



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

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## H-2A VISA

Updated Nov. 2015

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

## TABLE OF CONTENTS

<b>I. H-2A Visa</b> .....	<b>4</b>
A. Policy: A Balancing Act .....	4
B. History of Agricultural Guestworkers in the U.S. ....	5
C. Duration of an H-2A Visa .....	7
D. H-2A Jobs.....	7
<b>II. H-2A HIRING PROCESS</b> .....	<b>10</b>
A. Steps for Employers .....	10
B. Steps for Workers.....	12
<b>III. H-2A WORKERS IN THE U.S. – DATA</b> .....	<b>14</b>
A. The Number of H-2A Workers in the U.S. ....	15
B. H-2A Employer Demographics .....	17
C. H-2A Worker Demographics.....	18
<b>IV. RECRUITMENT OF FOREIGN WORKERS FOR H-2A JOBS</b> .....	<b>20</b>
A. No Federal Recruiter Registry .....	21
B. Information About Foreign Recruitment Not Maintained.....	21
<b>V. H-2A WORKER RIGHTS AND EMPLOYER OBLIGATIONS</b> .....	<b>23</b>
A. Written Disclosure of Job Terms and Employment Contract.....	25
B. Housing.....	25
C. Meals .....	25
D. Transportation .....	25
E. Daily Transportation Between Living Quarters and Worksite .....	26
F. Tools and Supplies .....	26
G. Wages .....	26
H. Taxes.....	27
I. Three-fourths Guarantee .....	27
J. Workers' Compensation .....	27

K. Recordkeeping .....	28
L. Retaliation Prohibited .....	28
<b>VI. ENFORCEMENT .....</b>	<b>29</b>
A. U.S. Department of Labor .....	29
B. Private Litigation .....	30
<b>VII. H-2A WORKERS – ISSUES .....</b>	<b>31</b>
A. Lack of Job Transferability .....	31
B. Abuses During Foreign Recruitment .....	31
C. Wage and H-2A Contract Violations.....	32
D. Retaliation.....	32
E. Lack of Portable Justice .....	33

## I. H-2A VISA

The H-2A nonimmigrant visa program allows employers to hire foreign workers for temporary agricultural jobs.<sup>1</sup> Participation in the H-2A program is contingent on the employer's showing it tried to locate and hire U.S. workers but was unable to do so. Employers, employer 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 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 actual visa and personally appear at the designated U.S. consulate abroad for an interview. Usually, the employer will 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 of time, 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.

### A. POLICY: A BALANCING ACT

The H-2A visa allows temporary agricultural employment when U.S. workers are not available for the job. Some argue that by using the H-2A visa program to bring in foreign workers, agricultural employers bypass the supply and demand market principles generally applicable to other U.S. employers. Agricultural employers point to a labor shortage and argue they need a reliable workforce to effectively tend commodities on a temporary and seasonal basis. Indeed, reports of a labor shortage in the agricultural sector persist despite rampant unemployment within the general U.S. workforce. There are at least two sides to this story. One version holds that not enough U.S. workers want jobs in agriculture. Another version is that U.S. workers are not willing to accept the wages and working conditions offered in agriculture, and that employers are either unable or unwilling to offer employment on better terms.

It is recognized that if foreign workers accept employment on terms U.S. workers will not tolerate, labor conditions in the United States suffer. Therefore, the H-2A program is designed to allow foreign workers only when employers certify that no qualified U.S. workers are available, even after the employers search for U.S. workers and offer the same benefits. Petitions for H-2A workers are granted when the U.S. Department of Labor determines hiring foreign workers will not adversely affect the wages and working conditions of U.S. workers.<sup>4</sup>

The H-2A program is thus built on a series of protections for both U.S. and foreign workers. The U.S. Department of Labor (USDOL) is in charge of requiring employers to adhere to these principles, 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.

## B. 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 contextualizes the current H-2A program. As the leading historian on the issue, professor Cindy Hahamovitch, has noted:

Since the Second World War, whenever concern about the number of “illegal aliens” in the United States reached a fever pitch, guestworkers gained legitimacy. In fact, within a few years of the wars’ end, the INS began dealing with the unauthorized Mexican immigrants it apprehended by transforming them into Braceros, a process the agency unfortunately called “Drying Out the Wetbacks.” Since the termination of the Bracero Program, whenever the U.S. public has fixated on “illegal immigration,” the H2 Program has grown in importance as a purportedly managed alternative to a seemingly unmanageable issue. The same is true today. In recent debates about immigration reform, both parties have considered proposals that would legalize millions of unauthorized immigrants by transforming them into legal but temporary guestworkers. . . . the story of . . . the thousands of other H2 workers who exited boats and airplanes to work in American fields and orchards is not a story of carefully managed migration. The history of the H-2 Program is a tale of exploitation, protest, litigation, and mass deportation.<sup>5</sup>

### 1. 19TH AND EARLY 20TH-CENTURY LABOR

The U.S. agricultural industry has utilized foreign labor since the Civil War. Until the late nineteenth century, hundreds of thousands of Chinese immigrants worked in U.S. agricultural fields “to supplant newly freed slaves.”<sup>6</sup> Chinese migrant workers came either indebted to or under contract with employers who paid for their travel to the United States.<sup>7</sup> The program was unpopular. Specifically, the public was not happy about the Chinese “willingness to accept substandard wages and conditions” even if they had little choice but to do so because of their debt or contract bondage.<sup>8</sup> Lawmakers at the time suggested the way to “protect domestic workers from

unfair competition . . . was to ensure that immigrant workers entered the United States freely or not at all.”<sup>9</sup> This was the backdrop to the first laws limiting foreign workers including the Chinese Exclusion Act of 1882 which banned all Chinese laborers from entering the United States.<sup>10</sup> A few years later, the Foran Act “extended the contract labor ban to immigrants of all nationalities.”<sup>11</sup>

During World War I, Mexican migrant workers freely crossed the border into the U.S. to work in the fields. While they were free to cross the border, they did not receive any permanent immigrant status.<sup>12</sup> After the war and in the years leading up to and during the Great Depression, competition for agricultural jobs increased. Mexican workers were deported in large numbers and in 1924, the U.S. Border Patrol was established.<sup>13</sup> This formally ended the ability to freely cross the U.S./Mexico border, though unauthorized crossings continued to fill agricultural labor demands with selective immunity from Border Patrol enforcement during particular periods and regions – as Kitty Calavita documents in the early 1940s in the Rio Grande Valley Texas border region.<sup>14</sup> As historian Mai Ngai chronicles, the Immigration Act of 1924 ushered in a quota system which severely limited the number of immigrants legally authorized to migrate from Mexico, making the social and economic reality of U.S. dependency on Mexican labor a “legal impossibility” and thus effectively creating the “illegal alien.”<sup>15</sup>

Historian Cindy Hahamovitch concludes that worldwide, more modern guestworker programs were conceived in part by exclusionary sentiment: “Temporary immigration schemes – guestworker programs – were state-brokered compromises designed to placate employers’ demands for labor and nativists’ demands for restriction.”<sup>16</sup>

## 2. WORLD WAR II GUESTWORKER PROGRAMS

Foreign worker programs began in earnest during World War II.<sup>17</sup> Agricultural lobbyists claimed a massive labor shortage due to the military, manufacturing, and migration.<sup>18</sup> However, in the South, what happened has been described “as a seismic shift in the balance of power between growers and farm laborers. Farm laborers hadn’t vanished, but their reduced numbers gave them the courage to demand more for their services. And farmworkers’ – especially black farmworkers’ – ability to make demands infuriated employers, who refused to admit that the ground beneath them had shifted.”<sup>19</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>20</sup> Between 1942 and 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.<sup>21</sup> Initially, the U.S. Farm Security Administration guaranteed various employment benefits for the workers, covering wages, housing, and a work guarantee.<sup>22</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 a month of work.<sup>23</sup> Most Braceros, however, did not know they were entitled to contracts or that they had any right to fair wages and benefits. The lack of government oversight and enforcement primed the situation for exploitation.<sup>24</sup> As has been documented, however, abuse of workers was widespread.<sup>25</sup>

There were organized strikes against employers, media spotlight, and lengthy legal battles. U.S. workers did not fare well during the time of the Bracero program either. Employers were supposed to hire Mexican workers only when faced with a labor shortage. In reality, employers favored the Mexican workers even when U.S. workers were available, and overall wages in agriculture decreased as a result.<sup>26</sup> In 1964, after 22 years and 4.5 million workers, the U.S. terminated the Bracero program.<sup>27</sup>

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

Also during World War II, the agriculture industry in Florida extensively lobbied the U.S. government for Caribbean workers.<sup>28</sup> U.S. Department of States officials negotiated terms of a labor importation program with the British Secretary for the Colonies, despite the Brits' initial concern that "the scheme sounded a bit too much like indentured servitude."<sup>29</sup> The U.S. eventually persuaded them. The Caribbean guestworker scheme was modeled after the Bracero program, requiring a certain wage, free transportation, housing, and a work guarantee.<sup>30</sup> In 1943, employers obtained permission to hire workers specifically from Barbados and the Bahamas.<sup>31</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 in Florida.<sup>32</sup>

The Caribbean scheme was the actual precursor to the contemporary H-2 temporary foreign worker program, eventually codified by the U.S. Congress in the Immigration and Nationality Act (INA) of 1952.<sup>33</sup> Both agricultural and non-agricultural temporary workers were included in the original H-2 program.<sup>34</sup> In 1986, the Immigration Reform and Control Act (IRCA) separated them into the current H-2A (agriculture) and H-2B (non-agriculture) sub-classifications.<sup>35</sup>

