

# **EPI comments on proposed changes to regulations governing the H-2A visa for temporary agricultural workers**

**Public Comments** • By [Daniel Costa](#) • September 24, 2019

*In addition to these public comments that EPI submitted to the Department of Labor re RIN 1205-AB89, EPI also signed on to the [extensive comments re RIN 1205-AB89 submitted by Farmworker Justice](#) on behalf of 42 organizations that focus on migrant worker rights.*

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*Submitted via regulations.gov\**

Re: [Temporary Agricultural Employment of H-2A Nonimmigrants in the United States \(RIN 1205-AB89\), Notice of Proposed Rulemaking<sup>1</sup>](#)

## About EPI

The Economic Policy Institute (EPI) is a think tank in Washington, D.C., that has investigated and reported on labor market issues and the conditions of low- and middle-income workers since 1986. EPI examines the economic landscape and analyzes what is happening to workers and working families—regardless of immigration status—including the more than 1.4 million migrants who are employed in the United States with temporary work visas. EPI has long had an interest in examining and safeguarding the wages and working conditions of all workers, and has published research relating to labor standards for migrant workers in temporary work visa programs as well as similarly situated U.S. workers. EPI has offered a comprehensive plan to reform the U.S. immigration system in a way that uplifts labor standards, raises wages, and leads to more broadly shared prosperity.

## I. Introduction: The H-2A visa program represents a large and growing share of farm jobs but is deeply flawed and in need of reform

We are submitting these comments in response to the U.S. Department of Labor's (DOL's) Notice of Proposed Rulemaking (NPRM) to update the regulations governing the H-2A temporary work visa program.

The H-2A temporary work visa program has grown in popularity among farm employers, increasing from over 48,000 jobs certified by the U.S. Department of Labor in 2005 to over 242,000 in 2018, while the number of visas issued by the U.S. Department of State has increased from nearly 32,000 to over 196,000 during the same period.<sup>2</sup> The H-2A workforce now represents roughly between 7 and 10% of the farm labor force nationwide working in crops, and over half of the jobs certified in 2018 were concentrated in the five states of Georgia, Florida, Washington, North Carolina, and California. The rapid expansion of H-2A has meant that the majority of new entrants to the farm workforce are now workers from Mexico with H-2A visas.<sup>3</sup>

Despite the rapid growth of H-2A, little has been done to improve the legal and regulatory framework in H-2A in a way that would better protect both migrant workers and U.S.

workers seeking jobs in agriculture, improve wages and working conditions, and curb the countless cases of abuse and exploitation of H-2A workers.

Although they are legally authorized to work, “guestworkers” employed with temporary visas are among the most exploited laborers in the U.S. workforce because the employment relationship created by the visa programs leaves workers powerless to defend and uphold their rights; this is certainly the case in H-2A, as reports from the media, advocacy groups, and government audit reports have pointed out time and time again.<sup>4</sup>

The abuses often start before guestworkers even arrive in the United States—many are required to pay exorbitant fees to labor recruiters to secure U.S. employment opportunities, even though such fees are usually illegal. Those fees leave them indebted to recruiters or third-party lenders, which can result in a form of debt bondage. After arriving in the United States, guestworkers may find out the jobs they were promised don’t exist.<sup>5</sup>

U.S. workers seeking jobs in agriculture are also vulnerable to being discriminated against and kept out of farm jobs because employers sometimes prefer exploitable H-2A guestworkers, as news reports and legal settlements have detailed.<sup>6</sup> And government oversight of the H-2A program by DOL has been woefully inadequate: Companies that are frequent and extreme violators of these rules are often allowed to continue hiring through H-2A and other temporary work visa programs with impunity.<sup>7</sup>

***For these reasons, we oppose any changes contained in the proposed rule that will have the effect of lowering wages and degrading labor standards for H-2A workers and similarly situated U.S. workers.*** Instead—considering the many flaws in the H-2A program and its rapid growth—protections and labor standards for H-2A migrant workers and U.S. workers in agriculture must be improved. Unfortunately, much of what DOL has proposed in this NPRM is misguided and will not help achieve that goal; it will instead result in an unnecessary and unjustified transfer of wealth from poor and underpaid farmworkers to employers and farm owners. We suggest that DOL consider our comments and adjust the proposed rule to reflect the suggestions offered herein.

