz v. Jackson & Perkins Co.*, 312 F.2d 48, (2d Cir. 1963).

<sup>29</sup> *Centeno-Bernuy v. Becker Farms*, 564 F.Supp.2d 166, 178-79 (W.D.N.Y. 2008).

## II. H-2A WORKERS IN THE U.S. – DATA

The three federal agencies that share responsibility for the H-2A program each publish a variety of data. The U.S. Department of Labor (USDOL) makes available the number of applications for temporary labor certification and the number of H-2A job positions requested and certified. In addition, USDOL publishes information on petitioners, employers, job location, and job type. The U.S. Department of State (DOS) annually presents data on the number of visas issued and the nationality of the workers that receive them. The U.S. Department of Homeland Security (DHS) publishes the number of

petitions for nonimmigrant H-2A worker status that were submitted and approved, as well as the number of border entries for individuals with H-2A visas, and the countries they came from.

### H-2A Top 10 Occupations

Occupations	H-2a Positions	Occupations	H-2a Positions	Occupations	H-2a Positions
Farmworkers and Laborers, Crop	242,585	Farmworkers and Laborers, Crop	274,939	Farmworkers and Laborers, Crop, Nursery Greenhouse	231,746
Agricultural Equip. Operators	15,396	Agricultural Equip. Operators	20,308	Farmworkers and Laborers, Crop	82,487
Farmworkers, Farm, Ranch & Aquacultural Animal	10,898	Farmworkers, Farm, Ranch & Aquacultural Animal	13,357	Farmworkers, Farm, Ranch & Aquacultural Animal	24,716
Construction Laborers	3,256	Construction Laborers	3,518	Agricultural Equip. Operators	15,794
Agricultural Workers, All Other	1,155	Agricultural Workers, All Other	1,196	Farmworkers, Farm, Ranch & Aquacultural Animal	6,069
Heavy and Tractor-Trailer Truck Drivers	577	Heavy and Tractor-Trailer Truck Drivers	1,084	Nursery Workers	3,275
Graders & Sorters, Agricultural Products	467	Graders & Sorters, Agricultural Products	810	Construction Laborers	2,184
First-Line Supervisors of Agricultural Crop and Horticultural Workers	379	First-Line Supervisors of Agricultural Crop and Horticultural Workers	759	Agricultural Workers, All Other	1,144
Farm Labor Contractors	143	Farm Labor Contractors	550	Graders & Sorters, Agricultural Products	1,063
Helpers – Production Workers	100	Packers and Packagers, Hand	280	First-Line Supervisors of Agricultural Crop and Horticultural Workers	385

Data source: U.S. Department of Labor, Employment and Training Administration, Performance Data. Retrieved from: <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

## A. THE NUMBER OF H-2A WORKERS IN THE U.S.

The exact number of H-2A workers in the U.S. at any given time is not publicly available. USDOL, DOS and DHS each maintain data in line with their respective roles in the H-2A process and publish some of that data at regular intervals, whether quarterly or annually. In 2021, farm employment generated almost 2.6 million jobs in the U.S.<sup>30</sup> putting H-2A visa holders' share of agricultural jobs at around 10%. USDOL tracks the number of workers that employers are certified to bring to the United States. DOS tracks how many visas were issued to foreign workers applying at U.S. consulates abroad. DHS tracks the petitions for nonimmigrant H-2A status and the number of admissions to the United States. Each agency collects additional data but is not required to publish it, limiting information exchange among agencies and with the public. An example includes an absence of publicly available data on the number of H-2A visas issued by age or sex.

### H-2A Numbers Across Agencies

Agency	Data collected	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
U.S. Department of Labor	Number of H-2A positions approved for temporary labor certification	242,762	257,667	275,430	317,619	371,619
U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services	Number of Form I-129 H-2A worker positions approved for employment*	279,482	302,422	308,877	339,314	402,929
U.S. Department of State	Number of H-2A visas actually issued to foreign workers at U.S. Consulates abroad	196,409	204,801	213,394	257,898	298,336
U.S. Department of Homeland Security – U.S. Customs and Border Protection	Number of H-2A admissions and readmissions at the border on I-94s**	298,228	442,822	510,343	586,992	—

\*For FY 2018-2022, USCIS approved H-2A worker data is taken from the H-2A employer data hub files, and total approved H-2A workers are reported here as the sum of initial and continuing approval of workers, see U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, H-2A Employer Data Hub. Retrieved from <https://www.uscis.gov/tools/reports-and-studies/h-2a-employer-data-hub/h-2a-employer-data-hub-files>

\*\*Any one individual could be counted more than once in these numbers, because workers come and go (and in some cases re-enter) with the same I-94; see U.S. Department of Homeland Security, Office of Immigration Statistics, Nonimmigrant Admissions. Retrieved from <https://www.dhs.gov/immigration-statistics/nonimmigrant>  
DOL data source: U.S. Department of Labor, Employment and Training Administration, Performance Data. Retrieved from: <https://www.dol.gov/agencies/eta/foreign-labor/performance>

DOS data source: U.S. Department of State, Bureau of Consular Affairs, Nonimmigrant Visa Statistics. Retrieved from <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html>

<sup>30</sup> White, M., and A. Van Leuven. (2023, July). *Changes in Farm Employment, 1969 to 2021*. farmdoc daily (13):130. Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign. Retrieved July 26, 2023 from <https://farmdocdaily.illinois.edu/2023/07/changes-in-farm-employment-1969-to-2021.html>.

## 1. DEPARTMENT OF LABOR DATA

USDOL certified 371,619 H-2A positions in 2022.<sup>31</sup> This number comes from ETA Form 9142, on which the employer requests a certain number of workers. If USDOL is satisfied that requirements are met, it will certify the number of workers requested. The H-2A case disclosure data published by the USDOL's OFLC thus reflects the number of H-2A positions certified through this certification process, though this may not represent the number of jobs that were *filled* by an H2-A worker.

## 2. DEPARTMENT OF STATE DATA

As discussed above, once an employer receives approval to hire H-2A workers, the prospective employees must apply for an H-2A visa at their local U.S. consulate. The Department of State tracks the number of H-2A visa applications that were ultimately approved each year. In 2022, the Department of State issued 298,336 H-2A visas, though the data does not reveal how many H-2A workers were present and working in the United States that year.<sup>32</sup>

## H-2A Labor Petitions Certified by USDOL

	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Petitions Submitted	11,698	13,095	14,063	16,334	19,088
Petitions Certified	11,319	12,626	13,552	15,619	18,560
Positions Requested	251,679	268,729	286,900	330,486	382,354
Positions Certified	242,762	257,667	275,430	317,619	371,619

Data source: U.S. Department of Labor, Employment and Training Administration, Performance Data. Retrieved from: <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

## 3. DEPARTMENT OF HOMELAND SECURITY DATA

DHS has two sub-agencies involved in the H-2A program and thus two data sets pertaining to the number of H-2A workers. The U.S. Citizenship and Immigration Services

<sup>31</sup> Office of Foreign Labor Certification. (2021). *H-2A Temporary Agricultural Program - Selected Statistics, Fiscal Year (FY) 2022 EOY*. U.S. Department of Labor, Employment and Training Administration. Retrieved April 5, 2023, from [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A\\_Selected\\_Statistics\\_FY2022.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2022.pdf).

<sup>32</sup> U.S. Department of State. (2023). *Worldwide NIV Workload by Visa Category FY 2022*. Retrieved June 5, 2023, from <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2022NIVWorkloadbyVisaCategory.pdf>.

(USCIS) receives the petitioner's Form I-129, which requests a specific number of visas be made available. Customs and Border Protection (CBP) interviews the workers who have received H-2A visas from their local U.S. Consulates at the border or port of entry, and issues each worker an entry document, or I-94.

#### A) U.S. CITIZENSHIP AND IMMIGRATION SERVICES

USCIS tracks the number of employer petitions (via Form I-129) that are approved each year. USCIS reported 16,756 approvals of H-2A nonimmigrant petitions in 2020.<sup>33</sup> This figure reflects the total number of petitions from employers; employers can use a single petition to request one or more new workers, make changes to a current H-2A worker's status, extend a current worker's stay, or petition to become the new employer of an existing H-2A worker.

#### B) CUSTOMS AND BORDER PROTECTION

U.S. Customs and Border Protection counted 586,992 H-2A visa admissions in 2021.<sup>34</sup> This number reflects all entries by H-2A workers into the U.S. that year, including when the same H-2A worker enters and re-enters the U.S. within a year. DHS's Office of Immigration Statistics publishes this information annually.

## B. H-2A EMPLOYER DEMOGRAPHICS

In Fiscal Year 2022, the five states with the most H-2A certified jobs were Florida, California, Georgia, Washington, and North Carolina.<sup>35</sup>

Employer or grower associations apply to bring in more workers than individual employers. In 2022, the top five biggest employers were North Carolina Grower's Association, Inc., Fresh Harvest, Inc., Foothill Packing, Inc., Temp Labor, LLC, and Farm Op Kuzzens H-2A, LLC.<sup>36</sup> The top occupations for H-2A workers according to Standard Occupational Classification (SOC) codes were farmers and laborers-

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<sup>33</sup> Office of Policy & Strategy. (2021, May). *H-2A Nonimmigrant Temporary Agricultural Worker Trends Report Fiscal Year 2017-2020*. U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security. Retrieved April 5, 2023, from <https://www.uscis.gov/sites/default/files/document/reports/H-2A%20Nonimmigrant%20Temporary%20Agricultural%20Worker%20Trends%20Report%20FY%202017%20-%202020.pdf>.

<sup>34</sup> Office of Immigration Statistics. (2022, November). *2021 Yearbook of Immigration Statistics*. U.S. Department of Homeland Security. Retrieved April 5, 2023, from [https://www.dhs.gov/sites/default/files/2023-03/2022\\_1114\\_plcy\\_yearbook\\_immigration\\_statistics\\_fy2021\\_v2\\_1.pdf](https://www.dhs.gov/sites/default/files/2023-03/2022_1114_plcy_yearbook_immigration_statistics_fy2021_v2_1.pdf).

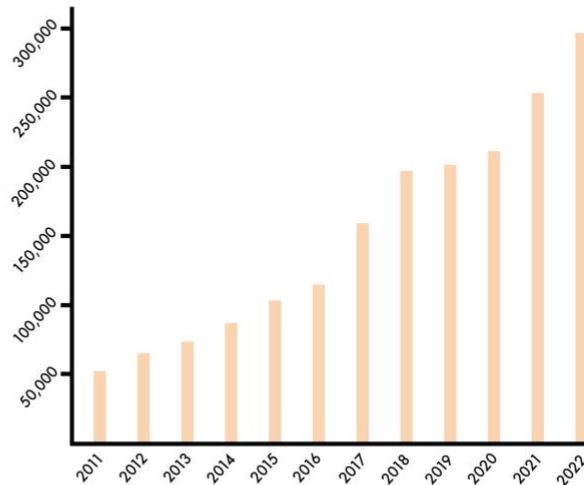
<sup>35</sup> Office of Foreign Labor Certification. (2022, September). *H-2A Temporary Agricultural Program — Selected Statistics, Fiscal Year (FY) 2022 EOY*. U.S. Department of Labor. Retrieved April 13, 2023, from [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A\\_Selected\\_Statistics\\_FY2022\\_Q4.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2022_Q4.pdf).

<sup>36</sup> Office of Foreign Labor Certification, 2021.

crop/nursery/greenhouse, crop farmworkers/laborers, agricultural equipment operators, farmworkers- farm/ranch/aquacultural animals, and nursery workers.<sup>37</sup>

## H-2A Visas Issued by DOS

Fiscal Year	H-2A visas issued
2011	55,384
2012	65,345
2013	74,192
2014	86,225
2015	108,144
2016	134,368
2017	161,583
2018	196,409
2019	204,801
2020	213,394
2021	257,898
2022	298,336



Data source: U.S. Department of State, Bureau of Consular Affairs, Nonimmigrant Visa Statistics. Retrieved from <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html>.

## C. H-2A WORKER DEMOGRAPHICS

The USCIS may approve petitions for H-2A nonimmigrant status only for individuals from certain countries designated annually by the DHS and DOS.<sup>38</sup> Individuals from other countries are allowed only if their admission is determined to be in the United States' interest.<sup>39</sup> In November of 2022, DHS designated 86 countries whose nationals are eligible to participate in the H-2A and H-2B programs.<sup>40</sup> More than 90% of H-2A workers are from Mexico.

<sup>37</sup> Office of Foreign Labor Certification, 2021.

<sup>38</sup> 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(i).

<sup>39</sup> 8 C.F.R. § 214.2 (h)(5)(i)(F)(1)(i)(D)(ii).

