

Rethinking the H-2A Visa Program for Guest Agricultural Workers

Submitted by:

Ana C. Lopez
Tom Dormody

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Executive summary

In the United States, workers from over 80 foreign countries are eligible to apply for a temporary H-2A visa, yet it is held mostly by workers from Mexico (Gutierrez & Zedillo, 2016). Costa & Rosenbaum (2017) define a temporary visa as the document that the foreign-born person acquires in order to enter the United States, such a document only allows the individual to stay in the United States for a specific period of time. The H-2A program offers, in a seasonal manner, legal status for foreign workers and more rights than undocumented immigrants have. Nonetheless, as a result of a meticulous review of the literature regarding the H-2A policy, several challenges which affect workers, employers, and contractors/recruiters emerged. Therefore, it was pertinent to synthesize (a) a brief historical background and overview of the H-2A program, (b) a statement of challenges encountered within the existing program regarding guest workers, employers, and contractors/recruiters, which hinder the wellbeing of all three parties, particularly guest workers, (c) recommendations for each challenge that could lead to the improvement of the H-2A program for all individuals involved.

Rethinking the H-2A Visa Program for Guest Agricultural Workers. A Policy Proposal
Brief.

Historical Background and Overview.

According to Cerdi (2016), the Department of Labor (DOL) in the United States is responsible for the H-2A guestworker visa program. “The H-2A program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary agricultural jobs.” (U.S. Citizenship and Migration Services, 2017, para. 1) The Bracero program (1942-1964), preceded H2-A, and sought to regulate the employment of agricultural workers from Mexico during World War II. Yet, such measures did not impede the entrance of undocumented workers who sought to improve their living conditions by entering and working in the United States (Cerdi, 2016; Izcara Palacios, 2010). However, according to Cerdi (2016), from 2008 until now, there has been an increase of Mexican citizens that have entered at the United States in a documented manner.

As documented in the Southern Poverty Law Center (2007), the H-2 sections of the Immigration and Nationality Act were still in place after the Bracero program ended in 1964. The H-2 program, which was not yet divided into H-2A and H-2B sections, was created in 1943 to fulfill the demands of sugar-cane cutting in Florida, which employed many Caribbean workers. Over 300 workers stopped their activities in the plantation as a protest against unfair wage and dangerous work conditions. Consequently, “the company called in the police, who used guns and dogs to force workers onto buses, on which they were removed from the camp and deported. This incident became known as the ‘dog war.’” (p. 5). In 1986, the H-2 program was revised and divided into the H-2A program for agricultural workers and H-2B program for non-agricultural workers, under the Immigration Reform and Control Act.

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Vengoechea (2013) and Durand (2007), highlighted that the H-2A program and the Bracero program do not have many differences. Except for prioritizing the hiring of workers from the United States, H-2A workers face most of the challenges they used to when the Bracero program was in place. H-2A workers do not have the freedom of switching employers. If issues of neglect or abuse arise, workers' choices are narrowed down to: working in such conditions or quitting the program completely. "Given that in the United States the H-2A visa is tied down to a single employer, the employer holds what has been referred to as the 'deportation card' in the employment relationship" (Vengoechea, 2013, p. 647). Employers reported challenges within this program as well, as they described it to be complex as they've had to demonstrate that there are no employees in the United States who are willing to undertake these jobs at the farms (Palacios & Rubio, 2010). Nevertheless, there has been an increase of this programs throughout recent years (NPR, 2017).

According to the Farm Bureau (2017), there was an increase of H-2A visa holders in the United States, because of a lack of farmworkers from the U.S. interested and willing in working with crops. Thus, farmers chose to request H-2A workers as a measure of emergency. During the 90's, the number of visas distributed yearly did not surpass 40,000. In 2012, there was a noticeable increase of H-2A workers, as about 50,000 visas were issued. Furthermore, over the last six years, there has been a double-digit increase on a yearly basis (Farm Bureau, 2017).

