

THE STATUS OF CITRUS LABOR

Navigating the H-2A program

By Fritz M. Roka

The number of H-2A foreign guest workers employed in Florida's agricultural operations has grown from 4,400 in 2009 to nearly 23,000 by the start of the 2015 citrus harvesting season, more than a five-fold increase (Figure 1). More H-2A workers came to Florida in 2015 than to any other state. Industry leaders estimate that more than 80 percent of the citrus crop is being harvested by H-2A workers.

The exponential growth of the H-2A program has been ignited by a shrinking pool of domestic workers and the questionable legal documentation of the existing domestic workers. With the U.S. Congress deadlocked over immigration reform, growers in Florida are left with the H-2A program as the only legal means to hire foreign workers to supplement their labor needs.

The H-2A program is expensive both in terms of the emotional energy to navigate a highly bureaucratic process as well as the financial cost to recruit workers and support all the contractual obligations embedded in the program. The purpose of this article is to provide a brief outline of what an agricultural employer needs to consider when hiring H-2A workers. In particular, this article should provide some guidance to those who are new to the program.

H-2A is a federal program with the U.S. Department of Labor (DOL) as



the lead agency. The DOL Employment & Training Administration's (ETA) Office of Foreign Labor Certification processes the H-2A petition. The DOL Wage and Hour Division monitors compliance of the H-2A contract after workers arrive. Many, if not all, H-2A employers complain that the DOL imposes an overly complex bureaucratic gauntlet through which a petition must pass. It is important to understand that the core mission of the DOL is to support *U.S. workers* — more jobs, higher pay and better working conditions. Therefore, any program that seeks to bring in foreign workers is by definition counter to the institutional DNA of the DOL.

TWO KEY CONDITIONS

In order for an agricultural employer to hire foreign workers through the H-2A program, two conditions must be proved:

1. There is *not* a sufficient number of domestic workers to satisfy the employer's labor needs.
2. Wages paid to foreign workers will *not* adversely affect the earnings of domestic workers performing similar jobs.

The petition process, which

requires active recruitment of domestic workers through the halfway point of the contract period, is designed to satisfy condition number 1. The Adverse Effect Wage Rate (AEWR), guaranteed hours of work and employer paid expenses, including housing, satisfies condition number 2.

UNDERSTANDING THE JOB ORDER

The first step in hiring H-2A workers is to complete the "job order," also known as the ETA-790. This job order fundamentally is a contract. Historically, domestic farmworkers have been hired on an "at will" basis, meaning there are no obligations between employer and employee beyond the daily terms and conditions statement and compliance with existing farm labor laws. With H-2A workers, there is now a contractual bond between employers and workers over a defined period of time. The job order sets forth the following conditions:

- Start and end dates of the contract period
- Total number of workers you want to hire for the contract period (Total means both domestic and foreign workers.)

- Crops to be worked and detailed description of each job to be done
- Housing lease agreements or proof of ownership for the number of beds matching the number of workers requested
- Housing inspection certificates verifying that units meet local/state health standards
- A meal catering contract if a housing facility does *not* have kitchens
- Copies of insurance policies, including general liability, workers' comp and vehicle policies
- Physical addresses of the farm, all work sites and housing facilities
- Minimum hourly earnings (usually the AEW, which in Florida was \$11.12/hour as of December 2016; expect the AEW to rise each year)
- Minimum number of "offered" weekly hours
- Payroll deductions, if any
- Performance requirements, housing and/or workplace rules [Note: Any performance/experience requirement in the petition must follow "prevailing practices" as established through Department of Economic Opportunity (DEO) surveys.]

For a farm labor contractor (FLC), there are a few more items that need to be included on the job order:

- Valid federal and state FLC licenses
- A surety bond that corresponds to the number of workers being requested
- Complete list of all grower agreements spanning the contract period

The job order is sent to the Florida DEO (the state workforce agency) between 60 and 75 days before the contract's start date. The DEO will use this job order to immediately begin recruiting domestic workers for your operation. If you need 50 citrus harvesters from December 1 through April 30, and 10 domestic workers answer the job order, the H-2A