<sup>40</sup> Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs 2023, 87 Fed. Reg. 67930 (Nov. 10, 2023).

## H-2A Top 10 Employers

2020		2021		2022	
Employer	H-2A visas issued	Employer	H-2A visas issued	Employer	H-2A visas issued
North Carolina's Grower's Assoc., Inc.	10,650	North Carolina's Grower's Assoc., Inc.	10,860	North Carolina's Grower's Assoc., Inc.	10,887
Fresh Harvest, Inc.	5,326	Fresh Harvest, Inc.	6,141	Fresh Harvest, Inc.	8,479
WAFLA	4,358	Foothill Packing, Inc.	3,818	Foothill Packing, Inc.	5,770
Foothill Packing, Inc.	3,199	WAFLA	3,295	Temp.Labor, LLC	4,201
Farm Op Kuzzens H2A, LLC	2,998	Farm Op Kuzzens H2A, LLC	3,046	Farm Op Kuzzens H2A, LLC	3,856
Rancho Nuevo Harvesting, Inc.	2,998	Rancho Nuevo Harvesting, Inc.	3,015	Elkhorn Packing Co., LLC	3,742
Overlook Harvesting Company, LLC	2,586	Zirkle Fruit Company	2,904	WAFLA	3,499
Temp.Labor, LLC	2,589	Temp.Labor, LLC	2,667	Manzana LLC	3,241
Zirkle Fruit Company	2,191	R & R Harvesting, Inc.	2,347	D&K Harvesting, Inc.	2,932
R & R Harvesting, Inc.	2,056	Overlook Harvesting Company, LLC	2,287	Zirkle Fruit Company	2,886

Data source: U.S. Department of Labor, Employment and Training Administration, Performance Data. Retrieved from: <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

### 1. AGE AND GENDER

The gender and age of H-2A workers is not published. When information was requested in 2010, DOS revealed 96% of H-2A workers were male, the largest number of workers was between the ages of 18 and 30, and the average worker was 32 years old.<sup>41</sup> Men accounted for 53,836 of the visas issued while women received 2,074 (or 3.7% of all H-2A visas issued in FY 2010).<sup>42</sup>

## III. H-2A HIRING PROCESS

The employer locates and hires foreign workers to fill those jobs it cannot fill with U.S. workers. Employers often hire foreign recruiters — or staffing agents who contract with foreign recruiters — to recruit workers in the workers' home countries. (See discussion in Section IV below). Less frequently, employers find foreign workers through their own

<sup>41</sup> Department of State. (2011). Nonimmigrant visa statistics for age and gender of H-2A workers [Data set]. Visa Office, Immigrant Visa Control and Reporting Division. Provided to Global Workers Justice Alliance.

<sup>42</sup> Department of State, 2011.



## H-2A Top 10 Origin Countries

2020		2021		2022	
Country	H-2A visas issued	Country	H-2A visas issued	Country	H-2A visas issued
Mexico	197,908	Mexico	239,274	Mexico	275,981
South Africa	5,508	South Africa	6,897	South Africa	9,554
Jamaica	4,659	Jamaica	4,872	Jamaica	4,826
Guatemala	2,123	Guatemala	2,507	Guatemala	2,978
Nicaragua	693	Peru	915	Peru	975
Peru	536	Nicaragua	783	Nicaragua	966
Ukraine	383	Ukraine	528	Honduras	558
Honduras	299	Honduras	454	Costa Rica	384
Costa Rica	243	Costa Rica	296	El Salvador	377
Romania	224	El Salvador	284	Romania	273

Data source: U.S. Department of Labor, Employment and Training Administration, Performance Data. Retrieved from: <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

travels abroad or current employees in the United States. Once the U.S. government grants permission to the employer to hire H-2A workers, the workers not already present in the U.S. who are offered a job must personally appear at the designated U.S. consulate abroad to apply for the H-2A visa.

### A. STEPS FOR EMPLOYERS

#### 1. DEPARTMENT OF LABOR

To hire H-2A workers, employers must seek a temporary labor certification from the USDOL, Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC) by submitting information to the federal government and the state government where the work will take place. Agents or attorneys may petition on behalf of any type of employer.<sup>43</sup> The petitioner must identify as an individual employer, labor contractor, or grower association. If a labor contractor is filing, it must state the name and

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<sup>43</sup> 20 C.F.R. § 655.130.

location of each employer where H-2A workers will be provided.<sup>44</sup> The petitioner must specify and explain the number of H-2A workers needed and demonstrate: (1) there are not enough U.S. workers qualified and available to fill the positions needed; and (2) the employment of foreign temporary workers will not have an adverse effect on the wages and working conditions of U.S. workers holding similar jobs.<sup>45</sup> The place of employment and location of each actual worksite should be described with as much geographical specificity as possible.

#### **DIGGING DEEPER: JOB CONTRACTORS FOR H-2A APPLICATIONS**

Farm labor contractors may apply for temporary certification for H-2A workers to work for a particular employer at a fixed-site.<sup>46</sup> These farm labor contractors are called “H-2ALCs” and are treated as employers for purposes of the H-2A hiring process.<sup>47</sup> By 2019, 42% of H-2A certifications were issued to farm labor contractors.<sup>48</sup> There is a federal law called the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) that requires farm labor contractors to register with USDOL.<sup>49</sup> The AWPA does not offer any protections for H-2A workers, however.<sup>50</sup>

Because the H-2A program requires employers to recruit U.S. workers for the agricultural jobs as a prerequisite to getting permission to hire foreign workers, H-2ALCs must be registered as farm labor contractors with USDOL. The USDOL’s Wage and Hour Division (WHD) manages the farm labor contractor registration process under the AWPA and publishes a list of all registered individuals.<sup>51</sup> H-2ALCs must submit a copy of their registration certificate to USDOL with their application for temporary labor certification.<sup>52</sup>

#### **A) CLEARANCE ORDER SUBMITTED TO STATE WORKFORCE AGENCIES**

The first step for employer’s seeking H-2A workers is to submit the Agricultural and Food Processing Clearance Order ETA Form 790 (clearance order) to the appropriate State Workforce Agency (SWA) about three to four months before an H-2A employee begins

<sup>44</sup> 20 C.F.R. § 655.132(b)(1).

<sup>45</sup> 8 U.S.C. § 1188(a)(1); 20 C.F.R. § 655.103(a).

<sup>46</sup> 20 C.F.R. § 655.132(a) (“An *Application for Temporary Employment Certification* filed by an H-2ALC must be limited to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees.”). See also: U.S. Department of Labor. (2022, August 31 version). H-2A Application for Temporary Employment Certification (ETA Form 9142-A). Retrieved April 7, 2023, from [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/eta\\_form\\_9142a.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/eta_form_9142a.pdf).

<sup>47</sup> 20 C.F.R. § 655.103(b).

<sup>48</sup> Rural Migration News. (2021, October). H-2A: Growth and FLCs from 2010-19 (Blog 245). Retrieved April 5, 2023, from <https://migrationfiles.ucdavis.edu/uploads/rmn/blog/2021/10/Rural%20Migration%20News%20Blog%20245.pdf>.

<sup>49</sup> See 29 U.S.C. §§ 1802(7) for defining farm labor contractor and 1811(a)-(d) for registration requirements.

<sup>50</sup> 29 U.S.C. §§ 1802(8)(B), (10)(B). The AWPA specifically excludes farmworkers who have H-2A visas from the definitions of migrant and seasonal farmworkers.

<sup>51</sup> Wage and Hour Division. (2023). *Migrant and Seasonal Agricultural Worker Protection Act Registered Farm Labor Contractor Listing*. U.S. Department of Labor. Retrieved April 5, 2023, from <https://www.dol.gov/agencies/whd/agriculture/mspa/farm-labor-contractors>.

<sup>52</sup> 20 C.F.R. § 655.132(b). H-2ALCs are also required to post a surety bond and copies of fully executed work contracts with each fixed-site agricultural business.

work.<sup>53</sup> The SWA is usually the state department of labor or employment service. The SWA reviews the order for compliance with both state and federal regulations.<sup>54</sup> Within a short time, the SWA will notify the employer of any problems, and the employer will have a short window to correct them.<sup>55</sup>

## Top 10 States of Employment

2020		2021		2022	
State	H-2A workers certified	State	H-2A workers certified	State	H-2A workers certified
Florida	39,064	Florida	44,706	Florida	50,973
Georgia	27,614	Georgia	35,205	California	43,760
Washington	26,832	California	32,333	Georgia	34,974
California	25,453	Washington	28,727	Washington	33,049
North Carolina	22,052	North Carolina	23,479	North Carolina	25,624
Louisiana	11,332	Louisiana	12,473	Michigan	15,524
Michigan	9,912	Michigan	11,376	Louisiana	13,770
Arizona	8,602	Arizona	10,842	Arizona	13,731
New York	8,482	New York	9,192	Texas	11,655
Kentucky	6,952	Texas	8,553	New York	9,876

Data source: U.S. Department of Labor, Employment and Training Administration, Performance Data. Retrieved from: <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

### B) TEMPORARY LABOR CERTIFICATION FILED WITH USDOL

After submitting the clearance order to the SWA and no less than 45 days before the date of need, the employer must file the H-2A Application for Temporary Employment Certification, ETA Form 9142A.<sup>56</sup> The application solicits information about the employer,

<sup>53</sup> 20 C.F.R. § 655.121(a)(1). See also: U.S. Department of Labor. (2022, August 31 version). *Agricultural Clearance Order (Form ETA-790)*. Retrieved April 7, 2023, from <https://foreignlaborcert.doleta.gov/pdfs/ETA-790-instructions-addendums.pdf>.

<sup>54</sup> 20 C.F.R. § 655.121(a)(3). See also: 20 C.F.R. § 653.501, et seq. for regulations pertaining to interstate clearance system and 20 C.F.R. § 655.122 for contents of job offers.

<sup>55</sup> 20 C.F.R. § 655.121(b)(1).

<sup>56</sup> 20 C.F.R. § 655.130(b); 20 C.F.R. § 655.130(b). See also: U.S. Department of Labor. (2022, August 31 version). *H-2A Application for Temporary Employment Certification (Form ETA-9142A)*. Retrieved April 7, 2023, from [http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142A.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A.pdf); U.S. Department of Labor. (2016, May 31 version).

the nature of the temporary need, basics of the job offer, minimum job requirements, the place of employment, rate of pay, and must include a copy of the clearance order.<sup>57</sup> USDOL will notify the employer of any problems with the application within a week and will provide an opportunity to correct any deficiencies through an amended application.<sup>58</sup> USDOL usually makes decisions within a week and employers can appeal denials or partial certifications.<sup>59</sup>

#### C) U.S. WORKER RECRUITMENT REQUIRED

Upon receiving the temporary employment certification approval from USDOL, the employer must begin actively recruiting U.S. workers for the positions until the foreign workers depart for the jobs.<sup>60</sup> H-2A program regulations require employers to actively recruit U.S workers in a manner similar to how non-H-2A employers in the region recruit their workers, for example, newspaper and/or radio advertising, contacting local unions, and posting a job notice in customary locations.<sup>61</sup> Employers are required to look for U.S. workers in a “multistate region of traditional or expected labor supply,” not to exceed three states for each area of employment<sup>62</sup> and are required to report their positive recruitment activities.<sup>63</sup>

#### **DIGGING DEEPER: THE 50% RULE**

Once the H-2A workers are hired, have obtained their visas, and depart their home country en route to their place of employment, employers are no longer required to actively recruit U.S. workers. However, under the 50% rule, any qualified U.S. workers who thereafter apply for open H-2A positions must be hired until 50% of the work contract period has elapsed.<sup>64</sup>

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*H-2B Application for Temporary Employment Certification (ETA Form 9142A – Appendix A)*. Retrieved April 7, 2023, from [http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142A\\_Appendix.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A_Appendix.pdf).

<sup>57</sup> U.S. Department of Labor. (2022, August 31 version). *H-2A Application for Temporary Employment Certification (Form ETA-9142A)*. Retrieved April 7, 2023, from [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/eta\\_form\\_9142a.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/eta_form_9142a.pdf); see also: 20 C.F.R. § 655.130(a).

<sup>58</sup> 8 U.S.C. § 1188(c)(2)(A); 20 C.F.R. § 655.141(a); and 20 C.F.R. § 655.141(b)(3).

<sup>59</sup> 20 C.F.R. § 655.141(b)(3), (4) and § 655.171.

<sup>60</sup> 20 C.F.R. §§ 655.150; 655.-655.153; 655.154, 655.and 655.158 (“the obligation to engage in positive recruitment... shall terminate on the date H-2A workers depart for the employer's place of work. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.”).