The United States issued more than 530,000 visas for H-1B, H-2A, H-2A, H-4 visa program in 2016, but the total number of workers participating in these programs at any one time is unknown because the various federal data systems that process visas are not linked. (Council on Foreign Relations, 2017, para. 3)

As appointed by the Office of Foreign Labor Certification (2016), the H-2A visa program allows migrant farmworkers from over 80 countries to work seasonally in the United States and

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have the right to: a) an hourly wage greater than the minimum wage and b) an average of 35 weekly work hours, transportation and housing. Though H-2A workers can bring their families to the United States, the U.S. Citizenship and Immigration Services (USCIS) states that spouses and unmarried and under-aged children must enter the United States under the H-4 classification. Such status does not allow them to either work or study in the United States. Consequently, family members oftentimes opt for staying in their country of origin to remain economically productive (Cerdi, 2016).

The duration of the visa starts at 8 months and can be periodically renewed over the course of 3 years if workers prove themselves to their employers. These employers must demonstrate that there are not enough workers from the United States applying for their agricultural jobs. After applying through the Department of Labor (DOL), employers must wait for approval and file a visa petition with the United States Citizenship and Immigration Services (USCIS). The petition for H-2A workers consists of the following steps:

- Offer a job that is of a temporary or seasonal nature.
- Demonstrate that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work.
- Show that employing H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.
- Generally, submit *a single* valid temporary labor certification from the U.S. Department of Labor with the H-2A petition. (A limited exception to this requirement exists in certain “emergent circumstances”) (USCIS, 2017, para. 2)

A contractor/recruiter oftentimes makes the connection between the employer and the workers. Contractors/recruiters are oftentimes unsupervised by Mexican or United States

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agencies, therefore, there is room for corruption and abuse towards the workers even before they arrive into the United States (Jornaleros Safe Report, 2013). Thus, the workers who achieve a successful submission of paperwork through contractors and the consulate and are granted an H-2A visa cannot be sure of their entrance into the United States. According to Dellinger (2015) “A consulate worker is a gatekeeper” (p. 825) as he/she can deny the entrance of guest workers with an H-2A visa on the basis of their perceptions or hunches as to the workers’ intentions. It is completely legal to turn the workers down and deny them the entrance to the U.S. even if their documents are in order.

Uncertainty regarding the entrance of H-2A workers into the United States severely harms the agricultural industry. Because of a lack of U.S workers to fill agricultural job positions, employers need to request guest workers in order to work with the crops in a timely manner. The American Farm Bureau (2017) reports that “delays result in workers arriving on average 22 days after the date of need, causing an economic loss of nearly \$320 million for farms that hire H-2A workers” (para. 5). Complex bureaucratic procedures, delay and/or prohibition of entrance of approved H-2A workers are some of the challenges that employers encounter with the H-2A program.

Challenges and Recommendations

A combination of elements such as a language barrier and struggles of power, places H-2A workers in vulnerable positions (Arcury, et al., 2015). Costa & Rosenbaum (2017) identified a lack of self-advocacy of H-2A employees, due to limited access to information regarding their human rights. Because of language barriers and the fear of not being re-hired, workers are oftentimes reluctant to speak up for themselves, know their rights, and claim a fair wage (Arcury, Summers, Talton, Nguyen, Chen & Quandt, 2015). As stated in the Jornaleros Safe Report

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(2013), “a lack of knowledge about the rights that come with an H-2A visa and lack of information about the conditions in which workers will be working have made it easier for contractors to commit abuse.” (p. 17)

Recommendation 1:

- Improve the measures in which H-2A workers are informed of their rights in English and in Spanish.

The H-2A handbook for employers, solely includes guidelines for paperwork and bureaucratic issues, failing to address human rights in an in-depth manner. The protections of workers from employers exist on paper and are supposed to be handed to the workers during their first week of labor. Nevertheless, employers oftentimes fail to execute this measure, and others that focus on the protection of wellbeing and human rights for H-2A guest workers (Stockdale, 2013).