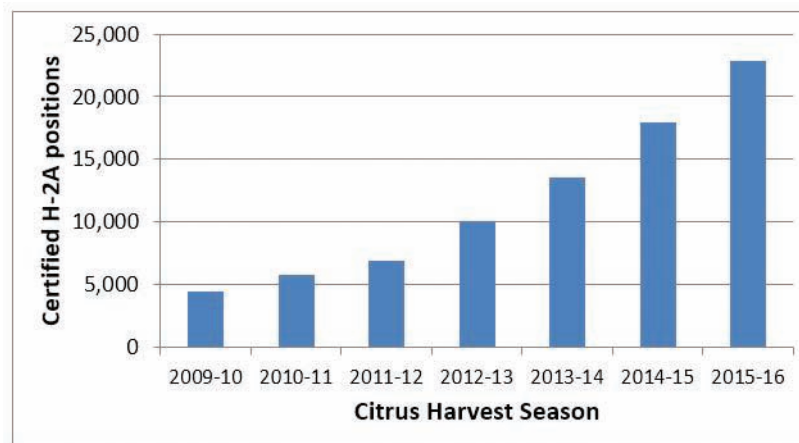


Figure 1. Number of H-2A agricultural workers in Florida, 2009–2016.

petition will be amended to "certify" only 40 foreign workers.

Even after H-2A workers arrive, the DOL will ask for reports on domestic worker recruitment through the halfway point of the contract period. In addition to the state DEO referrals, the DOL will provide specific directives as to the wider geographic area over which the employer will have to advertise for domestic workers. Any domestic worker who applies for an H-2A position must be hired and receive all the benefits stipulated in the contract.

PROCESSING THE PAPERWORK

Once the job order is approved by the DEO, you mail it along with ETA Form 9142 (Application for Temporary Employment) to the DOL-ETA Office of Foreign Labor Certification's National Processing Center in Chicago, Illinois. It is critical that these forms are completely and correctly filled out. Mistakes or incomplete information will cause processing delays and very likely jeopardize getting foreign workers by the desired date of need.

After DOL-ETA certifies a petition, the employer sends the package along with Form I-129 (Petition for nonimmigrant worker visa) to the Department of Homeland Security's Citizenship and Immigration Services (USCIS). After USCIS approves a visa request, the employer and/or in-country recruiter arranges for workers to be interviewed at the nearest U.S.

Department of State consulate office. Assuming the interviews proceed smoothly, workers will then travel to the border where they will be issued I-94 forms, which are in effect their H-2A visas.

CONSIDER THE COSTS

It is the employer's responsibility to pay for all costs related to the H-2A petition process. In particular, the employer must:

- Pay for the visa
- Pay for all transportation and living expenses to bring the workers from their *hometowns* through the consulate where they are interviewed and then all travel costs to complete the journey to their housing address in Florida
- Make a good faith effort to ensure that workers do *not* pay any "recruitment" fees. Worker payments to any third parties are prohibited by the H-2A rules, and the employer ultimately may be responsible to reimburse workers for any such payments. The Mexican National Employment Service has been vetted by both Florida growers and the Fair Food Standards Council as a reliable institution through which to appropriately recruit Mexican nationals for the H-2A program.

Pre-employment costs associated with the H-2A petition process, worker recruitment, transportation and housing have been estimated to be nearly

\$2,000 per worker, with 60 percent (\$1,200) estimated to be the cost to rent one bed for up to eight months. If an employer already owns a housing facility, pre-employment cash costs will be less. It would be, however, financially wise for employers to think about what they could have earned from renting their housing space to an H-2A contractor and charging that lost income as a non-cash cost to their H-2A program. Accounting for such an “opportunity cost” will enable the employer to better evaluate the long-term economic viability of using the H-2A program.

GET PROFESSIONAL HELP

It is recommended that employers find and pay people to help with the mechanics of processing an H-2A petition and managing the workers during the contract period. The expertise may be found in a single person or in a cadre of folks who understand individual aspects of the process such

as petition preparation, in-country recruitment, record keeping and compliance with the H-2A contract provisions. A reputable third-party company can be an invaluable resource, especially for those employers new to the H-2A program. This company should understand the many nuances of the petition and recruitment process and thereby help the employer avoid mistakes, which could delay arrival of workers and/or create added financial expenses. Even with professional help, the employer needs to be fully aware of the rules and regulations of the program. Ill-advised shortcuts or mistakes of ignorance by the employer or a service provider could lead to devastating financial consequences.

Employers who persevere and diligently follow the program rules may reap real and valuable rewards. The opportunity to rehire the best workers from the previous season allows employers to build a productive core

of workers who are familiar with a grower’s operations and expectations. More importantly, the H-2A contract gives employers a stable workforce throughout the season, providing at least “peace of mind” and at best, the certainties to most efficiently plan production schedules. 🍊

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FOR MORE

For additional information on Department of Labor rules and regulations regarding the H-2A program, see the following websites:

- https://www.dol.gov/whd/ag/ag_h-2a.htm
- <https://www.dol.gov/whd/regs/compliance/whdfs26.pdf>