## **II. Modifying the 50 percent rule will diminish the ability of U.S. workers to access farm jobs**

As mentioned above, news and media reports have detailed how employers sometimes take extreme measures to avoid hiring U.S. workers for farm jobs—making it imperative that there be increased, not decreased, protections for U.S. workers seeking employment on farms. DOL is proposing in this NPRM to eliminate what’s commonly known as the “50 percent rule,” which permits U.S. workers to have first preference for H-2A jobs—even after H-2A workers have begun employment—up until the first half of the work contract is completed. (After 50 percent of the work contract is completed, there is then no obligation for an employer to hire a U.S. worker for the job). DOL is proposing to replace the 50 percent rule with a rule that only obligates employers to hire U.S. workers during the first 30 days of a work contract.

In 2018, according to an unpublished EPI analysis of DOL’s H-2A labor certification disclosure data, the average duration of an H-2A job was 165 days, or approximately five and one-half months. That means that under the 50 percent rule, U.S. workers had, on average, 82 days to apply for a job that was filled by an H-2A worker if they missed the initial recruitment window or did not find out about the job until after the H-2A worker began employment. The 50 percent rule thus provides U.S. workers with additional time to find out about work opportunities they might be interested in. Under the proposed rule, on average U.S. workers will have 52 days less to find and apply for a job that is available to them, nearly two months less time, making it much less likely that U.S. workers will be able to access farm employment offered by H-2A employers.

### **III. Permitting staggered entries will undermine the utility and credibility of DOL’s labor market test**

Another proposal in the NPRM will permit what is known as “staggered entry.” Staggered entry is already a part of the H-2B visa program, but there it is referred to as “staggered crossings.” In the H-2B context, seafood employers are allowed to have their H-2B employers come into the United States to begin work “at any time during the 120 day period on or after the employer’s certified start date of work provided certain conditions are met.”<sup>8</sup> DOL’s proposal will apply the H-2B seafood staggered crossings rule to all H-2A workers and call it staggered entry. The immediate impact will be to completely undermine the utility and credibility of the labor certification process, which serves as the labor market test to see if an H-2A job opportunity represents a true shortage in the labor market at a particular point in time and in a particular area.

The H-2A visa is intended for seasonal jobs, and the average H-2A job lasts 165 days (as discussed in the previous section), but permitting employers to delay H-2A workers’ start dates by up to 120 days—approximately four months—after the day the employer has certified to DOL that they need a job to begin, means that the labor certification and the recruitment of U.S. workers for a particular job at a particular time is entirely a sham process. If employers are permitted to do staggered entries, then both migrant and U.S. workers seeking to fill farm jobs would not have real and meaningful access to job terms and start dates. Despite the fact that the rule would require that employers “continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified Application for Temporary Employment Certification, whichever is longer,”<sup>9</sup> the reality is that staggered entries create uncertainty about start dates for U.S. workers, which leads to a labor certification process that is unfair to both migrant and U.S. workers and would likely discourage U.S. workers from applying for farm jobs. U.S. workers will be on notice through this proposed regulation that they may have to begin a temporary job four months later than they originally thought they would.

In addition, the proposed staggered entry rule is surely ultra vires and, for this reason, should not be implemented by DOL. As DOL acknowledges in the NPRM, the H-2A staggered entry rule is modeled after the H-2B staggered crossings rule, which was created and implemented only after section 108 of the *Consolidated and Further*

*Continuing Appropriations Act of 2015* explicitly authorized it and became law.<sup>10</sup> While the H-2B staggered crossings rule is an unfortunate development for the same reasons expressed above, creating a staggered entry rule for H-2A that is modeled after the H-2B staggered crossings rule requires that DOL have an explicit statutory basis for it. The H-2B staggered crossings rule has a statutory basis but the H-2A staggered entry rule does not; thus, it would be illegal to implement this rule.

