H-2A Agricultural Guest Worker Program

The H-2A agricultural guest worker program was passed by Congress in 1986 as part of the Immigration Reform and Control Act (IRCA). Since its inception, the program has been the primary legal mechanism through which U.S. employers have hired seasonal agricultural guest workers. To import an agricultural guest worker under the H-2A program, an employer must first meet the requirements set forth in statute and corresponding federal regulations. Similarly, a foreign national seeking to enter the U.S. as an H-2A guest worker must meet admissibility requirements. Both employer and guest worker requirements are set forth below.

EMPLOYER REQUIREMENTS

To hire an H-2A agricultural guest worker, an employer must first apply for **"labor certification"** from the Department of Labor (DOL) that the guest worker positions sought to be created will not adversely affect U.S. workers. To get labor certification, the employer must meet several requirements.

Need. An employer seeking labor certification must first establish that "there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition."[1] To do this, DOL regulations require that employers:

1. Undertake "positive recruitment" efforts to obtain U.S. workers through informal channels, calling or sending letters to local farm labor organizations, migrant workers and other potential workers to find U.S. workers. Employers must also advertise the jobs in newspapers of general circulation or on the radio. Under federal regulations, DOL has the authority to:
    a. Require which publications and radio outlets are used and
    b. Determine whether the advertisements should be in English or another language.[23]
2. The employer must also utilize existing federal and state employment services with responsibilities over labor certification to contact U.S. workers through local, state and interstate job orders.[4]

Wages. An employer seeking labor certification must also establish that the employment of the alien in such labor or services will "not adversely affect the wages and working conditions of workers in the United States similarly employed."[5] To do this, DOL regulations require that the employer offer the job at the higher of the:

1. Adverse effect wage rate (AEWR), as determined by DOL;

2. Prevailing wage, as determined by a state prevailing wage survey; or
3. Federal minimum wage.[6]

The Department of Labor calculates the AEWR based on the average hourly wage for a broad category of field and livestock work over a wide geographic area. In many cases the AEWR is greater than both the minimum wage and the prevailing wage.[7]

Benefits. An employer seeking to import an H-2A agricultural worker must also provide certain benefits to all prospective workers, foreign or domestic. These include:

1. Free housing for those not reasonably able to return home each day;
2. Transportation from and back to the country of origin;
3. Low-cost meals (if the customary practice); and
4. Guaranteed employment for seventy-five percent of the period specified in the work contract.[8]

These wage and benefit provisions are enforced by the DOL, which has the power to impose penalties on employers and to seek specific performance of contractual obligations on behalf of workers.[9] H-2A workers can sue for breach of the job contract in state court, just as any other employee might. In addition, U.S. workers currently have recourse to the Migrant and Seasonal Agricultural Worker Protection Act for violations of the assurances made to DOL under the H-2A program.

Work Guarantee. Finally, employers seeking labor certification must assure DOL that they will abide by the *"50 percent rule."* The 50 percent rule requires employers to replace an H-2A visa-holder with any qualified U.S. worker willing to do the same job at the same rate of pay if that U.S. worker presents himself or herself for employment within the first 50 percent of the H-2A visa-holder's contract period.[10] Certain small businesses are exempt from the rule.

PETITION PROCESS

Upon receiving certification, the employer next files a petition with the DHS for permission to bring in the H-2A workers.[11] Because most employers seek to hire several H-2A workers, individual aliens are not usually identified in an employer's petition. DHS does not, therefore, review the eligibility of the beneficiaries of employer H-2A petitions, leaving the question of admissibility to the local consulate at the time a particular H-2A applicant applies for a visa. DHS may take anywhere from 2 to 21 days to approve the requested number of visas.[12]

Once a petition is approved, DHS notifies both the employer and the State Department. The State Department then informs the U.S. consulate in the country from which the workers will be applying that visa applications can be filed for the approved number of H-2A positions. It is the responsibility of the employer to inform the H-2A applicants directly or through an intermediary that the H-2A visas are available.