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

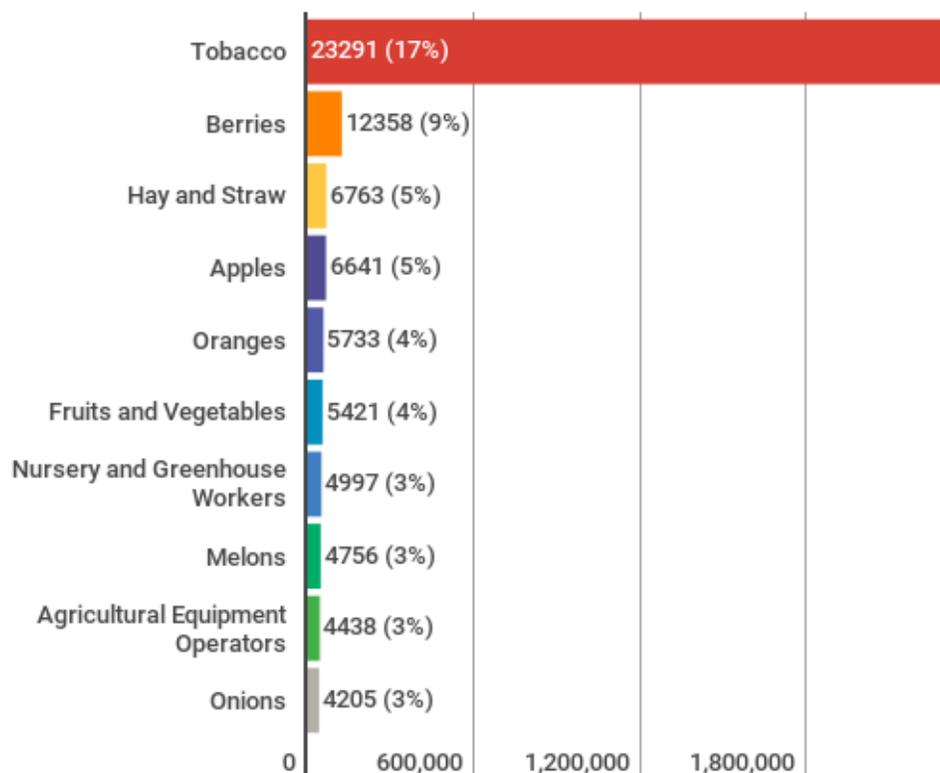
H-2A visas are valid for the time period in the approved work contract, which must be less than one year, but can be extended for up to 12 additional months.<sup>36</sup> The maximum time period any H-2A worker may be continuously present in the U.S. is 3 years.<sup>37</sup> After that time, the worker must leave for an uninterrupted period of 3 months before seeking readmission to the U.S. on another H-2A visa.<sup>38</sup>

#### D. H-2A JOBS

H-2A workers perform a wide range of agricultural jobs. Examples include tending to tobacco and cotton, pruning and picking fruit such as cherries, oranges, apples and peaches, planting and harvesting onions and other vegetable row crops, de-tasseling

corn, harvesting sugarcane, working in nurseries, greenhouses and on cattle ranches, and herding sheep.<sup>39</sup>

H-2A Jobs Snapshot 2015  
(Worker Positions Certified)



Source: U.S. Department of Labor, Selected Statistics, available at [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY\\_2015\\_Q4.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY_2015_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>40</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>41</sup>*

Regulations governing the FLSA divide this definition of agriculture into two categories: primary agriculture and secondary agriculture.<sup>42</sup> Primary agriculture is the cultivation and tilling of soil, and growing and harvesting any agricultural commodity.<sup>43</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>44</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>45</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>46</sup> Other examples of tasks not considered to be agriculture are mowing the lawn, 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>47</sup>

## II. H-2A HIRING PROCESS

The employer locates and hires foreign workers to fill those jobs it cannot fill with U.S. workers. Employers typically 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 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 who are offered the job personally appear at the designated U.S. consulate abroad to apply for the H-2A visa, if one is required.

### A. STEPS FOR EMPLOYERS

#### 1. DEPARTMENT OF LABOR

**Employers must seek a temporary labor certification** from the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification. Agents or attorneys may petition on behalf of any type of employer.<sup>48</sup> The petitioner must identify as an individual employer, labor contractor, or association. If a labor contractor is filing, it must state the name and location of each employer where H-2A workers will be provided.<sup>49</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>50</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>51</sup> These farm labor contractors are called "H-2ALCs" and are treated as employers for purposes of the H-2A hiring process.<sup>52</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>53</sup> The AWPA does not offer any protections for H-2A workers, however.<sup>54</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 manages the farm labor contractor registration process under the AWPA and publishes [a list of all registered individuals](#).<sup>55</sup> H-2ALCs must submit a copy of their registration certificate to USDOL with their application for temporary labor certification.<sup>56</sup>

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

The first step is to submit the Agricultural and Food Processing Clearance Order ETA Form 790 to the appropriate State Workforce Agency (SWA) about three to four months before an H-2A employee begins work.<sup>57</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>58</sup> Within a short time period, the SWA will notify the employer of any problems, and the employer will have a short window to correct them.<sup>59</sup>

#### 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>60</sup> The application solicits information on the employer, 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>61</sup> USDOL will notify the employer of any problems with the application within a week and will provide an opportunity to correct any deficiencies and file an amended application.<sup>62</sup> A decision is made usually within a week and employers can appeal denials or partial certifications.<sup>63</sup>

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

Upon receiving approval from USDOL, the employer must begin actively recruiting U.S. workers for the positions until the foreign workers depart for the jobs.<sup>64</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>65</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>66</sup> and are required to report their positive recruitment activities.<sup>67</sup>

#### **DIGGING DEEPER: U.S. WORKERS MUST BE HIRED UNDER 50% RULE**

Once the H-2A workers are hired, have 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 the H-2A positions must be hired until 50% of the work contract period has elapsed.<sup>68</sup> Many U.S. workers have found that [this rule is not enforced](#) and are left without a job.<sup>69</sup>

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

Upon finding the clearance order to be acceptable, the state workforce agency (SWA) enters the job for circulation within the interstate employment service system to recruit U.S. workers in the area.<sup>70</sup> In order to further facilitate U.S. workers access to these jobs, USDOL maintains an online [electronic job registry](#) called iCert.<sup>71</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. The timing of when jobs are posted is inconsistent.<sup>72</sup> For H-2A jobs, each clearance order should be available online through the first half of the period of employment.<sup>73</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 subagency, the U.S. Citizenship and Immigration Services (USCIS), for permission to hire nonimmigrant workers.<sup>74</sup> The employer submits to USCIS 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 of \$325 USD.<sup>75</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>76</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 of time and in the same location.<sup>77</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>78</sup> For the year 2015, DHS has designated 68 countries whose nationals are eligible to participate in the H-2A and H-2B programs.<sup>79</sup>

Generally, the workers do not need to be named individually on the Form I-129.<sup>80</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>81</sup> The total number of unnamed worker beneficiaries requested must be specified and must not exceed the number of positions certified by USDOL.

Once approved, the USCIS sends to the employer an I-797, Notice of Action, which notifies the employer it is 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 petitions approved, the decision is entered into the computer tracking system so the U.S. consulates have 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 DOS at the U.S. consulate or visa processing location in their country of origin.<sup>82</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, have to 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, he must apply for the visa at a U.S. embassy or consulate in the home country, unless the worker is from a Caribbean nation and does not need a visa. Usually an agent of the employer or recruiter will assist the workers with this process. The visa application is \$190 USD. The additional fees are \$85 USD for fingerprints/biometrics and \$26 USD for the interview.<sup>83</sup> H-2A program regulations mandate that employers pay for all costs and fees.<sup>84</sup> If the individual H-2A worker applying for the visa pays these expenses out of pocket before or at the interview, the employer must reimburse the worker in the first paycheck.<sup>85</sup>

Prospective H-2A workers must persuade the DOS official that they will return home when the job is done.<sup>86</sup> During the visa interview, DOS consular officers may ask about the worker's intention to return home after the job ends, and look at his or her work history and connections to their home community.

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

A visa is not required for H-2A workers coming from Jamaica and certain other Caribbean countries.<sup>87</sup> Once these workers are recruited for an approved H-2A petition, they bypass the interview at Department of State (DOS). The Caribbean worker will usually be given a letter or document indicating that he is coming to the U.S. to work on a specific H-2A contract and go directly to a designated port of entry for admission and will receive his I-94 upon entry as any other nonimmigrant worker would.

According to a recent Government Accountability Office report, DHS officials claim they are “in the process of drafting regulations to end this exemption from the visa requirement, which had its origin several decades ago, and was never revised.”<sup>88</sup>

Even though Caribbean H-2A workers are not issued visas from the Department of State (DOS), the same DHS and DOL regulations still apply to their employers. In other words, employers who bring in H-2A workers from Caribbean nations must still 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.

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

Foreign workers should not have to pay fees to a labor recruiter in their home country in order to obtain an H-2A position in the United States. Regulatory changes beginning in 2008 **banned recruitment fees**. Indeed, employers must certify that they have contractually forbidden recruiters and contractors from charging recruitment fees.<sup>89</sup> DOS 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>90</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>91</sup> Each worker must be given a **pamphlet** prepared by DOS detailing this information has been received, read, and understood by the applicant.<sup>92</sup>

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

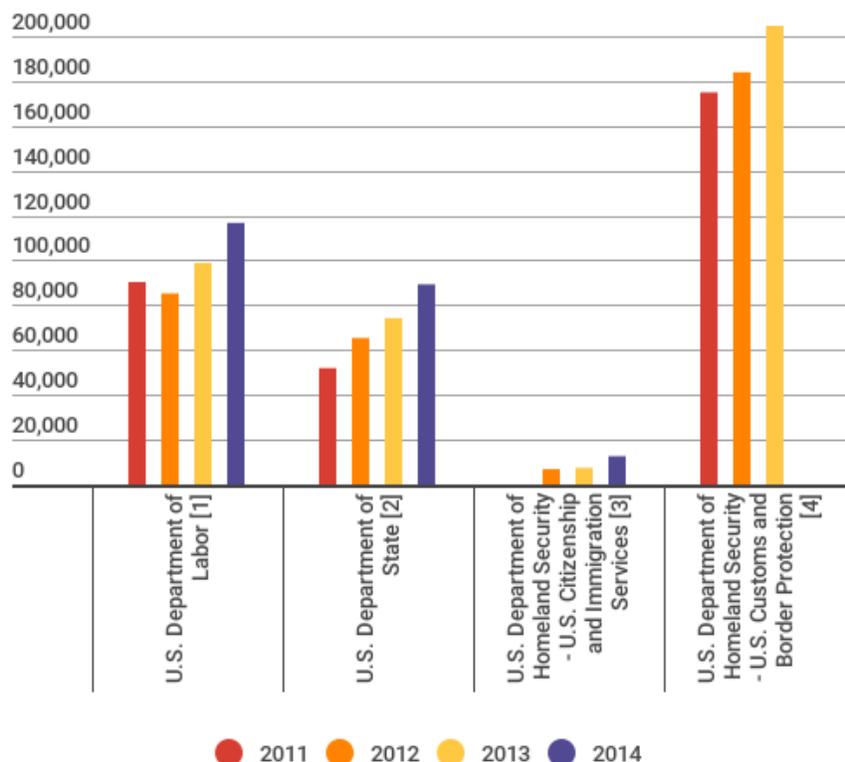
The final step for workers is to apply for admission at the border or port of entry. A visa does not guarantee admission.<sup>93</sup> Once the worker has the H-2A visa in-hand, he or she must pass inspection at the port of entry or border. The DHS sub-agency Customs and Border Patrol oversees admissions at the U.S. border.<sup>94</sup> DHS 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>95</sup>

### III. 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 actually 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.