<sup>61</sup> 20 C.F.R. § 655.154(b); Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6883 (February 12, 2010) (to be codified at 20 C.F.R. § 655 and 29 C.F.R. § 501), pp. 6884, 6912, 6927; 20 C.F.R. §§ 655.150; 655.153-655.1158.

<sup>62</sup> 20 C.F.R. § 655.154(a), (c); 8 U.S.C. § 1188(b)(4).

<sup>63</sup> 20 C.F.R. § 655.143(b)(3).

<sup>64</sup> 8 U.S.C. § 1188(c)(32)(B)(i); 20 C.F.R. § 655.135(d). Employers must offer employment to qualified U.S. workers when they apply during the 50% period, whether they are referred through the interstate employment service system or apply directly with the farm.

#### D) INTERSTATE SYSTEM AND ELECTRONIC JOB REGISTRY

Upon finding the clearance order to be acceptable, the state workforce agency (SWA) enters the job order for circulation within the interstate employment service system to recruit U.S. workers.<sup>65</sup> In order to further facilitate U.S. workers access to these jobs, USDOL maintains an online electronic job registry called Seasonal Jobs.<sup>66</sup> Each job listed should show the employer's name, the location of the worksite (city, county and state), the type of visa, wages and dates of employment. For H-2A jobs, each clearance order should be available online at [seasonaljobs.dol.gov](https://seasonaljobs.dol.gov) through the first half of the period of employment.<sup>67</sup>

## 2. DEPARTMENT OF HOMELAND SECURITY

Once the USDOL approves the temporary labor certification, the next step is for the employer to petition DHS's sub-agency, U.S. Citizenship and Immigration Services (USCIS), for permission to hire foreign workers, also known as nonimmigrant workers.<sup>68</sup> The employer submits the Petition for Nonimmigrant Worker, Form I-129, along with the H Classification Supplement, the approved ETA Form 9142A from USDOL, and the petition fee to USCIS.<sup>69</sup> The Form I-129 may not be filed or approved more than 120 days before the date of need (the day the job commences).<sup>70</sup>

Petitioners may file for more than one worker on a single Form I-129 if all workers will perform the same services for the same period and in the same location.<sup>71</sup> The petitioner must list the countries of citizenship for any foreign workers it intends to hire. Each year DHS decides from which countries petitioners may import foreign workers.<sup>72</sup> In

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<sup>65</sup> 20 C.F.R. § 655.121(c); 20 C.F.R. § 655.143(a) and (b)(1); 8 U.S.C.A. § 1188(b)(4). The SWA must maintain the clearance order in the system for the first 50 percent of the period of employment. 20 C.F.R. § 655.121(d).

<sup>66</sup> Seasonal Jobs. (n.d.) *SeasonalJobs.dol.gov*. U.S. Department of Labor. Retrieved April 5, 2023, from [seasonaljobs.dol.gov](https://seasonaljobs.dol.gov); see also: 20 C.F.R. § 655.144.

<sup>67</sup> 20 C.F.R. § 655.144.

<sup>68</sup> 8 C.F.R. § 214.2(h)(6)(iii)(E).

<sup>69</sup> U.S. Citizenship and Immigration Services. (2025, November 30 version). *Petition for a Nonimmigrant Worker (Form I-129)*. U.S. Department of Homeland Security. Retrieved April 5, 2023, from <https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf>. There is a \$150 USD fraud detection and prevention fee mandated by 8 U.S.C. 1184(c)(13)(A). Premium processing (to speed up the review time) is available for \$1,440 USD. The Form I-907, Request for Premium Processing Service, must be completed and submitted as well if the petitioner needs a quicker review process.

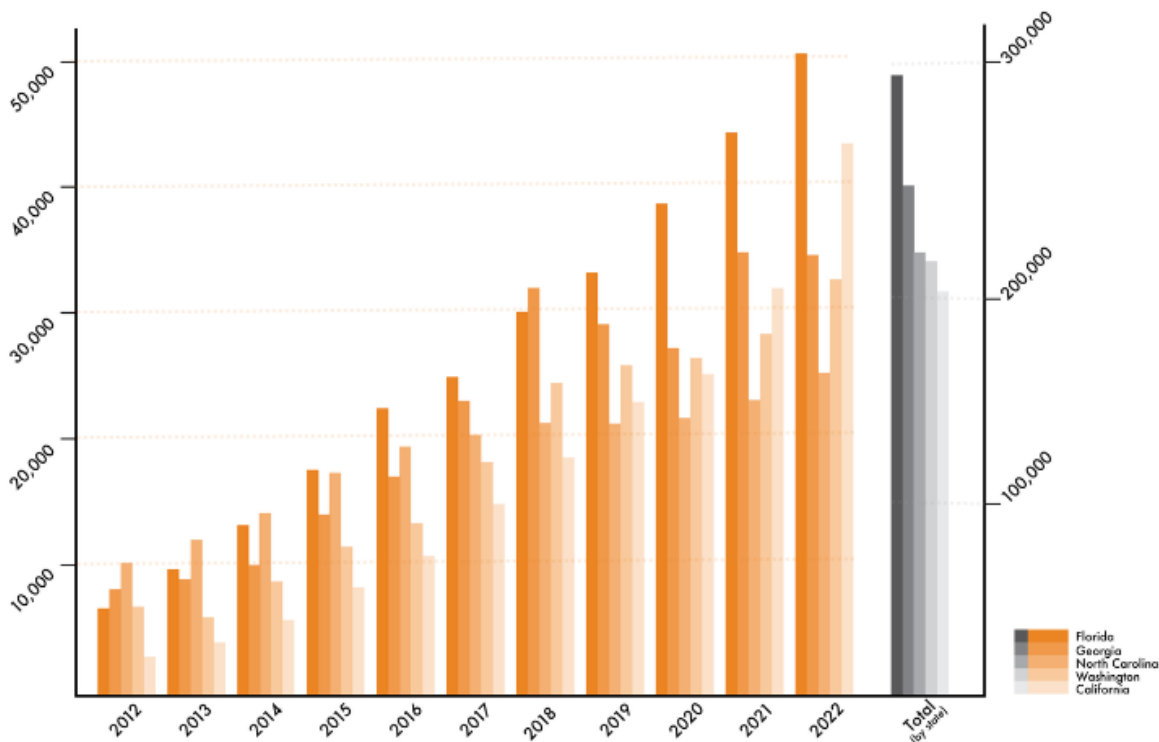
<sup>70</sup> 8 C.F.R. § 214.2(h)(9)(ii)(BA).

<sup>71</sup> 8 C.F.R. § 214.2(h)(2)(ii).

<sup>72</sup> The Department of Homeland Security specifies the countries from which employers are permitted to recruit H-2 workers. The list of H-2 eligible countries is published on a rolling basis and is valid for one year from publication. A national from a country not on the list may only be the beneficiary of an approved H-2 petition if the Secretary of Homeland Security determines that it is in the U.S. interest for that alien to be the beneficiary of such a petition. See 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii) (H-2A); 8 C.F.R. § 214.2(h)(6)(i)(E)(2) (H-2B).

2022, DHS designated 86 countries whose nationals are eligible to participate in the H-2A and H-2B programs during the next 12 months.<sup>73</sup>

### H-2A Top Five States of Employment 2012-2022



Data source: U.S. Department of Labor, Employment and Training Administration, Performance Data. Retrieved from: <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

Generally, the workers do not need to be named individually on the Form I-129.<sup>74</sup> There are exceptions for workers who are currently in the United States, or whose country of citizenship is not a DHS-designated participating country.<sup>75</sup> The total number of unnamed

<sup>73</sup> Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs, 87 Fed. Reg. 67930 (Nov. 10, 2022), Retrieved April 5, 2023, from <https://www.federalregister.gov/d/2022-24539>.

<sup>74</sup> 8 C.F.R. § 214.2(h)(2)(iii). However, there are exceptions. H-2A petitions must include the name of each beneficiary who is currently in the United States and USCIS may still require the worker's name if it is needed to establish eligibility. For example, if an employer files Form I-129 to extend the stay or become the new employer of an H-2A worker who is already in the U.S., or if an employer wishes to contract a worker from a country that is not listed as eligible, that worker must be named.

<sup>75</sup> 8 C.F.R. § 214.2(h)(2)(iii), see footnote 72.

worker beneficiaries requested must be specified and must not exceed the number of positions certified by USDOL.

Once approved, the USCIS sends an I-797, Notice of Action, to the employer notifying them that they are authorized to hire foreign workers. Form I-797 shows how many workers are approved and their countries of origin. The notice of approval is also entered in DHS's computer database tracking system, accessible by the Department of State's consular offices abroad. After I-129 approval, the decision is entered into the computer tracking system so the U.S. consulates can access that information when workers apply for the visas.

### 3. DEPARTMENT OF STATE

After DHS approves the employer's petition to hire nonimmigrant workers (Form I-129), the workers may apply for the visas from the State Department at the U.S. consulate or visa processing location in their country of origin.<sup>76</sup>

## B. STEPS FOR WORKERS

An H-2A visa is only available for an individual worker once an employer has authorization to hire a certain number of H-2A workers. Individuals who want to come to the U.S. on an H-2A visa, therefore, must find an employer who either has already obtained permission to hire H-2A workers, or is willing to do so.

### 1. VISA APPLICATION

Once a worker is offered and accepts the job, they must apply for the visa at a U.S. embassy or consulate in the home country. Often an agent of the employer or recruiter will assist the workers with this process. H-2A program regulations mandate that employees do not pay any fees related to obtaining an H-2A job.<sup>77</sup> If the individual H-2A worker applying for the visa pays these visa costs out of pocket before or after any visit to the consulate or embassy, the employer must reimburse the worker in the first paycheck.<sup>78</sup>

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<sup>76</sup> See generally 9 FAM [Foreign Affairs Manual] 402.10-4(D); Bureau of Consular Affairs, *Temporary Worker Visas*, U.S. State Department. Formerly, workers from Jamaica, Barbados, Grenada, Trinidad and Tobago, or British, French or Netherlands citizens who live in their Caribbean territories did not pass through the Department of Homeland Security or the Department of State procedures. That changed in 2018. See: Elimination of Nonimmigrant Visa Exemption for Certain Caribbean Residents Coming to the United States as H-2A Agricultural Workers, 83 Fed. Reg. 31447 (July 6, 2018) (to be codified at 8 C.F.R. § 212).

<sup>77</sup> 20 C.F.R. § 655.135(j); employees are responsible for costs that are primarily for the benefit of the worker, such as passport costs.

<sup>78</sup> Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6883 (February 12, 2010) (to be codified at 20 C.F.R. § 655 and 20 C.F.R. § 501), p. 6925.

Historically, through in-person interviews with consular officials, prospective H-2A workers needed to persuade State Department officials that they would return home when the job is done.<sup>79</sup> During the visa interview, State Department consular officers may ask about the worker's intention to return home after the job ends and look at their work history and connections to their home community. Recently, the Department of State has made visa interviews for H-2 workers discretionary due to the COVID-19 pandemic, a practice that will continue at least through the end of 2023.<sup>80</sup>

### **DIGGING DEEPER: CARIBBEAN WORKERS**

Before 2018, a visa was not required for H-2A workers coming from Jamaica and certain other Caribbean countries.<sup>81</sup> Once these workers were recruited for an approved H-2A petition, they would bypass the interview at the State Department. The workers would usually be given a letter or document indicating that they were coming to the U.S. to work on a specific H-2A contract and would go directly to a designated port of entry for admission and would receive their I-94 upon entry as any other nonimmigrant worker would.

Even though Caribbean H-2A workers were not issued visas from the Department of State (DOS), the same DHS and DOL regulations would still apply to their employers. In other words, employers who brought in H-2A workers from Caribbean nations still had to file their application for temporary labor certification, engage in positive recruitment efforts, and comply with regulations and the work contract so that wages and working conditions of U.S. workers are not adversely affected. Now, H-2A workers from Caribbean countries must obtain a visa and follow the same steps as any other H-2A visa holder.<sup>82</sup>

### **DIGGING DEEPER: THE RECRUITMENT FEE BAN AND THE STATE DEPARTMENT**

Foreign workers should not have to pay fees to a labor recruiter in their home country to obtain an H-2A position in the United States. Regulatory changes beginning in 2008 banned recruitment fees.<sup>83</sup> Indeed, employers must certify that they have contractually forbidden recruiters and

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<sup>79</sup> 8 U.S.C. § 1101(a)(15)(H)(ii) (H-2A and H-2B workers are defined as “having a residence in a foreign country which [s/]he has no intention of abandoning who is coming temporarily to the United States to perform” agriculture or other temporary services for which there are no available U.S. workers).