GUEST WORKER REQUIREMENTS

Admissibility is only determined when the alien arrives at the U.S. consulate in the alien's country of origin. There, the worker provides a passport and an H-2A visa application.[13] To be admitted, the alien must satisfy the typical requirements of any alien entrant into the United States. Broadly speaking, he or she:

1. Must not have committed a serious criminal offense;
2. Must not be a security threat; and
3. Must not be (or have recently been) illegally present in the United States.[14]
4. Very rarely, however, is the non-immigrant worker's visa application denied for any of these reasons.[15]

ADMISSIONS PERIOD

In general, an H-2A visa may be issued for up to one year. However, through extensions, an H-2A worker can remain in the country up to three years.[16] In addition, H-2A workers are permitted to bring spouses and children with them.[17] There is *no cap* on the number of foreign workers employers may import into the U.S. under the H-2A program, so long as the certification and other requirements are met. Over the past fifteen years, the number of H-2A visas issued to foreign agricultural workers has grown six-fold, from 6,445 in fiscal year 1992 to an estimated 37,149 in fiscal year 2006.[18]

Moreover, DHS does not have any express duty to ensure that H-2A visa-holders are transported out of the country at the end of their employment period, beyond the general removal process already in law for aliens who overstay their visas. Current law provides that an alien who has overstayed an H-2A visa in the previous five years cannot return on another H-2A visa. Also, an alien illegally in the country for more than 180 days is barred from entering the U.S. for three years, and an alien who is illegally in the country for over a year is barred from entering the U.S. for ten years (generally referred to as the three and ten-year bars).[19] The H-2A program provides foreign workers no monetary incentive to leave.

ENDNOTES

[1] INA §218(a)(1)(A), 8 U.S.C. §1188(a)(1)(A).
[2] 20 CFR 655.103(d).
[3] *Ibid.*
[4] 20 CFR 655.103(d).
[5] INA §218(a)(1)(A) & (B), 8 U.S.C. §1188(a)(1)(A) & (B).
[6] 20 CFR 655.102(b).
[7] 20 CFR 655.107(a). William G. Whittaker, *CRS Report for Congress: Farm labor: The Adverse Effect Wage Rate (AEWR)*, Order Code RL32861 (Updated May 8, 2007).
[8] 20 CFR 655.102(b)(1)-(6).
[9] NA §218(g)(2), 8 U.S.C. §1188(g)(2); 20 CFR 665.110; and 29 CFR Part 501.
[10] INA §218(c)(3)(B)(i), 8 U.S.C. §1188(c)(3)(B)(i), 20 CFR 655.103(e) and 655.106(e) & (f).
[11] INA §214(c).
[12] A 1997 General Accounting Office Report depicted the role of DHS in processing these petitions as "'rubber stamping.'" General Accounting Office Report, *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, GAO/HEHS-98-20 at 48 (Dec. 1997).
[13] INA §214(a) & (b).
[14] *Id*. at §212(a).
[15] General Accounting Office Report, *H-2A Agricultural Guestworker Program: Changes Could Improve Sevices to Employers and Better Protect Workers*, GAO/HEHS-98-20 at 52 (Dec. 1997).
[16] 8 CFR 214.2(h)(5)(iv)(A), (vii), (viii)(B) & (C); 20 CFR 655.101(g).
[17] This may be done using a spouse and family visa under INA § 101(a)(15)(h)(iii).
[18] Bruno, Andrea, *CRS Report for Congress: Immigration: Policy Considerations Related to Guest Worker Programs*, Order Code RL32044 at CRS-4 (Updated June 27, 2007). In addition to the significant number of legal agricultural workers, there is a large number of illegal agricultural workers in the United States exerting a downward pressure on wages and benefits. *See generally*, Linda Levine, *CRS Report for Congress: The Effects on U.S. Farm Workers of an Agricultural Guest WorkerProgram*, Order Code 95-712 at CRS-3 (Updated April 25, 2007).
[19] INA §212(a)(9)(B), 8 U.S.C. §1182(a)(9)(B).