In 2013, USDOL certified close to 100,000 H-2A jobs, DOS issued over 65,000 H-2A visas, and DHS counted 204,577 admissions of individuals with H-2A visas.<sup>96</sup> Several U.S. states in the South along with Washington have the largest number of H-2A workers, with more than 5,000 positions certified in each of these states. Every year, over 90% of H-2A workers are Mexican nationals. Anecdotal evidence suggests the great majority are men under the age of 40, but age and gender statistics are not published by any federal agency.

## H-2A Numbers at a Glance : FY 2011-2014



- [1] Number of H-2A Workers approved for temporary worker labor certification.
- This number is merely the H-2A jobs certified and does not account for the jobs that may be displaced by U.S. workers under the 50% rule.
- [2] Number of H-2A visas actually issued to foreign workers at U.S. Consulates abroad.
- This number does not count Jamaican and other Caribbean H-2A workers who are counted in the other agencies' stats because they do come after approved ETA Form 790s and they do get I-94s.
  - This number does not account for workers who may have received visas but never entered the U.S.
- [3] Number of Form I-129 petitions for nonimmigrant workers that were granted
- This does not reflect the exact number of individual workers because a petition could be (and is often) submitted for a group of workers. This number also includes changes of status/extension petitions.
- [4] Number of H-2A admissions and readmissions at the border on I-94s
- 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.

Sources<sup>97</sup>

## 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 that data at regular intervals, whether quarterly or

annually. USDOL tracks the number of workers that employers are certified to bring to the United States. DOS tracks how many visas were actually 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. While no agency presents a complete picture or even an accurate count of the number of individuals present in the U.S. with H-2A status at any time, the data is helpful to understand the general scope of the H-2A workforce.

### 1. DEPARTMENT OF LABOR DATA

USDOL certified 98,813 H-2A positions in 2013.<sup>98</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. Thus the H-2A case disclosure data published by the USDOL's Foreign Labor Certification reflects only the number of H-2A positions were certified through the temporary labor certification process. The fact a job position was certified for an H-2A worker does not necessarily mean that it was actually filled by an H-2A worker.

### 2. DEPARTMENT OF STATE DATA

DOS tracks the numbers of H-2A visas actually issued to individual foreign workers in any given year. In 2013, DOS issued 74,192 H-2A visas.<sup>99</sup> This number gives perhaps the best idea of how many foreign H-2A workers may enter the U.S. in any given year. However, this number does not indicate how many H-2A workers are actually present and working in the United States. It does not count the number of workers who entered with H-2A visas in previous years and extended their stay in the present year. Furthermore, even if a worker is issued a visa it does not necessarily mean the worker actually entered the U.S. Finally, because H-2A agricultural workers from the Caribbean are exempt from visa requirements, they are not counted in the DOS statistics.

### 3. DEPARTMENT OF HOMELAND SECURITY DATA

The U.S. Department of Homeland Security (DHS) has two subagencies 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 receives the petitioner's Form I-129, which requests a certain number of visas be made available. The Customs and Border Patrol 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

The U.S. Citizenship and Immigration Services (USCIS) reports 7,455 approvals of H-2A nonimmigrant worker petitions in 2013.<sup>100</sup> Because multiple beneficiaries (workers) may be included on one single Form I-129, this represents the number of petitions, not the number of workers. USCIS does not publish data on the number of workers requested on each petition when the petition is for multiple workers. Moreover, the same Form I-129 is used to make changes to a current H-2A worker's status as well as to petition for new workers. Therefore, the number of approvals includes petitions for

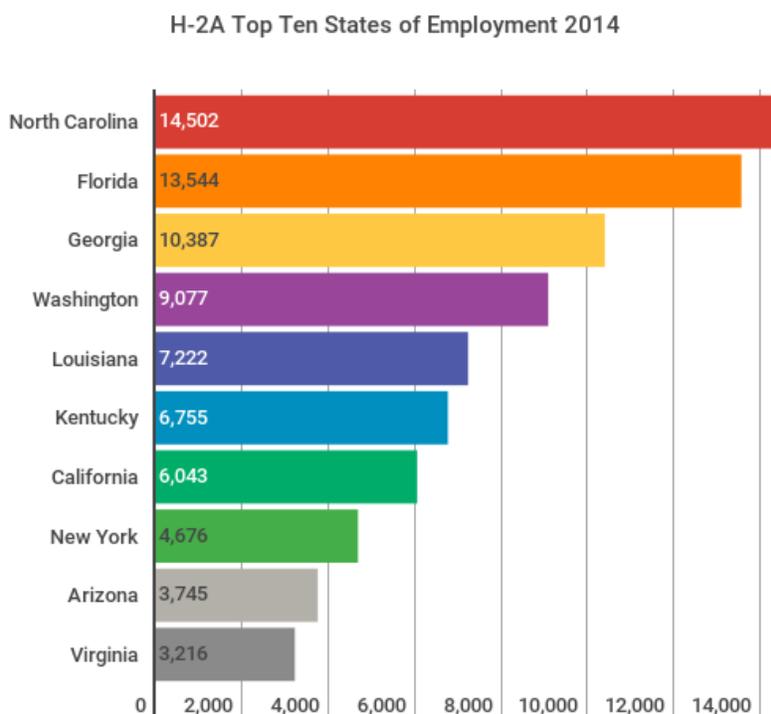
new groups of workers, petitions to extend the stay of individual H-2A workers, and petitions to become the new employer of an individual H-2A worker already in the United States.<sup>101</sup> USCIS does not break down the approval number into applications for new or current H-2A status.

#### B) CUSTOMS AND BORDER PATROL

U.S. Customs and Border Patrol (CBP) counted 204,577 H-2A visa admissions in 2013.<sup>102</sup> The number of nonimmigrant admissions refers to the number of admissions rather than to the number of individuals.<sup>103</sup> The way the data is collected does not distinguish between the first and return entries. Rather, all entries are counted as separate admissions.<sup>104</sup> In other words, there were 204,577 H-2A admissions to the U.S. in 2013, not 204,577 workers. DHS's Office of Immigration Statistics publishes this information annually.

## B. H-2A EMPLOYER DEMOGRAPHICS

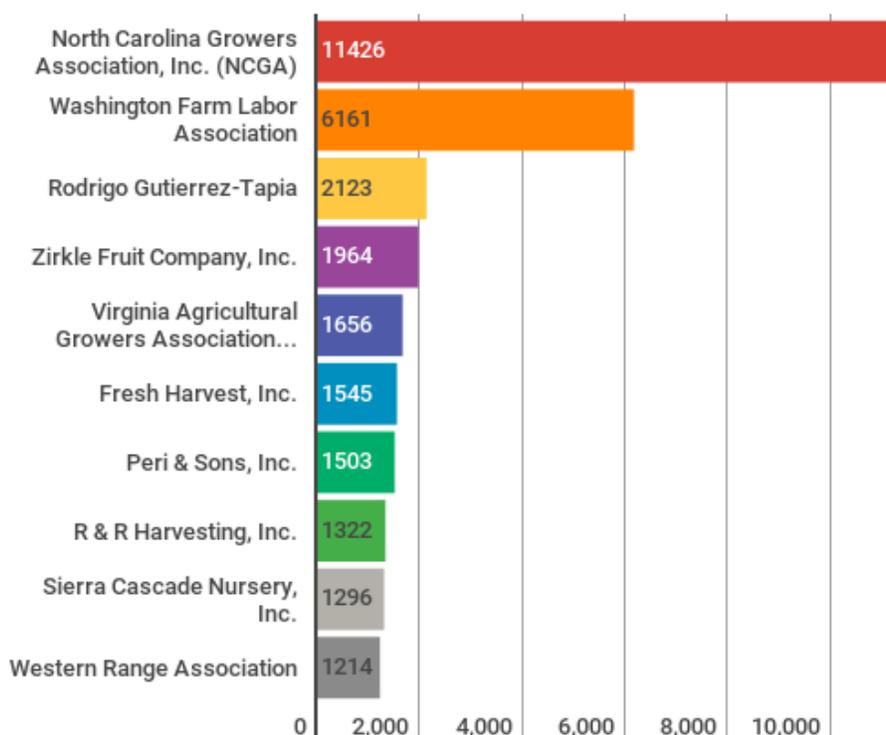
In 2014, the five states with the most H-2A certified jobs were North Carolina, Florida, Georgia, Washington, and Louisiana.<sup>105</sup>



Source (2012): U.S. Department of Labor, H-2A Selected Statistics, FY 2012, available at [http://www.foreignlaborcert.doleta.gov/pdf/h\\_2a\\_temp\\_agricultural\\_visa\\_2012.pdf](http://www.foreignlaborcert.doleta.gov/pdf/h_2a_temp_agricultural_visa_2012.pdf) (November 2015). Source (2013): U.S. Department of Labor, H-2A Selected Statistics, FY 2013, available at [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY2013\\_Q4.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2013_Q4.pdf) (November 2015). Source (2014): U.S. Department of Labor, H-2A Selected Statistics, FY 2014, available at [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY2014\\_Q4.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2014_Q4.pdf) (November 2015).