Oftentimes there is little tolerance to inactivity from employers towards workers, and the expectations of productivity vary from one employer to another one. Izcara Palacios (2010) addressed the existence of a servile attitude developed by many H-2A workers, which results from the fear of not being hired the next year. The development of “Black Lists” are an exemplar of these power relationships. In such lists, employers, on the basis of unstandardized expectations of productivity, register the “least productive” employees into a list, vetting them from future hires. Therefore, workers give their best to demonstrate competitiveness with each other, so that employers notice them and re-hire them for future seasons. The resulting workloads often bring workers to the limit of their physical capabilities.

Often workers' passports are withheld under the argument that the employer is the owner of the visa. If the worker complains about working conditions, unpaid wages, or anything else regarding their health and safety, employers will threaten

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the employee with calling Immigration and Customs Enforcement (ICE) and getting them deported. (Vengoechea, 2013, p. 647)

Although these workers can self-identify as documented, the current policy has set low standards regarding fair treatment and honoring of H-2A workers' basic human rights (Newman, 2011). A lack of regulations with regard to fair treatment and acknowledgment of human rights has hindered the safety and confidence of H-2A workers in the work environment.

Recommendation 2

- Educate H-2A employers and hold them accountable on the neglect to honor workers' human rights. Include these rights throughout workforce online platforms in English and Spanish.

As stated by Newman (2011), not many workers enjoy the rights of collective bargaining, mainly because of the high level of dependence they have on their employer, who basically decides whether the worker will be employed the next season or not. Additionally, the development of unions is challenging because of the short periods in which workers stay for the work. There are scarce opportunities, timewise, to building bonds of trust among workers. However, even when workers have the chance to establish such bonds and are willing to demand better conditions, most states do not allow for collective bargaining. "Though California's Agricultural Labor Relations Act grants farm workers the right to join a union and mechanisms to engage in collective bargaining, farmworkers in most other states do not have the right to unionize" (p.31) Fighting the injustices caused by power imbalances becomes more challenging for workers, because once they are hired, they are not allowed to switch employers or unionize (NPR, 2017). Workers have limited opportunities for negotiating as a workforce. Therefore, the

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process of demanding the honoring of their rights and the application of policy becomes challenging.

Recommendation 3:

- Allow guest workers with an H-2A working visa to unionize and grant them the right to collective bargaining.

“They [the workers] are dependent on their employers for their ability to stay in the country and their opportunity to obtain a visa in the following year” (Palacios & Rubio, 2010, p. 28). In addition to having limited negotiation capabilities, H-2A guest farm workers are only able to work for one employer (Izcarra Palacios, 2010). If workers experience abuse, they must stay with their employer or leave the program completely (Farmworker Justice, 2017). As described by hooks (1999) a scarce amount of choices entail oppression. Not being allowed to move from one employer to another, narrows the options these workers have and places them in a position of vulnerability.

Recommendation 4:

- Allow mobility to H-2A workers from one employer to another in one season.

Oftentimes, workers are hired through contractors/recruiters from their own country (Izcarra Palacios, 2010), It is documented in the Jornaleros Safe Report (2010-2013) that many abuses reported by H-2A guest farm workers have been perpetuated by contractors/recruiters. Oftentimes, recruiters will deceive workers by asking them for money in order to speed the hiring process, and many workers end up paying such fees due to the imperative need for income. False promises of job opportunities have been perpetuated by recruiters for the H-2A program, deceiving potential workers into purchasing visas that do not exist and charging them illegal fees. Additionally, there are many inconsistencies in the way migrant workers are

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recruited under this type of visa. Centro de los Derechos del Migrante (2013) registers five different models in which workers are recruited.