<sup>80</sup> U.S. Department of State. (2023, December 23). Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas. Retrieved May 4, 2023, from <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html>.

<sup>81</sup> 8 C.F.R. § 212.1(b)(i). Workers from Jamaica, Barbados, Grenada, Trinidad and Tobago, or British, French or Netherlands Dutch citizens who live in their Caribbean territories did not pass through the Department of Homeland Security or the Department of State procedures. Spouses and children of this group of agricultural workers could also enter the U.S. without a visa.

<sup>82</sup> Elimination of Nonimmigrant Visa Exemption for Certain Caribbean Residents Coming to the United States as H-2A Agricultural Workers, 83 Fed. Reg. 31447 (July 6, 2018) (to be codified at 8 C.F.R. § 212).

<sup>83</sup> Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 8537 (February 13, 2008) (to be codified at 20 C.F.R. § 655, and 29 C.F.R. § 501, § 780, § 788), pp. 8538, 8547–8548.



contractors from charging recruitment fees.<sup>84</sup> State Department personnel are instructed to notify DHS if any information comes to light during the visa application process that leads them to believe the worker has paid a prohibited fee or agreed to pay such a fee and has not been reimbursed or the agreement to pay the fee has not been terminated.<sup>85</sup>

## 2. ANTI-TRAFFICKING INFORMATION PROVIDED

The federal anti-trafficking law requires consular officers to ensure that all individuals applying for H visas are made aware of their legal rights.<sup>86</sup> Each worker must be given a pamphlet<sup>87</sup> prepared by DOS detailing this information and the consulate must ensure the material has been received, read, and understood by the applicant.<sup>88</sup>

## 3. ADMISSION AT U.S. BORDER OR PORT OF ENTRY

The final step for workers is to apply for admission at the border or port of entry. A visa does not guarantee admission; once workers have the H-2A visa in-hand, they must pass inspection at the port of entry or border.<sup>89</sup> Customs and Border Protection (CBP; a sub-agency of DHS) oversees admissions at the U.S. border. CBP will either permit or deny entry after their own inspection and will determine the permitted time allowed in the U.S., which may be less time than what is listed on the visa itself.<sup>90</sup>

# IV. RECRUITMENT OF FOREIGN WORKERS FOR H-2A JOBS

Employers, labor contractors, and associations often hire foreign recruiters to locate foreign workers. Foreign recruiters may have an office or residence abroad and may advertise by word of mouth or through local media outlets. Problems arise when foreign recruiters make false promises about the jobs or charge fees to prospective workers to

<sup>84</sup> 20 C.F.R. § 655.135(k); *Palma Ulloa v. Fancy Farms, Inc.*, 285 F.Supp.3d 1326 (M.D. Fla. 2018)

<sup>85</sup> 9 FAM 402.10-10(C)1.53 N2.2 (“[Y]ou should return the petition to DHS for reconsideration following current procedures outlined below in 9 FAM 41.53 N2.3 after consulting with your liaison in the Advisory Opinions Division of the Visa Office.”).

<sup>86</sup> 9 FAM 402.10-9(D)1.53 N28. Consular officers must enter a mandatory case note stating the pamphlet was provided and that the applicant indicated they understood its contents.

<sup>87</sup> U.S. Department of State. (n.d.). *Know Your Rights: An information pamphlet describing your rights while working in the United States*, (p. 5). Retrieved April 5, 2023, from <https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf>.

<sup>88</sup> 9 FAM 402.10-9(D). Responsibilities of information about enforcement of federal anti-trafficking law and consular officers.

<sup>89</sup> 8 C.F.R. § 235.1(f)(1).

<sup>90</sup> 8 U.S.C. § 1225; 8 C.F.R. Part § 235, Inspection of Persons Applying for Admission; see also Austin T. Fragomen, Jr., Alfred J. Del Rey, Jr., and Sam Bernsen, *Immigration Law and Business* § 2:11 (2010) (“The issuance of a nonimmigrant visa gives the alien permission to apply for admission to the United States at a port of entry...The visa does not assure an alien that they will be admitted to the United States, however; it merely indicates that a consular officer has found the alien eligible for temporary admission to the United States and not inadmissible under § 212(a) of the INA, 8 U.S.C.A. § 1182(a).”).

obtain the job. Even though regulations require employers to contractually prohibit recruiters from charging fees, that in and of itself does not stop the practice. (See Section VII below.) Whether the employer knew or should have known about the behavior of the foreign recruiter with respect to any of their workers is usually a contested issue when complaints about foreign recruitment arise.

## A. NO FEDERAL RECRUITER REGISTRY

There is no federal registration system in place for H-2A foreign recruiters, meaning that recruiters need not apply for permission to recruit internationally or be otherwise recognized by the US government before they engage in recruitment. The USDOL does publish a list of H-2B agents and recruiters as disclosed by H-2B employers in their petitions for workers.<sup>91</sup>

### **DIGGING DEEPER: STATE OF CALIFORNIA RECRUITER REGISTRATION LAW**

In 2016, the State of California (CA) expanded the regulation of recruiters bringing temporary foreign workers into the state.<sup>92</sup> SB 477 required recruiters, known as foreign labor contractors or FLCs, to:

- Adhere to standards preventing any workers coming to California from being required to pay any recruitment fees for a legal work visa.
- Register with the CA Labor Commissioner.
- Be publicly listed on the CA Labor Commissioner's website so workers and employers know who are legitimate FLCs.
- Post bond and provide an address where they can accept service of process when they register in California.
- Comprehensively disclose working terms and conditions to foreign workers during the recruiting process through a written contract in the worker's native language provided to both the worker and the CA Labor Commissioner.<sup>93</sup>

In addition, employers who use a California-registered FLC are protected by a safe harbor provision of the bill that exempts them from joint and several liability for the conduct of the FLC, whereas employers who engage with unregistered FLCs are not exempt.<sup>94</sup>

However, a drafting error in the passed legislation resulted in the bill being interpreted to cover only recruiters bringing H-2B workers to the state. This interpretation limited the coverage to merely 5,000 of the nearly 200,000 temporary workers who labor in California each year, even though the

<sup>91</sup> 20 C.F.R. § 655.9(c).

<sup>92</sup> Cal. BPC Sec. 9998.1.5(a); The California Foreign Labor Recruitment Law was passed in September 2014 as SB 477. A full copy of the Senate Bill is available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB477](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB477).

<sup>93</sup> Cal. BPC Sec. 9998.1.5; 9998.2.5.

<sup>94</sup> Cal. BPC Sec. 9998.8(c)(3).

original intent was to register and publish the recruiters of all guestworkers in the state. In 2021, California legislators drafted AB 364 to apply SB 477 to all temporary visa categories (except J-1),<sup>95</sup> but the bill was vetoed by the governor in September of 2022.<sup>96</sup>

## B. INFORMATION ABOUT FOREIGN RECRUITMENT NOT MAINTAINED

Any information about foreign recruiters collected by any of the federal agencies involved with the H-2A programs is not publicly available. This lack of transparency can make it difficult for prospective workers to evaluate whether a job offer is legitimate.

### 1. DEPARTMENT OF LABOR

USDOL does not request information about foreign recruiters in the temporary employment certification application ETA Form 9142A. The only USDOL regulation pertaining to recruitment is that applicants must forbid their recruiters from charging recruitment-related fees to prospective H-2A workers.<sup>97</sup> Appendix A to ETA Form 9142A requires the employer to make declarations under penalty of perjury regarding compliance with the recruitment fee ban and its contractual obligation to prohibit recruiters from charging fees.<sup>98</sup>

### 2. DEPARTMENT OF HOMELAND SECURITY

DHS requests limited information on foreign recruitment. On Form I-129, H-Classification Supplement, Section 2, the petitioner must list the countries of citizenship of the H-2 workers it intends to hire and whether a “staffing, recruiting, or similar placement service or agent” will be used to locate the foreign workers and if so, the name and address of the recruiter.<sup>99</sup> Employers do not need to disclose the name of all individuals who may work for the recruiter or even whether additional subcontractors will be engaged. Form I-129 asks the petitioner additional questions related to the prohibition on charging recruitment fees.<sup>100</sup>

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<sup>95</sup> Office of Assemblymember Freddie Rodriguez. (2021, February). *Assembly Bill 364 (Rodriguez) Foreign Labor Contractors* [Fact sheet]. Retrieved April 5, 2023, from <https://www.castla.org/wp-content/uploads/2021/02/AB-364-Foreign-Labor-Contractors.pdf>.

<sup>96</sup> Office of the Governor. (2022). *AB-364 Veto*. Retrieved June 14, 2023, from <https://www.gov.ca.gov/wp-content/uploads/2022/09/AB-364-VETO.pdf?emrc=6dda63>.

<sup>97</sup> 20 C.F.R. § 655.135(j).

<sup>98</sup> ETA Form 9142A, Appendix A, page A.2, declarations 10 11 and 121.

<sup>99</sup> U.S. Citizenship and Immigration Services. (2025, November 30 expiration date). *I-129 Petition for a Nonimmigrant Worker (H Classification Supplement to Form I-129)* pp. 15-16, questions 4, 7.a.-7.c.). U.S. Department of Homeland Security. Retrieved April 5, 2023, from <https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf>.

<sup>100</sup> U.S. Citizenship and Immigration Services, 2025, November 30 expiration date, p. 16, questions 8.a.-8.d., 9, 10.a.-10.b.

# KNOW YOUR RIGHTS

An information pamphlet describing your rights while working in the United States.

National Human Trafficking Hotline  
1-888-373-7888



William Wilberforce Pamphlet, Rights and Protections for Temporary Workers. See U.S. Department of State, Bureau of Consular Affairs. Retrieved from: <https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf>.

### 3. DEPARTMENT OF STATE

There are no statutes, regulations, or official policies mandating DOS officials to inquire about recruiters during the worker's visa application process.<sup>101</sup> However, several U.S. embassies in the region have nonimmigrant visa fraud units that are beginning to maintain a list of recruiters who are being investigated or are known to have committed visa

<sup>101</sup> See generally, 9 Foreign Affairs Manual (FAM 402.10) 41.53; Interviews with Department of State officials during 2010 and 2011.

fraud.<sup>102</sup> Additionally, if a DOS consular official discovers a worker has paid a recruitment fee, the visa application may be denied.<sup>103</sup>

## V. H-2A WORKER RIGHTS AND EMPLOYER OBLIGATIONS

H-2A contract rights protect, and apply equally to, H-2A workers and their U.S. counterparts. Such rights include a written employment contract, free housing, prompt reimbursement of all transportation costs, free tools and supplies, a promised wage and work guarantee, and workers' compensation coverage.<sup>104</sup> Employers must offer to U.S. workers the wages and terms and conditions at least equal to those offered to the H-2A workers and are required to maintain accurate payroll records. Retaliation is prohibited against H-2A or U.S. workers who assert their rights under the H-2A regulations.<sup>105</sup> In addition to the H-2A program regulations, workers are protected by other federal or state employment statutes including but not limited to the Fair Labor Standards Act, the Age Discrimination Employment Act, Title VII of the Civil Rights Act, the Trafficking Victims Protection Act, the Racketeer Influenced Corrupt Organizations Act, and state minimum wage and hour and discrimination laws. Whether specific statutes or common law rights apply to any given worker will depend on the facts of each situation.

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<sup>102</sup> See generally: U.S. Department of State. (2022). *9 Foreign Affairs Manual* (FAM 402.10) 41.53. Retrieved April 5, 2023, from <https://fam.state.gov/fam/09FAM/09FAM040210.html>; Interviews with Department of State officials during 2010 and 2011.

<sup>103</sup> U.S. Department of State. (2022). *9 Foreign Affairs Manual* (FAM 402.10-10(C)(b) Prohibited Fees. (The agency guidance instructs consular officials as follows: "If you have reason to believe that the applicant has paid a prohibited fee or agreed to pay such a fee and has not been reimbursed or the agreement to pay the fee has not been terminated, you should return the petition to USCIS for reconsideration..."). U.S. Consulate Sao Paulo, Brazil. (2005, Dec. 1) *H-2B Visas: The Good, The Bad and the Ugly*, U.S. State Department. (on file with author) ("Invariably, applicants have borrowed money or sold a car to fund the visa application and can never hope to make enough money in the four or five months the petition is valid to make a round-trip worthwhile. We deny most of these applications. Some of the ones that are issued arrive in the U.S. to find they have no job. In the end, the recruiters have made a fortune preying on the unsuspecting public, consulate visa appointments are swelled with these terrible cases, and few are issued visas. Only the recruiters benefit.").