Employer associations apply to bring in more workers than individual employers. In 2012, the biggest employer associations were North Carolina Growers Association, Washington Farm Labor Association, Western Range Association, and the Virginia Agricultural Growers Association.<sup>106</sup> That same year, the top single employers included Peri & Sons Farm for onions in California, Sierra Cascade Nurseries for strawberry plants in California, Zirkle Fruit Company, Inc. for yellow cherries in Washington, and Bland Farms for onions in Georgia.<sup>107</sup> The agricultural commodities where most H-2A labor was used were tobacco, oranges, cotton and onions.<sup>108</sup>

Top Ten H-2A Employers - 2014



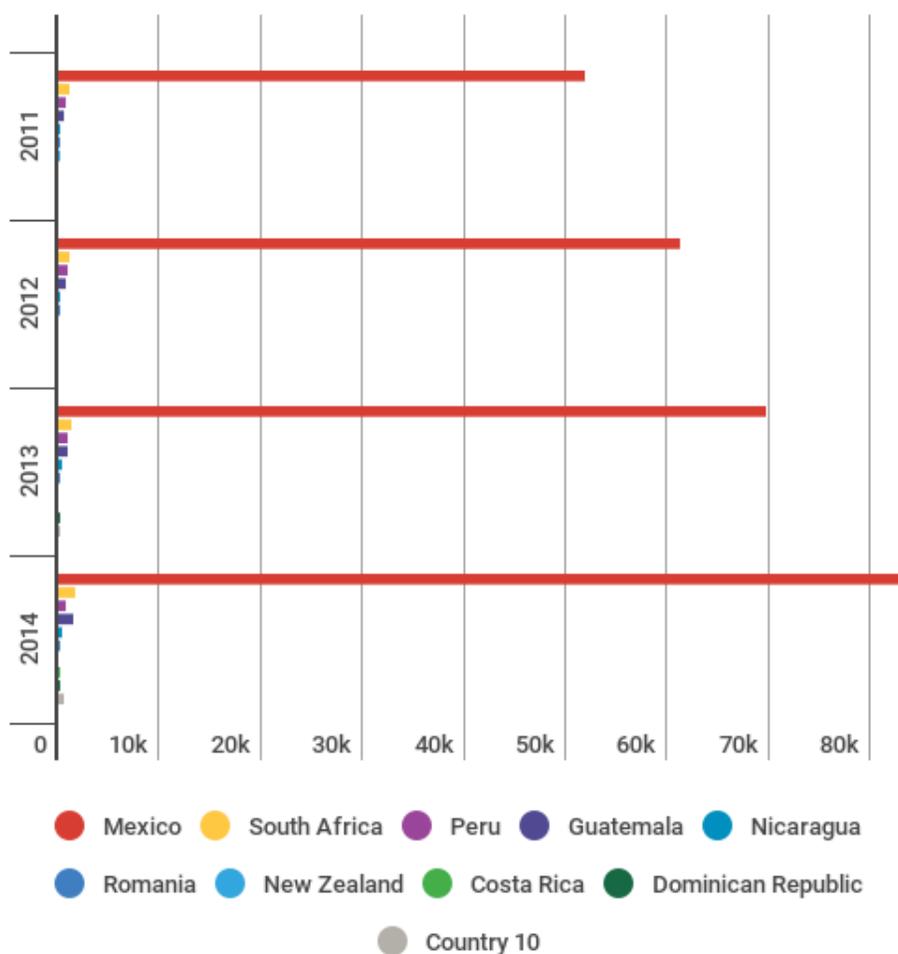
Source: U.S. Department of Labor, H-2A Selected Statistics, FY 2014, available at [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY2014\\_Q4.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2014_Q4.pdf).

## C. H-2A WORKER DEMOGRAPHICS

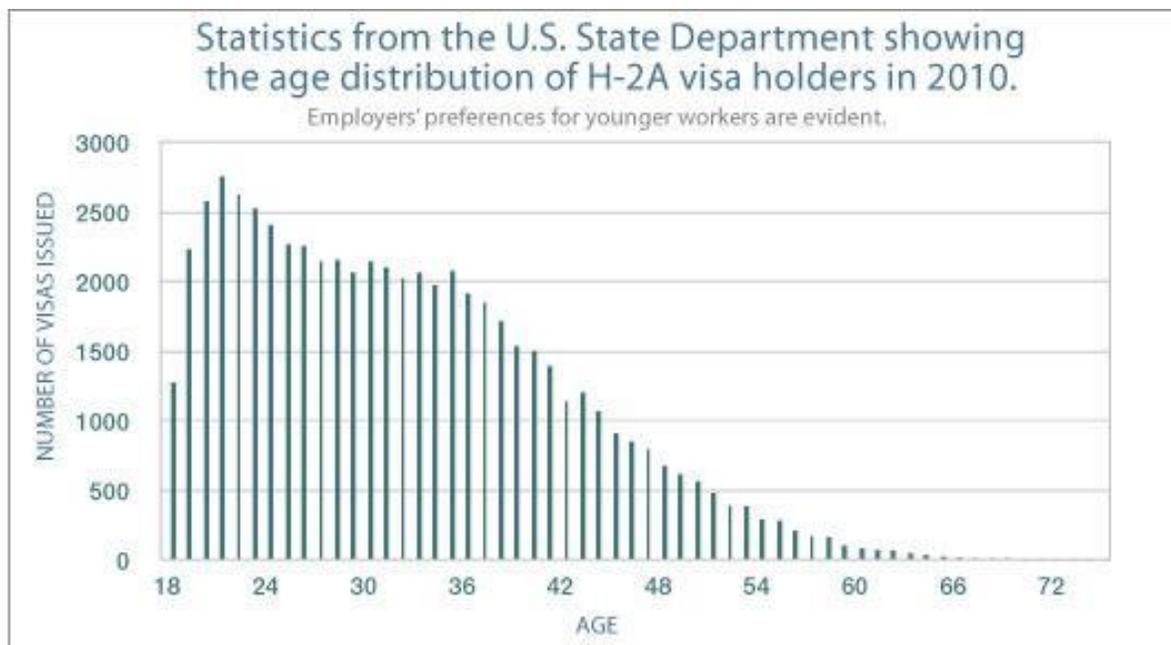
The U.S. Citizenship and Immigration Services (USCIS) may approve petitions for H-2A nonimmigrant status only for individuals from certain countries designated annually by the Department of Homeland Security (DHS) and the Department of State (DOS).<sup>109</sup> Individuals from other countries are allowed only if determined to be in the

U.S. interest.<sup>110</sup> For the year 2014, DHS identified 68 countries eligible to participate in the H-2A program. Even though dozens of potential source countries are on the authorized list, more than 90% of H-2A workers are from Mexico.<sup>111</sup>

H-2A Top Ten Sending Countries 2011-2014



Source: U.S. Department of State, FY 1997-2014 NIV Detail Table, available at <http://travel.state.gov/content/visas/english/law-and-policy/statistics/non-immigrant-visas.html> (November 2015).



### 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>112</sup> Men accounted for 53,836 of the visas issued while women received a mere 2,074 (or 3.7% of all H-2A visas issued in FY 2010).<sup>113</sup> Anecdotal evidence further suggests employers prefer to hire young men as workers.<sup>114</sup> Indeed, the data clearly legitimates the question of whether there is systemic gender and age discrimination against women and older workers in H-2A recruitment, as documented in a [2011 Farmworker Justice report](#).<sup>115</sup>

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

Employer, labor contractors and associations usually hire foreign recruiters to locate the foreign workers.<sup>116</sup> Foreign recruiters may have an office or residence abroad and may advertise by word of mouth or through local media outlets.<sup>117</sup> Problems come up when foreign recruiters make false promises about the jobs, or charge the workers exorbitant fees in order to 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 discussion in 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 fact issue when complaints about foreign recruitment arise.

### A. NO FEDERAL RECRUITER REGISTRY

There is no federal registration system in place for foreign recruiters.

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

Beginning on July 1, 2016, any person acting as a foreign labor contractor who recruits workers for eventual employment in California must register with the California State Labor Commissioner.<sup>118</sup> As of August 1, 2016, the commissioner will post on its public web site the names and contact information for all registered foreign labor contractors and a list of the names and contact information for any foreign labor contractors denied renewal or registration.<sup>119</sup>

### B. INFORMATION ABOUT FOREIGN RECRUITMENT NOT MAINTAINED

Any information about foreign recruiters collected by any of the federal agencies involved with the H-2 programs is not publicly available. This [lack of transparency is problematic](#) because prospective workers need to evaluate whether the job offer is legitimate. When workers have only informal sources to rely on, such as the recruiter's local reputation, the situation is ripe for abuse. In 2014, the Centro de los Derechos del Migrante launched [Contratados](#), which enables workers to share reviews of recruiters, as well as employers.<sup>120</sup>

#### 1. DEPARTMENT OF LABOR

USDOL does not request information about foreign recruiters in the temporary employment certification application.<sup>121</sup> Form 9142A's Section H "Recruitment Information" Box 6 provides space for the applicant to list recruitment activities, including the "source of recruitment, geographic location(s) of recruitment and the date(s) on which the recruitment was conducted."<sup>122</sup> However, this section of the form is commonly understood to refer to the applicant's obligation to recruit U.S. workers rather than the foreign H-2A workers.

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>123</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>124</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>125</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>126</sup>

## **3. DEPARTMENT OF STATE**

There is no statute, regulation, or official policy mandating DOS officials to inquire about recruiters during the worker’s visa application process.<sup>127</sup> However, at least 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 fraud.<sup>128</sup> Additionally, if a DOS consular official discovers a worker has paid a recruitment fee, the visa application may be denied.<sup>129</sup>

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

H-2A program regulations aim to ensure that U.S. workers will not be adversely affected by the employment of foreign workers. Because H-2A workers may come from countries with depressed economies they are often willing to suffer conditions unacceptable to U.S. workers. H-2A contract rights apply equally to H-2A workers and their U.S. counterparts and serve to protect them both. 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 insurance. Employers must offer the same terms and conditions to all workers and maintain accurate payroll records. Retaliation is prohibited. 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 particular situation.

## H-2A Fees and Costs: At a Glance

	Who pays?	Where's the law?
Recruitment fees	Not allowed.	20 C.F.R. § 655.135(j) (effective 2011)
Subsistence and transportation from home country to place of employment	<ul style="list-style-type: none"> <li>- 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.</li> <li>- Employer may have to reimburse H-2A worker in first paycheck, subject to FLSA minimum wage rate.</li> <li>- 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.</li> </ul>	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 \$11.86 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.	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)

## 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>130</sup> The work contract is usually in the same form as what the employer submits to USDOL to apply for temporary employment certification.<sup>131</sup> The work contract incorporates all of the H-2A regulations, including workers' rights.<sup>132</sup> The H-2A employment contract is enforceable by either the U.S. Department of Labor or by the workers themselves in civil court.<sup>133</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>134</sup> The employer can either provide its own housing or offer rental accommodations. Housing must meet applicable health and safety standards.