- MODEL 1 Employer-Recruiter (U.S.)- Recruiter (Mexico)- Worker: The U.S. employer contracts directly with Mexico-based recruitment agencies. The recruiter then locates workers to fill the job order.
- MODEL 2 Employer-Recruiter (U.S.)-Recruiter (Mexico)-Worker: The U.S. employer hires a U.S.-based recruitment agency subcontracts a Mexico-based recruitment agency or individuals in Mexico to assist them in their efforts.
- MODEL 3 Employer-Recruiter (U.S.)-Recruiter (U.S.) - Recruiter (Mexico)- Worker: The U.S. employer hires a U.S. recruitment agency. The U.S. recruitment agency subcontracts a second U.S recruitment agency. The second U.S. recruitment agency subcontracts a Mexico-based recruitment agency or individuals in Mexico to assist with their efforts.
- MODEL 4 Employer-Recruiter (U.S.)- Worker: The U.S. employer hires a U.S. recruitment agency that then directly locates workers to fill the job order.
- MODEL 5 Employer-Worker: Some U.S. employers ask their temporary migrant workers to recruit for them during their annual return to Mexico between seasons.

(Centro de los Derechos del Migrante, 2013, p. 11)

Such inconsistent measures have fostered many injustices towards workers. Additionally, the actions of contractors/recruiters are not supervised by the employer or the government. Therefore, the possibilities for fraud and other illegal practices are great. As stated in the Jornaleros Safe Report (2013) the lack of attention to the process of hiring workers in Mexico has created a vacuum where deceptive recruiters have taken advantage of to obtain millions of

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dollars by offering non-existent work in the U.S. or visas to cross safely into the United States.”

(p. 18)

Recommendations 5, 6 and 7:

- Redefine the criteria that contractors must meet in order to become competent to link H-2A employers and employees.
- Develop a partnership where the government of Mexico and the United States work together and supervise the actions of contractors/recruiters, in order to prevent fraudulent practices.
- Develop a vetting system for employers and contractors who fail to honor the human rights of agricultural workers.

Migrant farm workers, including temporary farm workers with an H-2A guestworker visa, suffer high levels of mortality and morbidity as a result of scarce regulations, limited access to a health care plan and continuous exposure to pesticides (Migrant Clinicians Network, 2015). “Farmworkers with H-2A visas face the same work and personal hazards as do all migrant farmworkers. They work in one of the nation’s most hazardous industries” (Arcury., et al, 2015, p. 71). Agriculture is one of the activities that requires higher levels of regulation in the United States (Izcara Palacios, 2010). According to the Migrant Clinician Network (2015), Hispanic workers are more likely than other ethnic groups to be involved in a fatal occupational injury, and recent years’ data have shown increases in fatal work injuries involving Latina/o workers.

Workers feeling ill or having work injuries are not always credited with having an acceptable excuse to stop working, unless the illness, wound, or injury is considered as severe to the employer’s eye (Izcara Palacios, 2010). While H-2A workers may receive better training regarding pesticide hazards than undocumented migrant workers do, there is an imperative need

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for employers to improve their responsiveness towards safety and health of H-2A workers.

Safety and health issues are also associated with housing. Newman (2011) declared that the homes provided for H-2A workers lack basic hygiene measures. The acquisition of health services to these workers is becoming more and more challenging as time passes by (Vallejos, Quandt, Grzywacz, Isom, Chen, Galvan & Arcury, 2011).

H-2A workers, are paying as little as \$10 a month for their health insurance premium. The AHCA would substantially reduce the amount of tax credit for which low-income farmworkers are eligible. Under the AHCA, the amount of tax credit received would be primarily based on the consumer's age. Farmworkers, the majority of whom are under 45, would receive less in tax credits than they currently receive under the ACA. (Farmworker Justice, 2017, p. 2)

Recommendations 8 and 9:

- Improve measures that guard against hazards and accidents within the work environment.
- Facilitate the access to health for guest workers, who are highly exposed to accidents, illness and death.

Arcury et al., (2015) have identified a gap in the research concerning the well-being and the working conditions set for H-2A workers across the country. On the other hand, Costa & Rosenbaum (2017), suggests that data are available. However, such data are not as descriptive as they could be with regard to improving the H-2A visa program for all are involved. Academic institutions and advocacy groups could be involved in data collection and analysis to improve the quality of the program. The Jornaleros Safe Report (2013) state that the vulnerability of participants involved influences the scarcity of data available regarding the H-2A program.