#### **IV. The proposed revisions to the H-2A wage methodology will not improve wages for H-2A workers and similarly situated U.S. workers**

We support the proposed continued general rule that requires H-2A employers to pay the highest of (1) the Adverse Effect Wage Rate (AEWR),<sup>11</sup> (2) the prevailing local wage as determined by a State Workforce Agency (SWA), (3) the wage established in a collective bargaining agreement, (4) the state minimum wage, or (5) the federal minimum wage. However, the terms of the proposed rule must be modified before the final rule stage in order to represent an improvement over the current rule. ***The H-2A program contains a statutory requirement that the wages of H-2A workers “will not adversely affect the wages and working conditions of workers in the United States similarly employed,”<sup>12</sup> but as written, the proposed rule is a step backward when it comes to wages for H-2A workers and U.S. workers, which is why we oppose the wage rule as written in this NPRM.***

First, the proposed wage methodology will essentially eliminate the requirement that employers offer at least the local prevailing wage, by making surveys conducted by State Workforce Agencies of local wage rates optional and by imposing requirements for crafting surveys that cannot be easily met by SWAs without additional funding. This means such surveys would be less likely to be completed, which would in turn decrease the availability of accurate local wage rates. DOL should instead look to strengthen and improve the prevailing wage surveys and provide SWAs with more funding to conduct them.

As an alternative, DOL has proposed allowing the use of prevailing wage surveys conducted by other state agencies or universities, which could then be submitted to the SWA. The rule recognizes that this could lead to conflicting surveys but does not offer a methodology for resolving such conflicts. Nor does the proposed rule address whether or not universities could accept money from grower associations to conduct prevailing wage surveys, which would result in an absurd conflict of interest and undermine the credibility of such surveys. Without further guidance addressing these serious concerns, we suggest that surveys that are not conducted by SWAs or not conducted or overseen directly by DOL not be permitted. The use of alternative wage surveys in the H-2B program are a useful case study: These alternative surveys have been used primarily to justify lowering the wages paid to H-2B workers, as individual examples and litigation have revealed,<sup>13</sup> and, for this reason, we urge DOL not to go down the path of permitting such wage surveys as an avenue to do the same for H-2A workers.

Second, the proposed methodology would also divide the Farm Labor Survey's (FLS's) category of "field and livestock workers" into a larger number of job categories for the purpose of setting an AEWR that is more closely tied to an occupation; but when a specific, narrower occupation is unavailable, DOL proposes using the statewide average wage for the occupation that is reported by DOL's Occupational Employment Statistics (OES) survey for the occupation according to Standard Occupational Classification (SOC) codes. However, wage rates for the same occupation can vary widely within a state, especially in a large state like California, which has some counties with very high living costs (e.g., Monterey) and some with more reasonable living costs (e.g., many of the counties in the San Joaquin Valley). And given that the OES also reports more local and relevant wage survey data (for Metropolitan Statistical Areas [MSAs], counties, and nonmetropolitan areas), which could easily be used to set the AEWR, it makes no sense to use the statewide OES wage as the reference point.

The local wage rates are easily accessible on Foreign Labor Certification Data Center's website, which is public and free.<sup>14</sup> The FLC Data Center's online wage library hosts wage rates surveyed by the OES and makes them available by local area and SOC code; it lists the averages for each area by occupation. Requiring that employers search for the local OES wage for an occupation would not cause any greater burden on employers than requiring them to search for the statewide OES wage rate for the occupation. In fact, most prevailing wage rates in a separate temporary work visa program managed by DOL—the H-2B visa—are set by occupation and local area through use of the FLC Data Center website, and DOL has asserted in the past that wage rates "derived from OES survey data will be more reflective of actual market wages than FLS data, and thus will best protect the wages and working conditions of U.S. workers from adverse effects."<sup>15</sup>

DOL has proposed to make the H-2A wage methodology much more complicated through the disaggregation of the FLS and the use of the OES. If DOL insists on going down this route, DOL should require that the AEWR be set at the highest wage from among all of the data sources available, which include the state or regional wage for the occupation from the FLS, the statewide OES wage for the occupation, and the local OES wage for the occupation (rather than picking the statewide OES in every case and ignoring the local OES wage).