## 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>135</sup> Any cost must be stated in the work contract. In 2015, the maximum meal charge is \$11.86 USD per day.<sup>136</sup>

## D. TRANSPORTATION

Upon completion of 50% of the contract period, the employer must reimburse the workers for their out-of-pocket inbound transportation costs, including daily subsistence and travel from where the worker came to the place of employment.<sup>137</sup> If the worker completes the entire contract period, or is displaced by a U.S. worker under the 50% rule, the employer must pay for the workers' outbound transportation back home, including subsistence costs.<sup>138</sup>

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

While H-2A regulations themselves 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 with the first week's wages.<sup>139</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>140</sup> When employees are made to incur expenses that are for the benefit of the employer prior to starting work it is the same as the employer paying for these expenses and then deducting them from the employees' pay in their first paycheck.<sup>141</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 subsistence costs when computing the first week's wages. When doing so, if the wages fall below the minimum wage, employers must reimburse the worker so the worker's earnings meet FLSA's minimum wage requirements. The USDOL later codified this result in H-2A regulations.<sup>142</sup>

## 2. SUBSISTENCE COSTS DURING TRAVEL

In 2015, 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 \$11.86 USD per day. The maximum amount a worker may receive is \$46 USD per day, if there is actual documentation.<sup>143</sup> Employers are also responsible for en route lodging costs, if any.<sup>144</sup>

## 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>145</sup> All transportation must meet safety and insurance regulations, and all drivers must be licensed.<sup>146</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>147</sup>

## 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>148</sup> The highest rate is typically the AEWR.

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

One way to protect wages for U.S. workers is by establishing an hourly minimum wage paid to H-2A workers. DOL annually [publishes the AEWR](#) for each state based on information from the U.S. Department of Agriculture. For the year 2015, the required wages vary from \$10 USD per hour in Alabama, Georgia and South Carolina, to \$13.59 USD per hour in Kansas, Nebraska, North Dakota and South Dakota. Generally, the AEWR increases slightly each year.<sup>149</sup>

## 2. PIECE RATE WORK

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, there are circumstances 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>150</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>151</sup>

## H. TAXES

H-2A workers are exempt from Social Security, Medicare, and unemployment compensation.<sup>152</sup> Therefore, employers are not required to pay 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 state tax law.

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

Even though compensation paid to H-2A workers is not considered to be "wages" for purposes of federal income tax withholding requirements, it is "wages" for purposes of an employer's W-2 reporting. Since 2011, employers are required to issue W-2s to H-2A workers who earn more than \$600 per year. Many H-2A workers do have 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. Taxes may quickly turn into a troublesome issue for H-2A workers. Advocates have developed [community education materials](#) for workers to avoid such problems.

## 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 total contract period.<sup>153</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 will have to pay the amount the worker would have received had he worked the guaranteed number of days.<sup>154</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.<sup>155</sup>

## J. WORKERS' COMPENSATION

H-2A workers are entitled to workers' compensation insurance coverage consistent with state law, at no cost to the worker.<sup>156</sup> This is true even in states that have laws which exempt agricultural workers from coverage.<sup>157</sup> Proof of workers' compensation

insurance, including the name of the carrier, must be included with the clearance order so workers have that information in their possession.

## 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>158</sup> Each worker must receive an itemized earnings statement or paystub with his or her wages for each pay period.<sup>159</sup>

## L. RETALIATION PROHIBITED

Retaliation against H-2A workers is prohibited. Indeed, employers “may not retaliate, threaten, coerce, blacklist, discharge, or in any manner discriminate against anyone” who has filed 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 himself or others rights offered by the H-2A program.<sup>160</sup> Workers may not waive any of their rights under the H-2A regulations.<sup>161</sup>

## VI. ENFORCEMENT

H-2A worker protections and the Fair Labor Standards Act are both enforced by 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 any 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 Wage and Hour Division (WHD) has enforcement authority over the H-2A regulations.<sup>162</sup> An enforcement action may result from a routine inspection or an informal complaint from any person.<sup>163</sup> If a worker complains, efforts are made to protect the confidentiality of the complainant.<sup>164</sup> In certain cases, WHD 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, as they did in January 2015 for a [New Jersey farm that it found unlawfully rejected qualified U.S. workers in favor of H-2A workers](#).<sup>165</sup> The amount of civil money penalties imposed 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.

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)

## 1. WOW SYSTEM

To help workers access wages collected by U.S. DOL, In January 2015 the agency launched the “Workers Owed Wages” (WOW) web-based application. The system was previously known as the Back Wage Employee Locator System (BWELS), available here: <http://webapps.dol.gov/wow/>. 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 money.

## B. PRIVATE LITIGATION

H-2A workers may enforce their rights in court, as long as 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 directly enforce the worker protection terms of the clearance order, which include H-2A regulations, by filing a breach of contract claim. A federal court may exercise supplemental jurisdiction over state law contract claims if there is an applicable federal statutory claim and the same facts, occurrences, witnesses and evidence are at issue.<sup>166</sup> H-2A workers do not need to seek redress through USDOL before filing a breach of contract case in federal or state court.<sup>167</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 awards grants to privately run agencies 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 as long as their legal issues arise out of the employment contract.<sup>168</sup> According to the LSC, “[t]he availability of such representation is intended to prevent the exploitation of H-2A workers and to ensure that the wages and working conditions of U.S. workers are not undermined.”<sup>169</sup>

To be eligible for legal services through an LSC grantee, noncitizens must also be “present in the United States.”<sup>170</sup> In 2000, LSC convened the Erlehnborn Commission to interpret this rule with regard 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:

*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.*

## VII. H-2A WORKERS – ISSUES

There are several issues that present problems for H-2A workers. There have been many documented cases of employer non-compliance with basic protections.<sup>171</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. Some have argued problems inherent to the design of guestworker programs create a [modern day system of indentured servitude](#). A 2014 [Urban Institute report](#) on human trafficking finds that employer control over worker immigration status makes workers particularly vulnerable to victimization.

### A. LACK OF JOB TRANSFERABILITY

As is the case with many other guestworker visas, H-2A workers hold their visas courtesy of the employer who petitioned the government for certification of the jobs and petition to hire foreign workers. If a worker wants to change employers, the new employer must go through that same hiring process.<sup>172</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 time period of the work contract. Thus, if a visa holder quits his job prematurely or is fired, the visa is no longer valid.<sup>173</sup> An employer must report all workers who “abscond” to both USDOL and DHS within two days – or be subject to penalty.<sup>174</sup> 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 its [most recent 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>175</sup> Advocates have documented problems with foreign recruitment.<sup>176</sup> Foreign 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. 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. After H-2A regulations banned recruitment fees, “recruiters adjusted their practices by charging fees after the workers had obtained their visas and levying charges under the guise of ‘service fees.’”<sup>177</sup> Indeed, “the Department’s power to enforce regulations across international borders is constrained.”<sup>178</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>179</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 adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.<sup>180</sup>

## 1. FRAUD

The current structure of the H-2A system facilitates outright fraud. There is no official mechanism to discern the legitimacy of a recruiter who sets up shop in a small rural village and offers jobs in the United States. [Recent studies](#), [reports](#), and [cases](#) suggest that the problem of defrauding foreign workers in their countries of origin runs rampant.

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

USDOL has assessed hundreds of H-2A employers for penalties and/or back wages.<sup>181</sup> For example, in 2012, the Department of Labor reached an agreement with Peri & Sons to pay a record total of \$2,338,700 in back wages to 1,365 workers, along with a civil money penalty of \$500,000.<sup>182</sup> Violations of the H-2A program, included wages that fell below the federal minimum hourly wage of \$7.25 per hour, not paying the workers for time spent in mandatory work-training, and not reimbursing the workers for subsistence expenses during inbound travel or return transportation costs at the end of the contract period. In 2010, USDOL fined J&R Baker Farms \$136,500 and ordered them to pay \$1.3 million in back wages owed to about 100 H-2A workers as well as 150 U.S. workers.<sup>183</sup>

Private lawsuits on behalf of H-2A workers have also highlighted wage and contract violations that are all too common.<sup>184</sup> In 2012, Arkansas company Candy Brand was ordered to pay \$1.5 million in back wages to more than 1,500 H-2A guest workers as a result of a class action lawsuit for failure to pay overtime, reimburse travel, or reimburse visa and other expenses in the first week of work.<sup>185</sup>

## D. RETALIATION

H-2A regulations protect workers from retaliation if they assert their rights.<sup>186</sup> Even so, reports consistently emerge about employers retaliating against workers who speak out about workplace conditions. In 1997 and again in 2000, the Government Accountability Office concluded that H-2A workers are “unlikely to complain about work protection violations” because of “fear they will lose their jobs or will not be hired in the future.”<sup>187</sup> More than a decade later, USDOL drew the same conclusion when an Assistant Secretary 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>188</sup>

According to the [U.S. Department of State's 2011 Trafficking in Persons Report](#),

Recruiters discouraged former workers from reporting labor violations, claiming that U.S. embassies or consulates would not grant future visas for those who complain –assertions that are false and contrary to U.S. law. Workers also feared seeking assistance because of blacklisting and other retaliation against workers who complain about their conditions.<sup>189</sup>

Lack of job transferability and indebtedness are two of the most significant factors repeatedly linked to H-2A workers' unwillingness to raise concerns about exploitation on the job.

#### **DIGGING DEEPER: THE PROBLEM OF BLACKLISTING**

The fear of retaliatory termination is accompanied by the fear of being “blacklisted” – being denied any further opportunity to work in the U.S., by the recruiter or by the employer. This joint force of recruiter and employer makes workers extremely reluctant to complain about working conditions. Some workers who report blacklisting have not even been involved in legal action. Often, the employer may be reacting to a one-time, individual act of protest, such as a worker raising a concern about safety, speaking up in support of another worker who was fired, or questioning wage deductions on a paycheck. Efforts to fight back against blacklisting include addressing the lack of safeguards and remedies in U.S. law through private contract, or settlement agreements following litigation.

## **E. LACK OF PORTABLE JUSTICE**

As with other nonimmigrant visas, the H-2A program does not set up a way for workers to enforce their rights or denounce abuses when they return home -- as the terms of their visa require -- after the work period ends.<sup>190</sup> Still, lawyers who represent H-2A workers continue advocating for their clients even after they return home. However, there are challenges. For example, foreign workers who are plaintiffs in lawsuits and need to return to the U.S. to give testimony at trial must apply for a visitor visa or humanitarian parole. The same is true for workers who are injured on the job and require continuing medical treatment in the United States. The process of seeking this sort of immigration relief is complicated and costly, with no guarantee of success.<sup>191</sup>

## ENDNOTES

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<sup>1</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(a); and 20 C.F.R. § 655.90(a)(1).