Recommendation 10:

- Fund follow-up research associated with the H-2A program, that ensures the implementation of regulations and continuous improvement of the H-2A program.

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Agricultural employers have consistently stated that the H-2A program is not sufficient to cover the needs of agricultural workers in the United States. The H-2A program provides less than 5% of the workers that the agricultural industry needs in order to operate successfully. Therefore, 50 to 70 percent of farmworkers in the United States are unauthorized (American Farm Bureau, n.d.).

As stated before, regardless of the thoroughness in which employers submit their paperwork and follow the necessary regulations, consulate workers may impede the entrance of workers who already have been granted an H-2A visa. In 2015, Barbara P. Glenn, CEO of the National Association of State Departments of Agriculture (NASDA), wrote a letter regarding this issue to Secretary of State, John Kerry and Secretary of Homeland Security, Jeh Johnson. The letter communicated a sense of urgency regarding agricultural workers, and a general concern among farmers as to harvesting their crops in a timely manner (NASDA, 2015). CEO Glenn addressed issues of food safety and potential diseases as consequences of interrupted and slow entrance of H-2A workers into the farms, highlighting the importance of speeding up the process of admission for H-2A workers.

To ensure an efficient harvest, farmers and ranchers across the country work through the expensive, bureaucratic process of legally finding laborers through the H-2A visa process. The current visa delays could disrupt the reliable, safe and secure domestic food supply our consumers depend upon. (para. 3)

Recommendation 11:

- Ensure that all H-2A workers who have already been granted an H-2A visa enter the United States in a timely manner.

Farmers and ranchers must overcome several challenges in order to find workers in and outside the United States. The rigidity and constant changes to the H-2A policy create many obstacles for agricultural employers and even H-2A professional agents to navigate; in many

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cases they must consult the guidelines and procedures with lawyers (American Farm Bureau, n.d.). Such issues hinder the competitiveness of the agricultural industry in the United States.

“U.S. agriculture faces a critical shortage of workers every year, as citizens are largely unwilling to engage in these rigorous activities and guestworker programs are unable to respond to the marketplace. This situation makes our farms and ranches less competitive with foreign farmers and less reliable for the American consumer.” (American Farm Bureau, 2017, para. 1)

There is a need for flexibility and simplification of bureaucratic procedures regarding the H-2A in order to streamline the entrance of guest agricultural workers. A lack of workers from the United States willing to apply for low-skill jobs in agriculture, poses a need for improvement of the H-2A program. Poignant modifications would not only improve the quality of life of guest workers, but also the efficiency and competitiveness of the agricultural industry in the United States.

Conclusion

Policy concerning the H-2A program should be changed to regulate the entrance and quality of life of foreign farm workers into the United States. The standards and regulations established by such a policy will set the parameters of success for the entire agricultural industry in the United States (Newman, 2011), which could not be what it is today without H-2A guest workers. If employers who have H-2A workers fail to acknowledge the workers' human rights, pay them a fair wage, and ensure health and safety measures, the message for all employers comes across as permissive. Permission to overwork, abuse and neglect workers.

Furthermore, the worker's country of origin plays an important role in stopping abusive practices toward migrant agricultural workers. Mexico being the top provider of guest agricultural workers, should become actively involved in the regulation of Mexican

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contractors/recruiters in order to stop fraudulent practices and illegal fees that place H-2A workers in a vulnerable position before they leave their country of origin.

Employers' voices should also be taken into consideration when it comes to rethinking the H-2A policy brief. Because of complicated procedures and inconsistencies within this program, agricultural employers must request support from a lawyer or advocate, being uncertain that workers are going to be admitted into the U.S. in a timely manner. Thus, employers have also expressed their displeasure as to delays and denial of entrance of H-2A workers. Such obstacles not only hinder the productivity of the agriculture industry but compromise food safety as well.

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