<sup>104</sup> Wage and Hour Division. (2010, February). *Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)*. U.S. Department of Labor. Retrieved June 12, 2023, from <https://www.dol.gov/agencies/whd/fact-sheets/26-H2A#:~:text=Guarantees%20to%20All%20Workers%3A%20H,which%20a%20normal%20workweek%20is.>

<sup>105</sup> Wage and Hour Division. (2012, April). *Fact Sheet #77D: Retaliation Prohibited under the H-2A Temporary Visa Program*, U.S. Department of Labor. Retrieved June 12, 2023, from [https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation.](https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation)

## A. WRITTEN DISCLOSURE OF JOB TERMS AND EMPLOYMENT CONTRACT

Employers must provide H-2A workers with a written copy of their work contract—in a language understood by the worker—by the time the worker applies for his or her visa.<sup>106</sup> The work contract is usually in the same form as what the employer submits to USDOL to apply for temporary employment certification.<sup>107</sup> The work contract incorporates all of the H-2A regulations, including workers' rights.<sup>108</sup> The H-2A employment contract is enforceable by either the USDOL or by the workers themselves in civil court.<sup>109</sup>

## B. HOUSING

Employers must provide housing at no cost to H-2A workers and to U.S. workers “who are not reasonably able to return to their residence within the same day.”<sup>110</sup> The employer can either provide its own housing or offer rental accommodations. Housing must meet applicable health and safety standards, which are often determined at a local or state level.

## C. MEALS

Employers must either provide free and convenient cooking and kitchen facilities where workers can prepare their own meals, or they must serve three meals a day.<sup>111</sup> The amount of any meal charge must be stated in the work contract. In 2023, the maximum meal charge is \$15.46 USD per day.<sup>112</sup>

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<sup>106</sup> 20 C.F.R. § 655.122(q).

<sup>107</sup> 20 C.F.R. § 655.122(q). The clearance order, or ETA Form 790, is what is usually translated to Spanish and provided to H-2A workers when they are recruited in their countries of origin. If no contract is provided, the required terms in the ETA 790 and the employer's temporary employment certification application are considered to be the work contract.

<sup>108</sup> 20 C.F.R. § 655.122(q). *See also*: 20 C.F.R. § 655.122 (Contents of job offers).

<sup>109</sup> 29 C.F.R. § 501.2 (enforcement authority belongs to the Wage and Hour Division of USDOL) Subpart B – Enforcement of Work Contracts; *see also Lopez v. Workman*, 2000 WL 34024458 (Ky. App. 2000). Whether workers can bring state law contract claims in federal or state court depends on the facts of each particular case. Usually, federal courts exercise supplemental jurisdiction over state law contract claims if there are other federal issues involved in the litigation.

<sup>110</sup> 20 C.F.R. § 655.122(d)(1).

<sup>111</sup> 20 C.F.R. § 655.122(g).

<sup>112</sup> Employment and Training Administration. (2023, February 9). *Meal Charge and Travel Subsistence*. U.S. Department of Labor. Retrieved April 5, 2023, from <https://www.dol.gov/agencies/eta/foreign-labor/wages/meals-travel-subsistence>.

## D. TRANSPORTATION

The employer must reimburse the workers for their out-of-pocket inbound transportation costs, including daily subsistence and travel from the worker's home to the place of employment, once 50% of the contract period has passed.<sup>113</sup> If the worker completes the entire contract period, or is displaced by a U.S. worker under the 50% rule (see page 20 above), the employer must pay for the workers' outbound transportation back home, including subsistence costs.<sup>114</sup>

### 1. FEDERAL WAGE LAW MAY REQUIRE EARLIER PARTIAL REIMBURSEMENT

While H-2A regulations themselves only require employers to reimburse workers for the full amount of their travel costs after they complete 50% of the work contract, the Fair Labor Standards Act may require earlier reimbursement of some or all the worker's inbound transportation and visa expenses with the wages of the first pay period.<sup>115</sup>

#### **DIGGING DEEPER: DE FACTO DEDUCTIONS AND ARRIAGA V. FLORIDA PACIFIC FARMS**

In 2002, the Eleventh Circuit Court of Appeals in *Arriaga v. Florida Pacific Farms, LLC* found that H-2A workers' travel and related expenses are primarily for the benefit of the employer.<sup>116</sup> When employees incur expenses that are for the benefit of the employer prior to starting work, it is equivalent to the employer paying for these expenses and then deducting them from the employees' first paycheck.<sup>117</sup> This concept is known as a de facto deduction from wages and is improper under the FLSA. Therefore, employers must account for the H-2A worker's inbound travel and visa costs when computing the first week's wages. If the first week's wages fall below the minimum wage, employers must compensate the worker such that their earnings meet FLSA's minimum wage requirements. The USDOL later codified this result in H-2A regulations.<sup>118</sup>

### 2. SUBSISTENCE COSTS DURING TRAVEL

In 2022, the minimum amount an employer must pay each worker for daily subsistence when traveling to and from the worker's home country and the place of employment is \$15.46 USD per day. The maximum amount a worker may receive is \$59 USD per day,

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<sup>113</sup> 20 C.F.R. § 655.122(h)(1).

<sup>114</sup> 20 C.F.R. § 655.122(h)(2).

<sup>115</sup> 20 C.F.R. § 655.122(h)(1), (p)(1); Wage And Hour Division. (2010, February). Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA). U.S. Department of Labor. Retrieved June 12, 2023, from <https://www.dol.gov/agencies/whd/fact-sheets/26-H2A>.

<sup>116</sup> *Arriaga v. Florida Pacific Farms, LLC.*, 305 F.3d 1228, 1242-43 (11th Cir. 2002).

<sup>117</sup> *Arriaga v. Florida Pacific Farms, LLC.*, at 1236. See also *De Luna-Guerrero v. North Carolina Grower's Ass'n*, 338 F. Supp. 2d 649, at 656 (E.D.N.C. 2004).

<sup>118</sup> 20 C.F.R. § 655.122(p)(1).

if there is actual documentation.<sup>119</sup> Employers are also responsible for inbound lodging costs, if any, as well as lodging costs for the time the H-2A worker was staying in the consular city during the time his or her visa application was being processed.<sup>120</sup>

## H-2A Fees and Costs

	Who Pays?	Where's the Law?
Recruitment fees	Not allowed	20 C.F.R. § 655.135(j) (effective 2011)
Recruitment fees	H-2A worker may pay up front. Employer reimburses H-2A workers who complete 50% or more of their contract for daily subsistence and travel costs incurred en route from where the worker came from to the place of employment.  Employer may have to reimburse H-2A worker in first paycheck, subject to FLSA minimum wage rate.  If the employer pays for the worker's transportation and daily subsistence to the place of employment, the employer may deduct this cost from the worker's wages only if the deductions would not violate the FLSA. In this case the employer would still need to reimburse the worker for all amounts deducted by completion of 50% of the contract period."	20 C.F.R. §§ 655.122(h)(1), 655.122(p)(1)
Visa fees, border inspection fees and other government mandated fees	H-2A worker may pay up front. Employer must reimburse H-2A worker in first paycheck, subject to H-2A wage rate.	8 C.F.R. § 214.2(h)(5)(xi)(A)
Daily transportation in between housing and worksite	Employer pays	20 C.F.R. § 655.122(h)(3)
Passport	H-2A worker pays	75 Fed. Reg. 6884, 6925 (February 12, 2010)
Housing	Employer provides to H-2A worker at no cost.	20 C.F.R. § 655.122(d)(1)
Meals	Employer may charge H-2A worker up to \$14 per day (for providing 3 meals per day) if cooking facilities are not provided in housing offered. Deductions for meal cost are subject to FLSA minimum wage requirements. (as of 2/20/23)	20 C.F.R. § 655.173 80 Fed. Reg. 9482 (February 23, 2015)
Tools, supplies, equipment	Employer pays without deposit or charge.	20 C.F.R. § 655.122(f)

<sup>119</sup> Employment and Training Administration. (2023, February 9). *Meal Charge and Travel Subsistence*. U.S. Department of Labor. Retrieved April 5, 2023, from <https://www.dol.gov/agencies/eta/foreign-labor/wages/meals-travel-subsistence>.

<sup>120</sup> Employment and Training Administration, 2023, February 9.



## E. DAILY TRANSPORTATION BETWEEN LIVING QUARTERS AND WORKSITE

If workers are living in employer-provided housing, employers must provide free transportation to and from the worksite each day.<sup>121</sup> All transportation must meet federal safety and insurance regulations, and all drivers must be licensed.<sup>122</sup>

## F. TOOLS AND SUPPLIES

Employers must supply H-2A workers with all necessary equipment needed for the job without charging them for it.<sup>123</sup> Equipment requirements are not always enumerated, and disputes may arise over whether a particular item of protective clothing or equipment is “necessary” for performing the job.

## G. WAGES

H-2A workers must be paid at least the highest of the following: (a) the local “prevailing wage” determined by Department of Labor and state workforce agencies; (b) the state or federal minimum wage; (c) the “adverse effect wage rate” (AEWR) which is the per-state average hourly wage of farmworkers determined by a U.S. Department of Agriculture survey; or (d) the agreed-upon collective bargaining wage.<sup>124</sup> The highest rate is typically the AEWR.

### 1. ADVERSE EFFECT WAGE RATE (AEWR)

DOL annually publishes the AEWR for each state based on information from the U.S. Department of Agriculture. For the year 2023, the required wages ranged from \$13.67 USD per hour in some Southeastern states, to \$18.65 USD per hour in California. Generally, the AEWR increases slightly each year.<sup>125</sup>

According to the 2021 U.S. Department of Agriculture (USDA) survey of employers, a survey used to set the Adverse Effect Wage Rate (AEWR), the average wage of all non-supervisory farmworkers was \$15.56 per hour. USDA reported slight variation in wages across non-supervisory occupations ranging from \$15.95 per hour for produce graders

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<sup>121</sup> 20 C.F.R. § 655.122(h)(3).

<sup>122</sup> 20 C.F.R. § 655.122(h)(4).

<sup>123</sup> 20 C.F.R. § 655.122(f).

<sup>124</sup> 20 C.F.R. § 655.122(l).

<sup>125</sup> 20 C.F.R. § 655.120(b)(1)(i)(B), subpart B. See also: Employment and Training Administration. (2023, January 1). *Adverse Effect Wage Rates*. U.S. Department of Labor. Retrieved April 5, 2023, from <https://www.dol.gov/agencies/eta/foreign-labor/wages/adverse-effect-wage-rates>.

and sorters and for livestock caretakers, to \$17.59 for agricultural equipment operators.<sup>126</sup> The average wage for private-sector non-supervisory non-farm occupations was \$25.90.<sup>127</sup> This comparison shows that non-supervisory farmworkers earn only 60% of what their non-farmworker counterparts earn. H-2A agricultural guest workers earn even less, at an average of \$14.28 per hour.<sup>128</sup>

In 2023 the USDOL promulgated new regulations governing the calculations used to determine the AEWR each year. The March 2023 rule maintains the reliance on the USDA's Farm Labor Survey (FLS) to determine average wages for most agricultural occupations, however, for less common agricultural occupations (truck drivers, farm construction workers) or geographic regions where FLS data is not available (Alaska and Puerto Rico), Occupational Employment and Wage Statistics data will be used to determine AEWR rates. Additionally, in cases where job orders list multiple job duties, the highest AEWR will be applied when there is a discrepancy.<sup>129</sup>

## 2. PIECE RATE WORK

Besides the AEWR, many agricultural workers are paid on a piece rate basis; for example, a fixed rate per bushel of apples harvested or per row of onions planted. Workers who earn wages on a piece rate basis may end up earning more than what they would earn if they were paid hourly. However, when piece rate earnings fall short of the hourly rate—for example, if the crop yield is low—the employer must supplement earnings so the pay period's wage average is at least the required hourly wage.<sup>130</sup> If an employer pays by the piece rate and requires a minimum productivity standard, that fact must be clearly specified in the clearance order and be in sync with what is customary practice in the area.<sup>131</sup>

H-2A regulations require payment of the “prevailing wage” in instances where it is higher than the AEWR, even when the prevailing wage is a piece rate. The state workforce agencies are responsible for conducting surveys to determine what the prevailing wage is and when it might be higher than the applicable AEWR. However, most state workforce agencies have not regularly conducted these surveys and in such cases, the employer is

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<sup>126</sup> Economic Research Service. (2023, March 22). *Farm Labor*, U.S. Dept. of Agriculture. Retrieved June 5, 2023, from <https://www.ers.usda.gov/topics/farm-economy/farm-labor/>.

<sup>127</sup> Employment and Training Administration, 2023, January 1.