<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).

<sup>4</sup> 8 U.S.C. §§ 1188(a)(1)(A) & (B); 8 C.F.R. § 214.2(h)(5)(ii) and 20 C.F.R. § 655.10.

<sup>5</sup> Cindy Hahamovitch, *No Man's Land: Jamaican Guestworkers in America and the Global History of Deportable Labor*, Introduction at 7 (Princeton University Press 2012).

<sup>6</sup> Hahamovitch, *No Man's Land*, at 13.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.; Public Broadcasting Service, *The Border: History: 1942 Mexican Immigrant Labor History*, available at <http://www.pbs.org/kpbs/theborder/history/index.html>.

<sup>11</sup> Hahamovitch, *No Man's Land*, at 13.

<sup>12</sup> Public Broadcasting Service, *The Border*.

<sup>13</sup> Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 127 (2004).

<sup>14</sup> Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* (New Orleans: Quid Pro Quo Books, 1992).

<sup>15</sup> Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*. (Princeton: Princeton University Press, 2005).

<sup>16</sup> Hahamovitch, *No Man's Land*, at 14.

<sup>17</sup> Hahamovitch, *No Man's Land*, Chapter Two: Everything But a Gun to Their Head, 22-49.

<sup>18</sup> Id. at 23.

<sup>19</sup> Id. (“Employers’ complaints of labor scarcity reveal that workers were present but increasingly demanding” at 27); see also Isabel Wilkerson, *The Warmth of Other Suns* (Vintage 2010), 150-157 (describing a black farmworker crew seeking to improve their wages in a Florida orange grove during WWII).

<sup>20</sup> Id. at 42; 7 U.S.C. §§1461, et seq. (repealed); Ruben J. Garcia, *Labor As Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 46 (2006).

<sup>21</sup> Mary Bauer, *A Brief History of Guestworkers in America, Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center (February 2013) available at <http://www.splcenter.org/publications/close-to-slavery-guestworker-progr...>

<sup>22</sup> Morgan, *Evaluating Guest Worker Programs*, 15 BERKELEY LA RAZA L.J. at 129.

<sup>23</sup> Id., Bracero History Archive, About Page, (2012), available at <http://braceroarchive.org/about>.

<sup>24</sup> Ronald L. Mize, Jr., *Reparations for Mexican Braceros? Lessons Learned from Japanese and African American Attempts at Redress*, 52 CLEV. ST. L. REV. 273, 286 (2005).

<sup>25</sup> Lorenzo A. Alvarado (FNa1), *A Lesson from My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 63 (2001).

<sup>26</sup> Bracero History Archive, About Page, (2012), <http://braceroarchive.org/about>

<sup>27</sup> Fred Koestler, *Bracero Program*, Handbook of Texas Online, Texas State Historical Association, (22 February 2010), available at [http://www.tshaonline.org/handbook/online/articles/BB/omb1\\_print.html](http://www.tshaonline.org/handbook/online/articles/BB/omb1_print.html).

<sup>28</sup> Hahamovitch, *No Man's Land*, at 22-49.

<sup>29</sup> Id. at 42. Hahamovitch notes that the “most remarkable thing about all this is the fact that the INS never agreed to it, as U.S. immigration law required.” at 48.

<sup>30</sup> Id. at 44-45.

<sup>31</sup> Alec Wilkinson, *Big Sugar: Seasons in the Cane Fields of Florida*, 144-47 (Alfred A. Knopf 1989).

<sup>32</sup> Id. For a detailed discussion of the genesis and onset of Jamaicans working in U.S. agriculture, see Hahamovitch, *No Man's Land*, at 50-66.

<sup>33</sup> Act of June 27, 1952, ch. 477, codified at 8 U.S.C. §1101 et seq.

<sup>34</sup> Andorra Bruno, *Immigration: Policy Considerations Related to Guest Worker Programs*, Congressional Research Service Report for Congress, 1 (2006), available at <http://fpc.state.gov/documents/organization/62664.pdf>.

<sup>35</sup> Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, 8 U.S.C. §1101; Mike Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guestworkers From Enforcing Their Rights*, 18 HOFSTRA

LABOR & EMPLOYMENT LAW JOURNAL 2001, 581-583 (detailing history of guestworkers leading up to the modern H-2A program).

<sup>36</sup> 8 C.F.R. §§ 214.2(h)(5)(viii)(C), (15)(ii)(C); see also 20 C.F.R. § 655.103(d).

<sup>37</sup> 8 C.F.R. § 214.2(h)(15)(ii)(C).

<sup>38</sup> U.S. Department of Homeland Security, United States Citizenship and Immigration Service, H-2A Temporary Agricultural Workers available at [www.uscis.gov](http://www.uscis.gov) (Jan. 2013); 8 C.F.R. 214.2(h)(5)(viii)(C).

<sup>39</sup> U.S. Department of Labor, Employment and Training Administration, H-2A Temporary Agricultural Visa Program, available at [http://www.foreignlaborcert.doleta.gov/pdf/h\\_2a\\_selected\\_statistics.pdf](http://www.foreignlaborcert.doleta.gov/pdf/h_2a_selected_statistics.pdf).

<sup>40</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(a); U.S. Department of Labor v. North Carolina Growers Association, Inc. 377 F.3d 345 (4th Cir. 2004).

<sup>41</sup> 29 U.S.C. § 203(f).

<sup>42</sup> 29 C.F.R. § 780.105(a).

<sup>43</sup> 29 C.F.R. § 780.105(b).

<sup>44</sup> 29 C.F.R. § 780.105(c).

<sup>45</sup> Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180, 1188 (10th Cir. 2004), quoting 29 C.F.R. § 780.15(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>46</sup> 29 C.F.R. § 780.141; see Wirtz v. Jackson & Perkins Co., 312 F.2d 48, (2d Cir. 1963).

<sup>47</sup> Centeno-Bernuy v. Becker Farms, 564 F.Supp.2d 166, 178 (W.D.N.Y. 2008)

<sup>48</sup> 20 C.F.R. § 655.130.

<sup>49</sup> 20 C.F.R. § 655.132.

<sup>50</sup> 8 U.S.C. § 1188(a)(1); 20 C.F.R. § 655.103(a).

<sup>51</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 ETA Form 9142A.

<sup>52</sup> 20 C.F.R. § 655.103(b).

<sup>53</sup> 29 U.S.C. §§ 1802(7) (defining farm labor contractor) and 1811 (registration requirement).

<sup>54</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>55</sup> U.S. Department of Labor, *Migrant and Seasonal Agricultural Worker Protection Act Registered Farm Labor Contractor Listing*, available at <http://www.dol.gov/whd/regs/statutes/FLCLlist.htm>.

<sup>56</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.

<sup>57</sup> 20 C.F.R. § 655.121(a)(1); U.S. Department of Labor, *Agricultural and Food Processing Clearance Order ETA Form 790* (version current March 2015), available at

[http://www.foreignlaborcert.doleta.gov/pdf/Revised\\_ETA\\_Form\\_790.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Revised_ETA_Form_790.pdf).

<sup>58</sup> 20 C.F.R. § 655.121(a)(3), see also 20 C.F.R. § 653.501, et seq. (regulations pertaining to interstate clearance system) and 20 C.F.R. § 655.122 (contents of job offers).

<sup>59</sup> 20 C.F.R. § 655.121(b)(1).

<sup>60</sup> 20 C.F.R. § 655.130(b); U.S. Department of Labor, *H-2A Application for Temporary Employment Certification, ETA Form 9142A* (version current March 2015), available at

[http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142A.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A.pdf), and *H-2B Application for Temporary Employment Certification, ETA Form 9142A – Appendix A* (version current March 2015), available at

[http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142A\\_Appendix.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A_Appendix.pdf).

<sup>61</sup> 20 C.F.R. § 655.130(a).

<sup>62</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>63</sup> 20 C.F.R. § 655.141(b)(3), (4) and § 655.171.

<sup>64</sup> 20 C.F.R. §§ 655.150-655.154, 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>65</sup> 20 C.F.R. § 655.154(b); 75 Fed. Reg. 6884, 6912 (Feb. 12, 2010); 20 C.F.R. §§ 655.150-158.

<sup>66</sup> 20 C.F.R. § 655.154(a), (c); 8 U.S.C. § 1188(b)(4).

<sup>67</sup> 20 C.F.R. § 655.143(3).

<sup>68</sup> 8 U.S.C. § 1188(c)(2)(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. In re Ackerman v. Mount Levels Orchards, No. 82-TAE-00003 (DOL Office of Administrative Law Judges, May 5, 1983), available at [http://www.oalj.dol.gov/public/ina/DECSN/1982\\_00003.jsa.pdf](http://www.oalj.dol.gov/public/ina/DECSN/1982_00003.jsa.pdf)

<sup>69</sup> See, e.g., Dan Rather, *Help Not Wanted?* Huffington Post, (October 13, 2010) available at

[http://www.huffingtonpost.com/dan-rather/help-not-wanted\\_b\\_761132.html](http://www.huffingtonpost.com/dan-rather/help-not-wanted_b_761132.html); and Jeremy Redmon, *Feds: South Georgia farm favors foreign laborers over U.S. workers*, The Atlanta Journal-Constitution (August 5, 2011).

<sup>70</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>71</sup> U.S. Department of Labor, *iCert Visa Portal System*, available at <https://icert.doleta.gov/>; see 75 Fed. Reg. 6884, 6927 (Feb. 12, 2010); 20 C.F.R. § 655.144.

<sup>72</sup> Author discussions with farmworker law advocates (March 2015).

<sup>73</sup> 20 C.F.R. § 655.144.

<sup>74</sup> 8 C.F.R. § 214.2(h)(6)(iii)(E).

<sup>75</sup> U.S. Department of Homeland Security, *I-129 Petition for a Nonimmigrant Worker and H Classification Supplement* (March 2015 current version), available at <http://www.uscis.gov/sites/default/files/files/form/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 \$1,225 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>76</sup> 8 C.F.R. § 214.2(h)(9)(i)(B).

<sup>77</sup> 8 C.F.R. § 214.2(h)(2)(ii).

<sup>78</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)(ii) (H-2A); 8 C.F.R. § 214.2(h)(6)(i)(E)(2) (H-2B).

<sup>79</sup> 79 Fed. Reg. 74735 (Dec. 16, 2014).

<sup>80</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., that worker must be named.

