H2A AND TEMPORARY AG WORKER PROGRAMS

The H-2A foreign worker program has been essential to the sheep farmers and ranchers who depend on temporary foreign labor to help care for more than one third of the ewes and lambs in the U. S. and, for over 50 years, have used and helped craft the current provisions of the program. While it has worked to fulfill that purpose, it has become incredibly burdensome for employers from a regulatory and cost standpoint. More alarmingly, the artificially inflated mandated minimum wages demanded of employer's have crippled American sheep producers' ability to compete with lamb imports and have made the program outright cost prohibitive for many producers. While the program itself is critical for a secure food supply in the United States, regulatory and potential statutory changes would shore up livestock producer's ability to produce a high quality, affordable product for consumers while ensuring a more stable labor force. The Department of Labor and Department of Homeland Security should review and address the following topics to achieve this mission.

Requests to Dept. of Labor for Regulatory Changes to Improve the Existing H-2A Program

1. **The Adverse Effect Wage Rate (AEWR).** The Immigration and Nationality Act (INA) delegates authority to Department of Labor to (1) determine there are not sufficient able, willing and qualified United States workers available to perform the agricultural labor or services of a temporary or seasonal nature for which an employer desires to hire temporary foreign workers; and (2) the employment of the H-2A worker(s) will not adversely affect the wages and working conditions of workers in the United States similarly employed. The INA is silent as to how the Secretary of Labor is to determine the effect of U.S. employers hiring H-2A foreign employees, whether adverse or not. However, it clearly places an affirmative duty to the Secretary of Labor to ensure any effect is not adverse.

   Current regulations promulgated by the Department of Labor use irrelevant surveys and wage formulas to force mandated minimum wages on H-2A employers that do not reflect real market conditions and are artificially escalated. These are referred to as the Adverse Effect Wage Rates. Ironically, these mandated minimum wages do not prove there has in fact been any adverse impact resulting from the employment of H-2A employees. Rather than performing accurate evaluation of the potential effects of employing H-2A employees, the Department of Labor forces an arbitrary minimum wage on employers that is devoid of economic rationale. The livestock industry petitions the Department and the Secretary to amend or repeal existing regulations to conform to the INA requirement. If an adverse effect is determined, all current regulatory methods of determining the different levels of the AEWR should be amended to reflect applicable market conditions and sound economic rationale.

2. **Farmworker Protection Final Rule.** Released in early 2024, this regulation has been subjected to legal action resulting in preliminary injunction rulings. The cost to implement an obviously contentious and possibly unconstitutional regulation has been very burdensome for employers and the Department of Labor. The regulation as finalized is a maze of repetitive and questionable rules that may be beyond the agency's authority. For example, the rule mandates "progressive discipline" procedures and access to worker housing (on ranch or on the open range) by worker advocates or union representatives that seem to be lifted directly from NLRB union rules rather than farmworker or herding regulations. There are three partial preliminary injunctions that have been issued against the final rule, each of which cites potential unconstitutional provisions of the rule. The Farmworker Protection Final Rule should be repealed entirely.

For more information, please visit the ASI website at www.sheepusa.org.
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3. **Special Procedures.** A portion of the livestock industry utilizes special provisions within the broad H-2A programs. The ability to hire temporary foreign herders dates back to World War 2, years before the INA, and when the current H2A was created in 1986, Congress directed that DOL use "special procedures," in recognition that herding is significantly different than crop agriculture. DOL issued special provisions beginning in 1989. Their existence is a direct result of the unique requirements to care for livestock in range production and shear sheep. Adjustments and updates to the current special procedures are needed to better serve the needs of today's livestock producers. Some of the more urgent needs would be:
   - An adjustment of the required "on call" work schedule to qualify for a range herder occupation.
   - Afford Sheep Shearers the exemption from filing deadlines that range herders already have.
   - Recognize the exemption from Migrant and Seasonal Protection Act given to Sheep Shearers and remove the requirement for employers to carry multiple and overlapping surety bonds.