<sup>128</sup> Employment and Training Administration, 2023, January 1.

<sup>129</sup> Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 2020, 88 Fed. Reg. 12760. (February 28, 2023). See also 20 C.F.R. § 655.

<sup>130</sup> 20 C.F.R. § 655.122(l)(2)(i). See also introduction to section G. *WAGES* above for applicable wage.

<sup>131</sup> 20 C.F.R. § 655.122(l)(2)(iii).

only required to offer the AEWR, even if workers' earnings at the AEWR would actually be less than if they were paid the most common piece rates in the area.<sup>132</sup>

## H. TAXES

H-2A workers are exempt from Social Security, Medicare, and unemployment compensation.<sup>133</sup> Therefore, employers are not required to pay federal employment payroll taxes for H-2A workers. However, H-2A workers are *not* exempt from the U.S. federal income tax. Whether H-2A workers have state income tax liability depends on the tax laws in the state where the worker is employed.

### **DIGGING DEEPER: FEDERAL INCOME TAX AND H-2A WORKERS**

Even though compensation paid to H-2A workers is not considered “wages” for purposes of federal income tax withholding requirements, it is “wages” for purposes of an employer’s W-2 reporting. Since 2011, employers have been required to issue W-2s to H-2A workers who earn more than \$600 per year. Many H-2A workers are required to file a federal income tax return and will owe U.S. federal income tax. Tax liability depends on personal income and how much time the individual has spent working in the U.S. in the last three years. If it is known in advance that a worker will have to pay income tax, the worker and employer may agree to voluntary federal income tax withholding (and taxes will be withheld from the H-2A worker’s wages). The U.S. Internal Revenue Service publishes guidance annually because this is a complicated and evolving area of law.

## I. THREE-FOURTHS GUARANTEE

Employers must guarantee to offer the H-2A worker a total number of hours of work equal to at least 75% of the hours listed during the entire contract period.<sup>134</sup> The contract period begins the first day after the H-2A worker arrives on the job and ends on the final date listed on the clearance order work contract. If employers offer less than 75% of the promised work, they are obligated to pay the worker any additional wages that the worker would have received had they worked the guaranteed number of days.<sup>135</sup> The three-fourths guarantee does not apply to H-2A workers who are displaced by U.S. workers during the first half of the contract period, H-2A workers terminated for cause, or who voluntarily leave the job before its conclusion.<sup>136</sup>

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<sup>132</sup> *Garcia v. Stewart*, 531 F. Supp. 3d 194, 218 (D.D.C. 2021).

<sup>133</sup> 26 U.S.C. § 3121(b)(1), (b)(19) (Federal Insurance Contributions Act exemption); 26 U.S.C. § 3306(c)(1)(B), (c)(19) (Federal Unemployment Tax Act exemption).

<sup>134</sup> 20 C.F.R. § 655.122 (i)(1).

<sup>135</sup> 20 C.F.R. § 655.122(i)(1)(iv).

<sup>136</sup> 20 C.F.R. § 655.122(i)(4).

## J. WORKERS' COMPENSATION

H-2A workers are entitled to workers' compensation insurance coverage consistent with state law at no cost to the worker.<sup>137</sup> This is true even in states that have laws which exempt agricultural workers from coverage.<sup>138</sup> Proof of workers' compensation insurance, including the name of the carrier, must be included with the clearance order submitted by the employer so workers have that information in their possession.

### H-2A: USDOL Civil Monetary Penalties

CMP amount	Violation	Authority
\$1,500	Each violation committed against each worker	29 C.F.R. § 501.19(c)
\$5,000	Willful violations and acts of intimidation, threats, coercion or blacklisting	29 C.F.R. § 501.19(c)(1)
\$50,000	Per worker for housing or transportation violations that cause death or serious injury	29 C.F.R. § 501.19(c)(2)
\$100,000	Per worker for repeated or willful housing or transportation violations that cause death or serious injury	29 C.F.R. § 501.19(c)(4)
\$5,000	Failure to cooperate with a WHD investigation	29 C.F.R. § 501.19(d)
\$15,000	Each unlawful termination, displacement or rejection of a U.S. worker	29 C.F.R. §§ 501.19(e)-(f)

## K. RECORDKEEPING

Employers must keep accurate work records including earnings, the nature and amount of work performed, the number of hours of work, the rate of pay, and any field tally records.<sup>139</sup> Each worker must receive an itemized earnings statement or paystub with their wages for each pay period.<sup>140</sup> Upon request, the worker or their representative may obtain a copy of these records from the employer.<sup>141</sup>

## L. RETALIATION PROHIBITED

Retaliation against H-2A workers is prohibited. Employers “may not retaliate, threaten, coerce, blacklist, discharge, or in any manner discriminate against anyone” who has filed

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<sup>137</sup> 20 C.F.R. § 655.122(e).

<sup>138</sup> 20 C.F.R. § 655.122(e)(1). For a list of states and whether they require compensation coverage for farmworkers, see Farmworker Justice. (2009). *State Workers' Compensation Coverage for Agricultural Workers*. Retrieved April 6, 2023, from [https://www.farmworkerjustice.org/wp-content/uploads/2012/08/6.3.a.1State\\_Workers\\_Comp\\_Information\\_for\\_Health\\_Centers\\_11-09.pdf](https://www.farmworkerjustice.org/wp-content/uploads/2012/08/6.3.a.1State_Workers_Comp_Information_for_Health_Centers_11-09.pdf).

<sup>139</sup> 20 C.F.R. § 655.122(j)(1).

<sup>140</sup> 20 C.F.R. § 655.122(k).

<sup>141</sup> 20 C.F.R. § 655.122(j)(2).

a complaint, instituted any proceeding, testified or is about to testify in any proceeding, consulted with an attorney or legal services program, or exercised on behalf of themselves or others rights offered by the H-2A program.<sup>142</sup> Workers may not waive any of their rights under the H-2A regulations.<sup>143</sup>

## VI. ENFORCEMENT

H-2A worker protections and the Fair Labor Standards Act are both enforced by the Wage and Hour Division (WHD) of the U.S. Department of Labor (USDOL). If an H-2A worker claims any sort of discrimination and Title VII is implicated, then the Equal Employment Opportunity Commission may enforce those rights. State agencies customarily will have the authority to enforce state laws that apply to H-2A workers. Workers themselves may enforce their own employment and civil rights by filing a lawsuit in federal or state court as allowed by law. However, as is the case with all temporary foreign workers, it is a challenge to find a lawyer willing to represent clients who are bound to return home once their work visas expire.

### A. U.S. DEPARTMENT OF LABOR

USDOL's WHD has enforcement authority over the H-2A regulations.<sup>144</sup> An enforcement action may result from a routine inspection or an informal complaint from any person.<sup>145</sup> If a worker is the complainant, efforts are made by the WHD to protect the worker's confidentiality.<sup>146</sup> In certain cases, the USDOL may recommend revocation of existing temporary labor certifications (or even ban the employer from future participation in the H-2A program), seek injunctive relief and recover unpaid wages and other money owed to workers, or assess civil monetary penalties.

For example, at the end of 2020, Flo-Ag, a Florida farm labor company, was found to have violated several of the regulations of the H-2A program by the USDOL. Flo-Ag failed to pay its U.S. workers the same pay, or provide some of the same benefits, as its H-2A workers. Flo-Ag owed \$45,212 in back pay to 113 employees, were ordered to pay \$17,939 in civil penalties, and was debarred from participating in the H-2A program for two years.<sup>147</sup> The amount of civil money penalties imposed on violating employers

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<sup>142</sup> 20 C.F.R. § 655.135(h)(1)-(5) and 29 C.F.R. § 501.4(a)(1)-(5).

<sup>143</sup> 29 C.F.R. § 501.5.

<sup>144</sup> 29 C.F.R. §§ 501.02, et seq; 29 C.F.R. §§ 501.1(c), "Authority of the Wage and Hour Division. The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment..."

<sup>145</sup> 29 C.F.R. § 501.6(c).

<sup>146</sup> 29 C.F.R. § 501.6(b).

<sup>147</sup> Neal, D. (2020, December 7). A Florida farm labor company owed \$45,000 in pay. It's banned from the H-2A visa program. *Miami Herald* Retrieved DATE, from <https://www.miamiherald.com/news/business/article247664010.html>.

depends on the violation and its severity. Workers do not receive any portion of civil money penalties; they are paid to the U.S. Treasury.

## 1. WOW SYSTEM

To help workers access wages collected by USDOL, the agency launched the “Workers Owed Wages” (WOW) web-based application.<sup>148</sup> The system was previously known as the Back Wage Employee Locator System (BWELS). The updated and streamlined WOW system enables workers or advocates to answer a series of questions to determine whether WHD has collected and is holding back wages for the workers; if so, the system helps connect workers with the relevant WHD office to receive their back wages.

## B. PRIVATE LITIGATION

H-2A workers may enforce their rights in court if the court has jurisdiction to hear the case. Jurisdiction is conferred by virtue of a federal statute, such as the Fair Labor Standards Act, or under common law. H-2A workers can directly enforce the worker protection terms of the clearance order, which include H-2A regulations, by filing a breach of contract claim. H-2A workers do not need to seek redress through USDOL before filing a breach of contract case in federal or state court.<sup>149</sup> In other words, the fact that USDOL has enforcement authority over the H-2A regulations does not preclude individual H-2A workers from filing their own lawsuits to enforce their contracts.

### **DIGGING DEEPER: FEDERALLY FUNDED LEGAL SERVICES FOR H-2A WORKERS**

The federally funded Legal Services Corporation (LSC) awards grants to privately run organizations that provide legal assistance to the poor. Legal services programs that are LSC grantees are subject to a series of regulations governing the clients they are allowed to represent.

Generally, only certain classes of noncitizens are eligible for legal services from LSC grantees. The LSC regulations state that nonimmigrant H-2A agricultural workers may be clients of an LSC grantee if their legal issues arise out of the employment contract.<sup>150</sup>

To be eligible for legal services through an LSC grantee, noncitizens must also be “present in the United States.”<sup>151</sup> In 2000, LSC convened the Erlehnborn Commission to interpret this rule with respect to H-2A worker clients, who by definition must depart the United States when their contract ends, a date which rarely corresponded with the resolution of their legal issues. After thorough study, the Commission issued their findings in a report, concluding:

<sup>148</sup> Wage and Hour Division. (n.d.) *Workers Owed Wages*, U.S. Department of Labor. Retrieved April 6, 2023, from <https://webapps.dol.gov/wow/>.

<sup>149</sup> *Lopez v. Fish*, 2012 WL 2126856 (E.D. Tenn. 2012).

<sup>150</sup> 45 C.F.R. § 16265.11(a).

<sup>151</sup> 45 C.F.R. § 1626.5.

*For H-2A workers, representation is authorized if the workers have been admitted to and have been present in the United States pursuant to an H-2A contract, and the representation arises under their H-2A contract. LSC grantees are authorized to litigate this narrow range of claims to completion, despite the fact that the alien may be required to depart the United States prior to or during the course of the representation. LSC grantees may not represent aliens in this category who have never entered or been present in the United States.*

## C. ACCESS RIGHTS

H-2A workers are often, by the nature of their jobs, geographically isolated and may not know where to turn when questions about workplace violations, or employer conduct, arise. Further complicating H-2A workers' access to legal services is the fact that H-2A housing is provided free of charge and usually controlled by employers. This arrangement potentially gives employers the power to prevent legal counsel from visiting H-2A workers in their temporary homes.

The laws governing visitors of H-2A workers at employer-owned housing<sup>152</sup> differ from state to state. Some state and local governments have made official declarations and opinions clarifying the right of H-2A and other migrant workers and farmworkers to receive guests at their employer sponsored housing, such as those offering legal services and other assistance (such as health care or education). One example is an opinion from the New York State Attorney General, issued in 1991, stating that “[m]igrant farmworkers have the right to be visited in labor camps where they reside by doctors, lawyers, labor union representatives, the clergy or other persons during non-working hours without interference by their employers or owners of the labor camp.”<sup>153</sup>

Similarly, Washington state has declared that “the rights to freedom of speech and association protected by the state and federal constitutions generally limit an employer’s right to restrict access by legal aid organizations to private labor camps. Thus, legal advocates, who enter a private labor camp for the purpose of determining whether any migrant worker living in the camp wishes to speak with them, do not commit criminal trespass. If a migrant worker living at the camp does wish to speak with them, then the advocate can stay consistent with the invitation the advocate receives from the migrant

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<sup>152</sup> As described above, H-2A employers must provide housing to H-2A workers at no cost. In many cases this is accomplished by employers providing housing that they own to the H-2A workers they have contracted. This type of housing is typically referred to as employer provided, or employer owned, housing, or as private labor camps. Other possibilities include housing rented from a third party, or state-owned accommodations.