<sup>81</sup> 8 C.F.R. § 214.2(h)(2)(iii).

<sup>82</sup> See generally 9 FAM [Foreign Affairs Manual] 41.53; Bureau of Consular Affairs, *Temporary Worker Visas*, U.S. State Department, available at [http://travel.state.gov/visa/temp/types/types\\_1271.html#5](http://travel.state.gov/visa/temp/types/types_1271.html#5). There is an exception to this for workers from Caribbean nations who do not require a visa. See 8 C.F.R. § 212.1(b)(i). Workers from Jamaica, Barbados, Grenada, Trinidad and Tobago, or British, French or Netherlands citizens who live in their Caribbean territories do not pass through the Department of Homeland Security or the Department of State procedures.

<sup>83</sup> U.S. Department of State, *Fees for Visa Services*, available at [http://travel.state.gov/visa/temp/types/types\\_1263.html](http://travel.state.gov/visa/temp/types/types_1263.html).

<sup>84</sup> 20 C.F.R. § 655.135(j).

<sup>85</sup> 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010).

<sup>86</sup> 8 U.S.C. § 1101(a)(15)(H) (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>87</sup> 8 C.F.R. § 212.1(b)(i). Workers from Jamaica, Barbados, Grenada, Trinidad and Tobago, or British, French or Netherlands citizens who live in their Caribbean territories do not pass through the Department of Homeland Security or the Department of State procedures. Spouses and children of this group of agricultural workers may also enter the U.S. without a visa.

<sup>88</sup> U.S. Government Accountability Office, *H-2A VISA PROGRAM: Modernization and Improved Guidance Could Reduce Employer Application Burden*, GAO-12-706, Sept. 2012.

<sup>89</sup> 20 C.F.R. § 655.135(k).

<sup>90</sup> 9 FAM 41.53 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>91</sup> 9 FAM 41.53 N28. Consular officers must enter a mandatory case note stating the pamphlet was provided and that the applicant indicated he or she understood its contents.

<sup>92</sup> Id.; see 9 FAM 41.21 N6.8 for information about enforcement of federal anti-trafficking law and consular officer responsibilities.

<sup>93</sup> 8 C.F.R. § 235.1(f)(1).

<sup>94</sup> See 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 he or she 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).”).

<sup>95</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 he or she 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).”).

<sup>96</sup> As of March 2015, DHS has not yet published data from 2014. Therefore in order to compare the three agency’s respective data sets, 2013 is the last most recent year for complete data.

<sup>97</sup> U.S. Department of Labor, 2012 Annual Report, available at [http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2012\\_Annual\\_Report-11-29-2013-Final\\_Clean.pdf](http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2012_Annual_Report-11-29-2013-Final_Clean.pdf) (February 2015) U.S. Department of Labor Employment and Training Administration, H-2A Selected Statistics, FY 2013, available at [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY2013\\_Q4.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2013_Q4.pdf); U.S. Department of State NIV Workload by Visa Category FY 2012 Chart, available at <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2012NIVWorkloadbyVisaCategory.pdf> ; U.S. Department of Homeland Security, USCIS, I-129 H2A Performance Data FY 2012 Qtr4, available at <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-129-petition-temporary-agricultural-h-2a-worker> ; USCIS Form I-129 Petition for a Nonimmigrant Worker with a Status of Temporary Agricultural Worker (H-2A) Chart, FY 2013, Quarters 1, 2, and 3, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129\\_h2a\\_performancedata\\_fy2013\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129_h2a_performancedata_fy2013_qtr3.pdf) ), and USCIS Number of I-129 Petition for a Nonimmigrant Temporary Agricultural Worker (H-2A) by Case Status and State, July 1 - September 30, 2013 (FY 2013, Quarter 4), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I-129H2A-FY13Q4.pdf> . USCIS Form I-129 Petition for a Nonimmigrant Worker with a Status of Temporary Agricultural Worker (H-2A) Chart, FY 2013, Quarters 1, 2, and 3, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129\\_h2a\\_performancedata\\_fy2013\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129_h2a_performancedata_fy2013_qtr3.pdf) ), and USCIS Number of I-129 Petition for a Nonimmigrant Temporary Agricultural Worker (H-2A) by Case Status and State, July 1 - September 30, 2013 (FY 2013, Quarter 4), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I-129H2A-FY13Q4.pdf> ; and U.S. Department of Homeland Security, Annual Flow Report, Nonimmigrant Admissions to the United States: 2012, available at [http://www.dhs.gov/sites/default/files/publications/ois\\_ni\\_fr\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2012.pdf). U.S. Customs and Border Protection available at [www.cbp.gov](http://www.cbp.gov) for . . . s ta from any other year has been available since January 2013. U.S Department of Labor, H-2A Temporary Agricultural Labor Certification Program Selected Statistics, FY 2015 available at [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY2014\\_Q4.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2014_Q4.pdf) . U.S. Department of State, FY 1997-2014 NIV Detail Table, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html). U.S. Department of Homeland Security, USCIS, Number of I-129 Petition for a Nonimmigrant Temporary Agricultural Worker (H-2A) by Case Status and State, Quarter 1 FY2014, available at, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129\\_H2A\\_performancedata\\_fy2014qtr2.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129_H2A_performancedata_fy2014qtr2.pdf) . Quarter 2 FY2014, available at, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129\\_H2A\\_performancedata\\_fy2014\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129_H2A_performancedata_fy2014_qtr3.pdf) . Quarter 3 FY2014, available at, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129\\_H2A\\_performancedata\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129_H2A_performancedata_fy2014_qtr4.pdf) . Quarter 4 FY2014, available at,

[http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129\\_h2a\\_performancedata\\_fy2015\\_qtr1.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129_h2a_performancedata_fy2015_qtr1.pdf) .

<sup>98</sup> U.S. Department of Labor, *H-2A Selected Statistics, FY 2013*, available at [http://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY2013\\_Q4.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2013_Q4.pdf).

<sup>99</sup> U.S. Department of State, *NIV Workload by Visa Category FY 2013 Chart*, available at <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2013NIVWorkloadbyVisaCategory.pdf>.

<sup>100</sup> USCIS Form I-129 Petition for a Nonimmigrant Worker with a Status of Temporary Agricultural Worker (H-2A) Chart, FY 2013, Quarters 1, 2, and 3, available at [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129\\_h2a\\_performancedata\\_fy2013\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I129_h2a_performancedata_fy2013_qtr3.pdf), and USCIS Number of I-129 Petition for a Nonimmigrant Temporary Agricultural Worker (H-2A) by Case Status and State, July 1 - September 30, 2013 (FY 2013, Quarter 4), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I-129H2A-FY13Q4.pdf> .

<sup>101</sup> 8 C.F.R. § 214.1(c)(1) (2009); 8 C.F.R. § 214.2(h)(2)(i)(D)(2011).

<sup>102</sup> Katie Foreman and Randall Monger, *Annual Flow Report, Nonimmigrant Admissions to the United States: 2013* U.S. Department of Homeland Security, Office of Immigration Statistics (2014), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_ni\\_fr\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2013.pdf).

<sup>103</sup> *Id.*; see U.S. Department of Homeland Security, *2011 Yearbook of Immigration Statistics* (2012).

<sup>104</sup> Interview with Office of Immigration Statistics employee (Oct. 17, 2011).

<sup>105</sup> U.S. Department of Labor, Office of Foreign Labor Certification, *Selected H-2A Statistics FY 2012*.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* For background summarizing the farm operations of one large H-2A employer, Sierra Cascade Nursery, see the video posted at <http://www.youtube.com/watch?v=s5R2rKcpuos> (last visited March 2015).

<sup>108</sup> *Id.*

<sup>109</sup> 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(i).

<sup>110</sup> 8 C.F.R. § 214.2 (h)(5)(i)(F)(1)(ii).

<sup>111</sup> U.S. Department of State, *Nonimmigrant Visa Issuance by Visa Class and Nationality FY 1997-2012* (2013).

<sup>112</sup> Nonimmigrant visa statistics for age and gender of H-2A workers was provided to Global Workers Justice Alliance from the Department of State, Visa Office, Immigrant Visa Control and Reporting Division (2011).

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F. 3d 861, 863-67 (4th Cir. 2001) (Mexican plaintiff not hired for H-2A job in the U.S. because he was over 40 years old, lost age discrimination case because plain language of the ADEA does not regulate age discrimination against a foreign national that occurs in another country, even if the employment sought is with a U.S. company at a job located in the U.S.); and *Olvera-Morales v. Sterling Onions, Inc.*, 322 F. Supp. 2d 211, 214 (N.D.N.Y. 2004) (Mexican women brought a Title VII gender discrimination case claiming that although they were qualified for H-2A jobs, those positions were reserved for men, and the women were instead hired for H-2B jobs, which were less favorable with lower wages and fewer benefits).

<sup>115</sup> Farmworker Justice, “No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers” (2011), available at <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf>.

<sup>116</sup> *Id.*, see also *Jurado-Jimenez, et al. v GLK Foods*, Civil Action No. 12-cv-209, *Second Amended Complaint* (E.D. Wis., filed Dec. 11, 2013) (on file with author).

<sup>117</sup> GAO-15-154, p. 25-28; Centro de los Derechos del Migrante, Inc., *Recruitment Revealed* (January 2013), available at [www.cdmigrante.org](http://www.cdmigrante.org); Proyecto Jornaleros Safe, *Mexicanos en EU con visa: Los Modernos Olivados*, (November 2012), available at <http://www.globalworkers.org>.

<sup>118</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.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB477](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB477)

<sup>119</sup> *Id.*

<sup>120</sup> Michelle Chen, *Can a ‘Yelp’ for Immigrant Guestworkers Help Them Avoid Abusive Bosses?*, *The Nation* (October 27, 2104), available at <http://www.thenation.com/blog/186041/can-yelp-immigrant-guestworkers-help-them-avoid-abusive-bosses#>.

<sup>121</sup> See, e.g., 20 C.F.R. § 655, Subpart B for lack of regulation.

<sup>122</sup> ETA Form 9142A, page 5, section H, box 6.

<sup>123</sup> 20 C.F.R. § 655.135(j)

<sup>124</sup> ETA Form 9142A, Appendix A, page A.2, declarations 10 and 11.

<sup>125</sup> Form I-129, H Classification Supplement, page 15, questions 4, 7.a.

<sup>126</sup> *Id.*, page 16, questions 8.a.-8.d., 9-10.