Requests to Dept. of Homeland Security for Regulatory Changes to Improve the Existing H-2A program.

1. **Asylum Fees.** As of April 1, 2024, USCIS assesses an "Asylum Fee" to each petition form submitted for approval to employ H-2A workers. In addition to the regular fee increases, the cumulative cost impact ranges from an 83% increase for a small employer to 268% increase for large employers. While USCIS cites increasing cost of processing forms to justify the increase in fees, it's not clear that there is a nexus to form processing expenses. Employers are assessed a fee ($300 per form for small employers/ $600 per form for employers with more than 25 fte) each time they file a nonimmigrant form. DHS fees should reflect actual costs and increases should result in improvements and efficiency. It is unfair to shift the cost of other immigration programs to H-2A program users by adding onerous fees. The asylum fee should be removed from the form fees immediately.

2. **Modernizing H-2A Program Requirements, Oversight, and Worker Protections Regulation.** USCIS released this regulation on 12/18/2024 with an effective date of 01/17/2025. Despite its title, the final rule does nothing to modernize the program but focuses heavily on expanding DHS oversight of H-2 program use. The rule mandates that employers will be liable for any prohibited fees paid by employees, whether the employer was aware of such transactions or not. Further, DHS is granted additional authority to conduct surprise inspections accessing employer's property and even penalizes any employer the investigator deems "uncooperative". Along the lines of the Department of Labor's Worker Protection Regulation, this final rule was not made in good faith, penalizes employers making every effort to comply and does very little to actually protect H-2A workers. The Modernizing H-2A Program Requirements, Oversight, and Worker Protections Regulation should be repealed entirely.

3. **Modernizing processing of H-2A petitions.** Beyond negligible case status updates on their website, USCIS has made no effort to improve or modernize the processing of H-2A petitions. Paper forms must be mailed to the processing center. Forms will be denied or returned without an actual ink signature. All notices are mailed via USPS. When those notices are lost by USPS, the agency will not answer inquiries. If a form is delayed beyond the agency purported 15-day processing time, employers must contact a congressional member to request help through the congressional liaison. Emailing notices would provide substantial cost savings for USCIS, shorten processing times and result in more reliable communication. A review of USCIS procedures and use of more economical resources and processes is urgently needed.

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Proposed Statutory Changes to the H2A Temporary Ag Worker Program Via New Legislation

Create a Workable H2A Temporary Ag Guestworker Program. The current program is broken, it is expensive, flawed and plagued with red tape. A guestworker program should help sheep producers who are willing to pay a fair wage, employ law abiding, dependable noncitizen workers when no American workers are available or in the case of range herders, do not exist.

Instead, H2A employers are burdened with costly mandates and exposed to frivolous litigation. Employers must pay an artificially inflated wage rate (some states require additional overtime payments) that is higher than the prevailing wage in their region as well as housing, food, clothing and transportation for their workers at their own expense. These unnecessarily burdensome requirements place H2A employers at a competitive disadvantage in the marketplace and threaten the future of over one third of U.S. sheep producers.

A new H2A guestworker program must be reliable, efficient and fair, ensuring sheep farmers and ranchers will have access to a legal, stable supply of workers for seasonal as well as year-round work. Key components of any legislation should include the following industry specific provisions:

- **A fair wage rate based on production cost limitations and marketplace realities that is not artificially inflated or subject to unreasonable overtime payment requirements and accounts for all costs borne by the employer.**
- **Codification of the specific Special Procedures for Herders.**
- **A streamlined process to allow Herders to return to the same farm or ranch year after year.**
- **Extended stays for Herders up to 3 years.**
- **Allocation of a minimum of 2500 visas for "range herders" subject to the Special Procedures.**
- **Elimination of unnecessary fees and advertisement requirements.**

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