<sup>153</sup> Opinion. No. F91-7 (Opinions N.Y. Atty. Gen. Nov. 25, 1991). Retrieved April 12, 2023, from <https://casetext.com/case/opn-no-f91-7>.

worker.”<sup>154</sup> As these two opinions show, some states consider the right of the worker to receive visitors to trump the property rights of the employer/housing owner to vet those who visit the workers in employer provided housing. In other states there is case law precedent giving migrant workers the option to receive service providers as guests.

Recent court decisions have complicated the stance of many states that consider the tenant’s rights of workers superior to the property rights of farm owners. In 1975, California passed the Agricultural Labor Relations Act (ALRA), which established collective bargaining rights for farmworkers in the state—and established the Agricultural Labor Relations Board (ALRB) to enforce the ALRA.<sup>155</sup> Specifically regarding the ability of organizers to access farmworkers, the ALRB permits organizers to visit sites of farmworker employment within specific parameters: 1) the union must give notice to the employer before taking access; 2) organizers cannot disrupt work; 3) organizers can only engage workers for an hour before and after work and during lunch; and 4) organizers must limit their access to 120 days during a year.<sup>156</sup>

In 2016, California’s access rule was challenged in federal court by two agricultural employers, who argued that their property rights were being violated when forced to allow union organizers onto their property.

The Federal District Court dismissed the growers’ complaint, holding that the access regulation did not constitute a per se physical taking.<sup>157</sup> A divided panel of the Court of Appeals for the Ninth Circuit affirmed the dismissal, and the farm owners appealed the dismissal to the U.S. Supreme Court.<sup>158</sup> The Supreme Court ruled against the access rule, finding that when it created a right for a third party to enter the farm owners’ property, it constituted a per se physical taking of the property.<sup>159</sup>

## VII. H-2A PROGRAM – CRITICISM

There are several issues that consistently present problems for H-2A workers. There have been many documented cases of employer non-compliance with general labor law

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<sup>154</sup> Office of the Attorney General of Washington State. (2020, September 2). *Access By Legal Aid Representatives to Private Property Where Migrant Workers Are Housed*. Retrieved April 6, 2023, from <https://www.atg.wa.gov/ago-opinions/access-legal-aid-representatives-private-property-where-migrant-workers-are-housed>.

<sup>155</sup> Agricultural Labor Relations Board. (2023). *About the Agricultural Labor Relations Board*. State of California. Retrieved April 6, 2023, from <https://www.alrb.ca.gov/about-us/>.

<sup>156</sup> Agricultural Labor Relations Board. (2023). *A Handbook on the California Agricultural Labor Relations Law*. State of California. Retrieved June 6, 2023, from <https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/09/Handbook0918.pdf>.

<sup>157</sup> *Cedar Point Nursery v. Gould*, 2016 WL 3549408 (E.D. Cal. June 29, 2016).

<sup>158</sup> *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019). See also *Cedar Point Nursery v. Hassid*, 5 F.4th 1098 (9th Cir. 2021). Retrieved April 13, 2023, from [https://www.supremecourt.gov/opinions/20pdf/20-107\\_ihdi.pdf](https://www.supremecourt.gov/opinions/20pdf/20-107_ihdi.pdf).

<sup>159</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Cedar Point Nursery V. Hassid*, 5 F.4th 1098 (9th Cir. 2021).



or with H-2A program rules.<sup>160</sup> As with other temporary nonimmigrant visas that tie workers to a specific employer, there is a lack of job transferability. This makes the employee dependent on the employer for lawful immigration status. When there are problems on the job, H-2A workers may be unwilling to come forward because they do not want to risk losing their job and their ability to work in the United States. The fear of retaliation for complaining persists despite the long-standing ban on retaliation. It may take the form of an employer simply choosing not to hire the worker for future contracts or the foreign recruiter not allowing the worker to apply for jobs with any H-2A employers. Regardless, claims of retaliation are very difficult to investigate and prove because of the complexity involved with hiring decisions.

## A. LACK OF JOB TRANSFERABILITY

As is the case with many other guestworker visas, H-2A workers obtain their visas only through the employer who petitioned the government to hire foreign workers. If a worker wants to change employers, the new employer must go through that same hiring process.<sup>161</sup> The worker may not begin the new job until the federal government approves the change. In any case, the validity of the visa is parallel to the period of the work contract. Thus, if a visa holder quits his job prematurely or is fired, the visa is no longer valid.<sup>162</sup> An employer must report all workers who “abscond” to both USDOL and DHS within two days – or be subject to penalty.<sup>163</sup> As a result, H-2A workers may be willing to put up with unfavorable working conditions rather than risk the immediate loss of their lawful immigration status and potential deportation.

## B. ABUSES DURING FOREIGN RECRUITMENT

In March 2015, the U.S. Government Accountability Office released a report for the U.S. Congress on the H-2A visa program, calling for increased protections for foreign workers, in large part based on abuse starting during recruitment.<sup>164</sup> The report noted that foreign

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<sup>160</sup> See: U.S. Government Accountability Office. (2017, May 30). *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* (GAO-15-154 p. 787-7879, Appendix IV: Details on Back Wages and Civil Money Penalties Assessed by the Department of Labor). Retrieved April 6, 2023, from <https://www.gao.gov/products/gao-15-154>. Farmworker Justice. (2011). *No Way to Treat a Guest: Why the H-2A agricultural visa program fails U.S. and foreign workers* (p. 20-32, Appendix: Resources on H-2A program abuse). Retrieved April 6, 2023, from <https://www.farmworkerjustice.org/resource/no-way-to-treat-a-guest-why-the-h-2a-agricultural-visa-program-fails-u-s-and-foreign-workers/>.

<sup>161</sup> 8 C.F.R. § 214.2(h)(2)(i)(D). Employers must go through all the regular hiring steps, first filing a temporary labor certification with USDOL and then filing a Form I-129 petition for H-2B approval and an extension of the worker's stay in the United States.

<sup>162</sup> 9 FAM 41.53 N10 (Nov. 24, 2009) (length of stay)402.10-12. If a growers' association is the sole or joint employer of the H-2A worker, then it may transfer workers among its members. 8 U.S.C. § 1188(c)(3)(B)(iv).

<sup>163</sup> 20 C.F.R. §§ 655.122(n). Abandonment is defined as five consecutive, unexcused absences.

<sup>164</sup> U.S. Government Accountability Office. (2017, May 30). *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* (GAO-15-154). Retrieved April 6, 2023, from <https://www.gao.gov/products/gao-15-154>.

workers in dire need of jobs may take out loans in order to pay recruitment fees and other costs they are told are necessary to work in the United States.<sup>165</sup> Recruiters may charge a prospective H-2 worker without the employer's knowledge and tell the worker to keep the fee agreement secret. Even though employers and labor contractors must instruct recruiters to refrain from charging fees, recruiter fees are difficult to eradicate as a practical matter. Perhaps to skirt the 2010 ban on collecting recruitment fees,<sup>166</sup> "recruiters adjusted their practices by charging fees after the workers had obtained their visas and levying charges under the guise of 'service fees.'"<sup>167</sup> Indeed, "the Department's power to enforce regulations across international borders is constrained."<sup>168</sup>

When workers are indebted before they even arrive in the U.S., they are at risk of being compelled to work against their will.<sup>169</sup> The effects of this reach beyond the H-2A workers themselves. Workers who have heavily indebted themselves to secure a place in the H-2A program may be subject to exploitation in ways that would drive down wages and working conditions for all workers, foreign and domestic.<sup>170</sup>

Further compounding these issues is the fact that there is no official U.S. mechanism to discern the legitimacy of a recruiter who sets up shop in a small rural village in foreign territory and offers jobs in the United States. Because prospective H-2A workers do not have an official mechanism to vet employers or recruiters before applying, there is an increased risk of engaging with unethical recruiters.

### C. WAGE AND H-2A CONTRACT VIOLATIONS

H-2A workers are often among the lowest paid workers in the U.S., and their temporary immigration status, in which their visa is tied to their employer, often deters them from reporting workplace violations. Investigations of agricultural operations that were undertaken by WHD found that 70% of farms violated employment laws, including violations of wage theft and inadequate housing. Despite this high rate of violations, due to a lack of WHD investigators, farm employers have about a 1.1% chance of being

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<sup>165</sup> U.S. Government Accountability Office. (2017). Page 30.

<sup>166</sup> Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6883 (February 12, 2010) (codified at 20 C.F.R. § 655 and 29 C.F.R. § 501), p. 6924.

<sup>167</sup> U.S. Department of State. (2011). *Trafficking in Persons Report* (p. 377). Retrieved April 6, 2023, from <https://2009-2017.state.gov/documents/organization/164452.pdf>.

<sup>168</sup> Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6883 (February 12, 2010) (to be codified at 20 C.F.R. § 655 and 29 C.F.R. § 501), p. 6926.

<sup>169</sup> Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6883, 2010, p. 6925.

<sup>170</sup> Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6883, 2010, p. 6925.

investigated in any given year.<sup>171</sup> This provides an incentive for farms to not expect investigations, and when investigations do occur there is little deterrence of H-2A worker rights violations.<sup>172</sup> Even with limited capacity, USDOL has assessed hundreds of H-2A employers for penalties and/or back wages.<sup>173, 174, 175</sup> Private lawsuits on behalf of H-2A workers have also highlighted wage and contract violations.<sup>176, 177, 178</sup>

## D. HEALTH AND SAFETY

Federal regulations of the H-2A program require that all H-2A employers must comply with all applicable Federal, State, and local laws and regulations, including health and safety laws.<sup>179</sup> However, lack of oversight has led many advocates to conclude that employment conditions have made many migrant workers, including those with H-2A visas, overly vulnerable to health hazards on the job and in their living quarters. This risk has been particularly highlighted during the recent COVID-19 pandemic.

### 1. DOCUMENTED OUTBREAKS

Because past employers of temporary visa workers have housed workers in crowded living conditions, there was considerable concern for the health and safety of workers during the global COVID-19 pandemic. Substantive research has emerged regarding the spread of the COVID-19 virus within agricultural worker populations in the U.S., and

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<sup>171</sup> Costa, D. (2022, July 20). *Second-class workers: Assessing H-2 visa programs' impact on workers*. Economic Policy Institute. Retrieved June 6, 2023, from <https://www.epi.org/publication/second-class-workers-assessing-h2-visa-programs-impact-on-workers/#epi-toc-14>.

<sup>172</sup> Costa, D. (2022, December 15). *70% of All Investigations in Agriculture Detected Violations of Federal Wage and Hour Laws and Farm Labor Contractors are the Biggest Violators*, Economic Policy Institute Retrieved June 6, 2023, from <https://www.epi.org/press/70-of-all-investigations-in-agriculture-detected-violations-of-federal-wage-and-hour-laws-and-farm-labor-contractors-are-the-biggest-violators-policymakers-must-do-more-to-protect-farmworkers-and-ho/>.

<sup>173</sup> Data Enforcement. (2023). *Wage and Hour Compliance Action Data*. U.S. Department of Labor. Retrieved April 6, 2023 from [https://enforcedata.dol.gov/views/data\\_summary.php](https://enforcedata.dol.gov/views/data_summary.php).

<sup>174</sup> U.S. Department of Labor. (2012, July 10). *US Department of Labor Reaches Agreement Resulting in More than \$2.3 Million in Back Wages to Temporary Foreign Agricultural Workers* [Press release]. Retrieved April 6, 2023, from <https://www.dol.gov/newsroom/releases/whd/whd20120710>.

<sup>175</sup> U.S. Department of Labor. (2010, November 18). *US Labor Departments Wage and Hour Division Assesses Georgia Agricultural Employer \$1.3 Million in Back Wages and \$136,500 in Penalties* [Press release]. Retrieved April 6, 2023, from <https://www.dol.gov/newsroom/releases/whd/whd20101118>.

<sup>176</sup> Southern Poverty Law Center. (2012, January 5). *Arkansas Company to Pay \$1.5 Million to Guestworkers Owed Back Wages in SPLC Lawsuit* [Press Release]. Retrieved April 6, 2023, from <https://www.splcenter.org/news/2012/01/05/arkansas-company-pay-15-million-guestworkers-owed-back-wages-splc-lawsuit>.

<sup>177</sup> *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276 (11th Cir. 2016).