<sup>127</sup> See generally, 9 Foreign Affairs Manual (FAM) 41.53; Interviews with Department of State officials during 2010 and 2011.

<sup>128</sup> Justice in Motion (formerly Global Workers Justice Alliance), interviews with U.S. Consular Officials (2006-2016).

<sup>129</sup> 9 FAM 41.53 N2.2.c. (The agency guidance instructs consular officials as follows: “If you suspect that the alien-beneficiary has paid a prohibited fee and he or she has not been reimbursed or the agreement to pay the fee has not been terminated, you should return the petition to DHS for reconsideration.”) U.S. State Department, Consulate Sao Paulo, Brazil, *H-2B Visas: The Good, The Bad and the Ugly*, (Dec. 1, 2005) (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>130</sup> 20 C.F.R. § 655.122(q).

<sup>131</sup> *Id.* 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>132</sup> *Id.*; see 20 C.F.R. § 655.122 – Contents of job offers.

<sup>133</sup> 29 C.F.R. Supbart B – Enforcement of Work Contracts. See also Frederick County Fruit Growers Association, Inc. v. McLaughlin, 703 F. Supp. 1021 (D.D.C. 1989), *affm’d*, 968 F. 2d. 1265 (D.C. Cir. 1992); Villalobos v. North Carolina Growers Association Inc. I, 42 F.Supp.2d 131 (D.R.R. 1999), Centeno-Bernuy v. Becker Farms, 2008 WL 2483285 (WDNY 2008). 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>134</sup> 20 C.F.R. § 655.122(d)(1).

<sup>135</sup> 20 C.F.R. § 655.122(g).

<sup>136</sup> U.S. Department of Labor, Employment and Training Administration, *Meal Charge and Travel Subsistence*, available at [http://www.foreignlaborcert.doleta.gov/meal\\_travel\\_subsistence.cfm](http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm) (last accessed March 20, 2015).

<sup>137</sup> 20 C.F.R. § 655.122(h)(1).

<sup>138</sup> 20 C.F.R. § 655.122(h)(2).

<sup>139</sup> 20 C.F.R. § 655.122(h)(1), (p)(1).

<sup>140</sup> *Arriaga v. Florida Pacific Farms, LLC.*, 305 F.3d 1228 (11th Cir. 2002).

<sup>141</sup> *Id.* at 1236; *De Luna-Guerrero v. North Carolina Grower’s Ass’n*, 338 F. Supp. 2d 649, at 656 (E.D.N.C. 2004).

<sup>142</sup> 20 C.F.R. § 655.122(p)(1).

<sup>143</sup> U.S. Department of Labor, Employment and Training Administration, *Meal Charge and Travel Subsistence*, available at [http://www.foreignlaborcert.doleta.gov/meal\\_travel\\_subsistence.cfm](http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm) (last accessed March 20, 2015).

<sup>144</sup> *Id.*

<sup>145</sup> 20 C.F.R. § 655.122(h)(3).

<sup>146</sup> 20 C.F.R. § 655.122(h)(4).

<sup>147</sup> 20 C.F.R. § 655.122(f).

<sup>148</sup> 20 C.F.R. § 655.122(l).

<sup>149</sup> See also U.S. Department of Labor, *OFLC Case Disclosure Data, H-2A Program 2014*, available at <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm>. In 2014, actual wages paid by the top 10 employers who requested the most H-2A workers ranged from \$9.73 to \$11.87 per hour for a 36-40 hour workweek.

<sup>150</sup> 20 C.F.R. § 655.122(l)(2)(i).

<sup>151</sup> 20 C.F.R. § 655.122(l)(2)(iii).

<sup>152</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>153</sup> 20 C.F.R. § 655.122 (i)(1).

<sup>154</sup> 20 C.F.R. § 655.122(i)(1)(iv).

<sup>155</sup> 20 C.F.R. § 655.122(i)(4).

<sup>156</sup> 20 C.F.R. § 655.122(e).

<sup>157</sup> For a list of states and whether they require compensation coverage for farmworkers, see Farmworker Justice, *State Workers' Compensation Coverage for Agricultural Workers* (2009), available at [http://www.farmworkerjustice.org/sites/default/files/documents/6.3.a.1State\\_Workers\\_Comp\\_Information\\_for\\_Health\\_Centers\\_11-09.pdf](http://www.farmworkerjustice.org/sites/default/files/documents/6.3.a.1State_Workers_Comp_Information_for_Health_Centers_11-09.pdf).

<sup>158</sup> 20 C.F.R. § 655.122(j).

<sup>159</sup> 20 C.F.R. § 655.122(k).

<sup>160</sup> 20 C.F.R. § 655.135(h)(1)-(5) and 29 C.F.R. § 501.4(a)(1)-(5).

<sup>161</sup> 29 C.F.R. § 501.5.

<sup>162</sup> 29 C.F.R. §§ 501.0, et seq.

<sup>163</sup> 29 C.F.R. § 501.6(c).

<sup>164</sup> 29 C.F.R. § 501.6(b).

<sup>165</sup> U.S. Dept. of Labor WHD News Release, "Monroeville, New Jersey, farm to pay \$175,000 in back wages and penalties," (January 2015), available at <https://www.dol.gov/opa/media/press/whd/WHD20142097.htm>.

<sup>166</sup> *Arriaga-Zacarias v. Lewis Taylor Farms, Inc.* 2008 WL 5115005 (M.D. Ga. 2008).

<sup>167</sup> *Lopez v. Fish*, 2012 WL 2126856 (E.D. Tenn. 2012).

<sup>168</sup> 45 C.F.R. § 1625.11.

<sup>169</sup> LSC External Opinion # EX-2000-1014, August 8, 2000.

<sup>170</sup> 45 C.F.R. § 1626.5.

<sup>171</sup> See, e.g., GAO-15-154, p. 77-78, Appendix IV: Details on Back Wages and Civil Money Penalties Assessed by the Department of Labor; and Farmworker Justice, *No Way To Treat a Guest: Why the H-2A agricultural visa program fails U.S. and foreign workers*, p. 20-32, and Appendix: Resources on H-2A program abuse, (2011) available at

<http://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>

<sup>172</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>173</sup> 9 FAM 41.53 N10 (Nov. 24, 2009) (length of stay). 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>174</sup> 20 C.F.R. §§ 655.122(n). Abandonment is defined as five consecutive, unexcused absences.

<sup>175</sup> Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154 (March 2015), available at <http://www.gao.gov/assets/670/668875.pdf>.

<sup>176</sup> See, e.g., International Labor Recruitment Working Group, *The American Dream Up for Sale, A Blueprint for Ending International Labor Recruitment Abuse* (February 2013), available at <http://fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf>; Centro de los Derechos del Migrante, Inc., *Recruitment Revealed* (January 2013), available at [www.cdmigrante.org](http://www.cdmigrante.org); Proyecto Jornaleros Safe, *Mexicanos en EU con visa: Los Modernos Olivados* (November 2012); Ashwini Sukthankar, *Visas, Inc.: Corporate Control and Policy Incoherence in the U.S. Temporary Foreign Labor System*, Global Workers Justice Alliance (2012).

<sup>177</sup> U.S. Dept. of State, *Trafficking in Persons Report*, at 377 (June 2011) available at <http://www.state.gov/documents/organization/164458.pdf>.

<sup>178</sup> 75 Fed. Reg. 6884, at 6926 (Feb. 12, 2010).

<sup>179</sup> *Id.*

<sup>180</sup> 75 Fed. Reg. 6884, at 6925 (Feb. 12, 2010).

<sup>181</sup> U.S. Department of Labor, *Wage and Hour Compliance Action Data* (July 18, 2011) available at [http://ogesdw.dol.gov/raw\\_data\\_summary.php](http://ogesdw.dol.gov/raw_data_summary.php).

<sup>182</sup> U.S. Department of Labor, Press Release, (January 2013), available at <http://www.dol.gov/opa/media/press/whd/WHD20121352.htm>

<sup>183</sup> U.S. Department of Labor, *DOL Hits H-2A Employer With \$1.3 Million in Back Wages, \$136,500 in Fines*, Press Release (November 18, 2010) available at <http://www.dol.gov/opa/media/press/whd/WHD20101532.htm>.

<sup>184</sup> See [http://migration.ucdavis.edu/rmn/more.php?id=1550\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1550_0_4_0)

<sup>185</sup> Southern Poverty Law Center, *Arkansas Company to Pay \$1.5 Million to Guestworkers Owed Back Wages in SPLC Lawsuit*, Press Release (January 5, 2012), available at <http://splcenter.org/get-informed/news/arkansas-company-to-pay-15-millio...>

<sup>186</sup> 20 C.F.R. § 655.135(h)(1)-(4); 29 C.F.R. § 501.4(a)(1)-(4); see also, U.S. Dep't of Labor factsheet, <http://www.dol.gov/whd/regs/compliance/whdfs77d.pdf> (January 2012).

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<sup>187</sup> See Cynthia M. Fagnoni, *H-2A Agricultural Guestworkers: Status of Changes to Improve Program Services*, at 10, No. T-HEHS-00-134, U.S. General Accounting Office (June 15, 2000), available at <http://www.gao.gov/archive/2000/he00134t.pdf> and U.S. General Accounting Office, *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, No. HEHS-98-20, at 60 (Dec. 1997), available at <http://www.gao.gov/archive/1998/he98020.pdf> (“H-2A workers are unlikely to complain about worker protection violations . . . because they fear that they will lose their jobs” or not be accepted as workers in the future).

<sup>188</sup> Jane Oates, Asst. Secretary of Labor, *Before the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, U.S. House of Representatives, Agriculture’s Industry Workforce Challenges* (Sept. 13, 2011), available at <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).

<sup>189</sup> U.S. Department of State, *Trafficking in Persons Report*, at 378 (June 2011), available at <http://www.state.gov/documents/organization/164458.pdf>.

<sup>190</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).

<sup>191</sup> See generally Global Workers Justice Alliance, *Challenges in Transnational Litigation: Representing Absentee Workers in U.S. Courts*, 4<sup>th</sup> Ed. (November 2014); Global Workers Justice Alliance, , *Promoviendo la Justicia Móvil: Guía Básica de derechos laborales e inmigración relevante a migrantes transnacionales en los EE.UU.* (September 2014), available at [http://www.globalworkers.org/sites/default/files/Promoviendo\\_Justicia\\_Movil-Guia.pdf](http://www.globalworkers.org/sites/default/files/Promoviendo_Justicia_Movil-Guia.pdf).