<sup>178</sup> Southern Poverty Law Center. (2020, August 14). *SPLC sues farm labor contractor for underpaying H-2A guest workers and threatening to deport them for speaking out*. Retrieved April 6, 2023, from <https://www.splcenter.org/news/2020/08/14/splc-sues-farm-labor-contractor-underpaying-h-2a-guest-workers-and-threatening-deport-them>; *Benito v. Lowry Farms, Inc.*, Complaint, Case No 1:20-cv-01039-SOH (W.D. Ark. Dec. 5, 2022). Retrieved April 13, 2023, from [https://www.splcenter.org/sites/default/files/de\\_2\\_and\\_2-1\\_complaint\\_with\\_exhibit.pdf](https://www.splcenter.org/sites/default/files/de_2_and_2-1_complaint_with_exhibit.pdf).

<sup>179</sup> 20 CFR 655.135(e).

numerous outbreaks and deaths were documented amongst H-2A workers in Florida,<sup>180,181</sup> California,<sup>182</sup> and Washington.<sup>183</sup>

## 2. BARRIERS TO HEALTH SECURITY

The dangers of the pandemic were exacerbated by the fact that significant access barriers prevent nonimmigrant agricultural workers from obtaining health security. Most seasonal workers are uninsured, and thus face greater threats to their health. Virus-related provisions vary state to state; some states have implemented safety regulations that protect farm workers, whereas others exclude farm workers from protection.

For example, the Michigan Department of Health and Human Services issued a public health order requiring migrant housing camp operators to test all newly arriving workers for COVID-19 within 48 hours and isolate them from other residents for 14 days upon arrival.<sup>184</sup> When looking at broader health protections, some states' paid sick leave protections largely exclude *all* agricultural workers, such as those of Oregon,<sup>185</sup> while other states do not have any paid sick leave protections, such as Texas. Without medical leave, migrant workers being paid hourly or on a "piece" rate basis may risk their health to continue working while ill, as the alternative is to face the risk of being sent back home before their temporary visas expire.<sup>186</sup>

Migrant workers face other access barriers to health care. There is a general distrust of state of health departments — and the medical system at large — due to a general fear of U.S. authorities. Workers sometimes also face threats from their employers when seeking aid. Language barriers also serve as obstacles to health security, such as when resources in workers' native dialects/languages are not provided by employers or local health facilities.

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<sup>180</sup> Lauzardo, M., Kovacevich, N., Dennis, A., Myers, P., Flocks, J., and Morris, G., Jr. (2021). An Outbreak of COVID-19 Among H-2A Temporary Agricultural Workers. *American Journal of Public Health*, 111(4), 571-573.

<sup>181</sup> National Center for Farmworker Health, Inc. (2021). *COVID-19 in Rural America: Impact on Farms & Agricultural Workers*. Retrieved April 6, 2023, from [http://www.ncfh.org/uploads/3/8/6/8/38685499/msaws\\_and\\_covid-19\\_fact\\_sheet\\_april\\_2021\\_final.pdf](http://www.ncfh.org/uploads/3/8/6/8/38685499/msaws_and_covid-19_fact_sheet_april_2021_final.pdf).

<sup>182</sup> National Center for Farmworker Health, Inc., 2021.

<sup>183</sup> National Center for Farmworker Health, Inc., 2021.

<sup>184</sup> State of Michigan Department of Health and Human Services. (2020, August 3). *Emergency Order Under MCL 333.2253 Mandatory Testing, Preventative Measures, and Safe Housing for Agricultural Workers*. Retrieved April 6, 2023, from [https://www.michigan.gov/-/media/Project/Websites/coronavirus/Folder28/20200803\\_-\\_MDHHS\\_Public\\_Health\\_Order\\_-\\_Agriculture\\_Testing\\_vF.pdf?rev=9f4969e8c8e742d2bace90fb5a885986](https://www.michigan.gov/-/media/Project/Websites/coronavirus/Folder28/20200803_-_MDHHS_Public_Health_Order_-_Agriculture_Testing_vF.pdf?rev=9f4969e8c8e742d2bace90fb5a885986).

<sup>185</sup> Oregon Code § 653.020 (1)(a) (Excluded Employees), (1)(c)(A)(B)-(C) (Minimum Wages; Employment Conditions; Minors). Retrieved April 13, 2023, from [https://www.oregonlegislature.gov/bills\\_laws/ors/ors653.html](https://www.oregonlegislature.gov/bills_laws/ors/ors653.html).

<sup>186</sup> Lauzardo et al., 2021, pp. 571-573.

## E. RETALIATION

H-2A regulations protect workers from retaliation if they assert their rights.<sup>187</sup> Even so, reports consistently emerge about employers retaliating against workers who speak out about workplace conditions. In 2015, the Government Accountability Office addressed issues in a report on both the H-2A and H-2B programs. Specifically, the fear of retaliation was highlighted as a reason that H-2A visa holders are hesitant to speak out about workplace issues:

One disincentive to reporting abuse is that workers can only work for the employer who petitioned for them. This requirement can make workers fear retaliation if they complain about mistreatment because the workers do not have the choice of working for another employer. For example, several NGOs reported that workers may be threatened with exclusion from future employment opportunities.<sup>188</sup>

In a 2011 congressional hearing on agricultural workforce issues, an Assistant Secretary of Labor told Congress it “often finds it difficult to get people to testify because they are afraid of the next year... [T]hese workers are very afraid to bring some of their concerns forward and do so many times through their advocacy groups so that they can keep their anonymity rather than putting their name on the line.”<sup>189</sup>

This reality has been confirmed by many advocates and workers who stress the difficulty of choosing to complain about working conditions and risking future work opportunities as a result.

The first thing that the employer does once a worker has complained about wages or working conditions, is go back to the recruiter and say, ‘I don't want to hire this guy next year because they complained about me,’ and that affects not only

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<sup>187</sup> 20 C.F.R. § 655.135(h)(1)-(4); 29 C.F.R. § 501.4(a)(1)-(4). See also: Wage and Hour Division. Wage and Hour Division. (2012, April). Fact Sheet #77D: Retaliation Prohibited under the H-2A Temporary Visa Program. U.S. Department of Labor. Retrieved April 7, 2023, from <https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation>.

<sup>188</sup> U.S. Government Accountability Office. (2017, May 30). *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* (GAO-15-154). Retrieved April 6, 2023, from <https://www.gao.gov/products/gao-15-154>.

<sup>189</sup> Workforce Challenges Facing the Agricultural Industry: Hearing before the U.S. House Committee on Education and the Workforce, Subcommittee on Workforce Protections, 112th Cong. (2011, September 13). Retrieved April 7, 2023, from <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg68264/html/CHRG-112hrg68264.htm>; When asked what type of “fraud” the response is often “all types”—worker, recruiter, and employer. Interviews with U.S. consular officials (2006-2014).

recruitment for that particular employer, but also for all of the employers that a recruiter has a relationship with.”<sup>190</sup>

## 1. DEFERRED ACTION FOR WORKERS IN LABOR DISPUTES

As a measure to combat the potential for retaliation through threats of deportation and other immigration consequences against H-2A and other workers, DHS created a process for workers to request temporary protection if they are exerting their rights in the workplace. This protection, deferred action, is a two-year temporary status accompanied by a work permit that allows a worker to remain in the U.S. and work with enforcement agencies to pursue any potential labor claims. An H-2A worker seeking this deferred action would need an enforcement agency to communicate to DHS that the worker is key to an ongoing investigation of a labor dispute and should remain in the U.S. to participate in the investigation of the case. This interagency collaboration bolsters labor and employment agency pursuit of worksite violations allowing them to hold abusive employers accountable, while protecting workers from retaliation.<sup>191</sup>

## F. H-2A CASES OF ABUSE AND HUMAN TRAFFICKING

The human trafficking of temporary foreign workers comprises a significant portion of the total trafficking cases that are filed each year.<sup>192</sup> The Human Trafficking Legal Center reports that roughly 55% of civil cases filed between 2003 and 2020 in federal court that alleged trafficking were brought by foreign-born plaintiffs who entered the United States with legal visas.<sup>193</sup> In a further breakdown, The Human Trafficking Legal Center notes that about 11% of cases alleging labor trafficking were brought by plaintiffs who were trafficked while laboring as H-2A workers.

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<sup>190</sup> Cabrera-Lomeli, C. (2022, June 30). *Blacklisted for Speaking Up: How California Farmworkers Fighting Abuses Are Vulnerable to Retaliation*. KQED. Retrieved June 27, 2023, from <https://www.kqed.org/news/11918317/blacklisted-for-speaking-up-how-california-farmworkers-fighting-abuses-are-vulnerable-to-retaliation>.

<sup>191</sup> Mayorkas, A. (2021, October 12). *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*. U.S. Department of Homeland Security. Retrieved June 27, 2023, from [https://www.dhs.gov/sites/default/files/publications/memo\\_from\\_secretary\\_mayorkas\\_on\\_worksite\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf).

<sup>192</sup> See, e.g., *Rosas v. Sarbanand Farms LLC, Complaint for Damages and Injunctive Relief*, Case No. 2:18-cv-00112 (W.D. Wash., January 25, 2018). Retrieved April 13, 2023, from <https://columbialegal.org/wp-content/uploads/2018/11/Rosas-v.-Sarbanand-Complaint.pdf>; *Ovando v. Barajas, Complaint*, Case No. 5:19-cv-464 (N.D. Fla., November 12, 2019). Retrieved April 13, 2023, from <https://www.courtlistener.com/docket/16459376/1/perez-ovando-v-barajas/>; *Gutierrez-Morales v. Planck, Motion for Leave to File a Third-Party Complaint*, Case No. 5:15-CV-158-JMH; *Gonzalez Leiva v. Clute, Order Recommending Grant of Default Judgment*, Case No. 4:19-CV-87-TLS-JPK, (N.D. Ind. Sept. 11, 2019). Retrieved April 13, 2023, from <https://www.leagle.com/decision/infdc020210201c93>; *Arreguin v. Sanchez*, 398 F. Supp. 3d 1314 (S.D. Ga. 2019); *West et al. v. Butikofer*, Case No. 19-CV-1039-CJW-KEM (N.D. Iowa Aug. 18, 2020).

<sup>193</sup> Carey, R. (2021, July). *Federal Human Trafficking Civil Litigation: 2020 Data Update*, The Human Trafficking Legal Center. Retrieved April 7, 2023, from [https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-Data-Update-2020\\_FINAL.pdf](https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-Data-Update-2020_FINAL.pdf).

Polaris, an anti-human trafficking organization in Washington D.C. and operator of the National Human Trafficking Hotline reported that 2,841 H-2A visa holders were identified as labor trafficking victims from 2018 through 2020.<sup>194</sup>

The federal government in 2021 filed charges against dozens of defendants for the human trafficking of hundreds of farmworkers in Georgia. The investigation was called “Operation Blooming Onion” and uncovered the abuse of more than 100 H-2A visa holders from Mexico, Guatemala, and Honduras by two dozen traffickers. The conspirators are alleged to have made more than \$200 million by charging workers for transportation, food, and housing, and forcing them to work for virtually little or no pay through threats of violence, death, torture, and deportation over several years.<sup>195</sup>

## G. LACK OF PORTABLE JUSTICE

As with other nonimmigrant visas, the H-2A program does not expressly provide for workers to enforce their rights or report abuses—as the terms of their visa require—when they return home after the work period ends.<sup>196</sup> Still, lawyers who represent H-2A workers continue advocating for their clients even after they return home. However, there are challenges. Access to the U.S. legal system is complicated for workers who seek legal remedy after they have returned home. Workers who depart the U.S. may also file suit, but their physical distance raises challenges for their participation in the case. Portable justice—the right and ability to access justice across borders—is not provided in this or any other guestworker program in the United States.

Unaware of their legal rights or available services, many workers return home before exploring the possibility of seeking redress for any violation of their rights. Attempts to investigate possibilities for legal remedy with U.S. Consulates or Embassies are rarely fruitful, as DOS is not tasked with handling complaints of labor law violations. This obstacle makes it difficult to hold abusive employers accountable for mistreating visa holders. While not impossible, the legal and practical obstacles to gaining redress for visa holders—or even to learn about their rights and legal options—from their home countries are so great that legal remedies are seldom pursued from abroad.

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<sup>194</sup> Polaris Project. (2022, July). *Labor Trafficking on Specific Temporary Work Visas*. Retrieved June 12, 2023, from <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>.

<sup>195</sup> U.S. Dept. of Justice. (2021, November 22). *Human smuggling, forced labor among allegations in south Georgia federal indictment*. Retrieved June 14, 2023, from <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-laboramong-allegations-south-georgia-federal-indictment>.

<sup>196</sup> 8 C.F.R. §§ 214.2(h)(5)(viii)(B) (30 days for H-2A workers to depart the U.S. after the job ends), and 214.2(h)(13)(i)(A) (10 days for H-2B workers to depart).