In sum, in order to prevent downward pressure on farm wages, the updated prevailing wage methodology should be the highest among (1) the local prevailing wage rate established by a SWA; (2) the wage established in a collective bargaining agreement; (3) the state minimum wage; (4) the federal minimum wage; (5) the state or regional wage reported by FLS; (6) the local wage reported in the OES for the occupation; or (7) the statewide wage reported in the OES for the occupation.

## **V. Shifting transportation costs to workers is an unreasonable transfer of wealth from low-paid migrant workers to H-2A employers and farm owners**

Current H-2A regulations require employers to reimburse workers for their long-distance travel costs from their home to their place of employment and back home again at the end of their term of employment. The proposed rule would require employers to pay the costs of transportation for H-2A workers only to and from the U.S. consulate or embassy in their home country, rather than to and from their hometown or region, which may be a long distance from the nearest embassy or consulate. The NPRM shows in Table 4 that DOL estimates this proposed rule will result in H-2A workers paying \$789.61 million more over the next 10 years than they would to travel to and from their H-2A jobs under the current rule (in 2017 dollars).<sup>16</sup>

H-2A workers, and farmworkers in general, are some of the lowest-paid workers in the U.S. labor market. As EPI research has shown, H-2A workers earn approximately the same wages on average as unauthorized immigrant workers who have virtually no labor rights in practice—and this is largely due to the legal framework of the H-2A visa that renders them essentially indentured workers without the ability to switch jobs and employers.<sup>17</sup> The U.S. Department of Agriculture has also show that nonsupervisory farmworkers in the United States earned only between 56 and 57% of what U.S. nonfarm production workers earned in 2017.<sup>18</sup> This means that many farmworkers and H-2A workers earn wages that are at or near poverty levels. Therefore, requiring H-2A workers to pay over three-quarters of a billion dollars to travel to low-paying and/or poverty-level jobs in the United States—jobs that most H-2A workers have already paid illegal recruitment fees to obtain—is not only unreasonable, it is also an unconscionable transfer of wealth from these workers to farm owners who will earn a projected net farm income of \$88 billion in 2019 alone<sup>19</sup> and therefore can easily absorb the few hundred dollars each H-2A worker needs to get to his or her worksite in the United States.

## **VI. Conclusion: Congress must act to improve conditions for the farm labor force and for H-2A workers**

The only rational and durable solution for stabilizing the farm labor force is for Congress to craft solutions that do not rely on temporary immigration statuses and indentured guestworkers like H-2A workers, that pay farmworkers a living wage, that keep these workers protected in the fields, and that allow them to become permanent members of American society. First and foremost, Congress should pass a law that provides a path to citizenship for the current members of the farm labor force who lack an immigration status. Next, Congress should limit the time that any future H-2A workers or guestworkers employed in agriculture may remain in a temporary status by allowing those workers to self-petition for permanent residence after a provisional period working in H-2A or another temporary status. In addition, Congress should appropriate more funding to allow DOL to audit a significant share of H-2A employers every year to ensure compliance with

regulations and job contract terms. Finally, Congress should pass a law that permanently bans any employer from hiring through H-2A or any other temporary work visa program if that employer has violated any labor or employment laws.

Sincerely,

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Economic Policy Institute

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\* *The letter published here has been slightly modified from the version that was submitted to regulations.gov. Some passages have been lightly edited for clarity; the substantive content has not changed.*

## Notes

1. 84 Fed. Reg. 36168.
2. Office of Foreign Labor Certification, “[OFLC Performance Data](#)” (online disclosure data), U.S. Department of Labor, last updated September 24, 2019; Bureau of Consular Affairs, “[Nonimmigrant Visa Statistics](#)” (online data resource), U.S. Department of State, n.d.
3. Philip Martin, “[The H-2A Farm Guestworker Program Is Expanding Rapidly: Here Are the Numbers You Need to Know](#),” *Working Economics* blog (Economic Policy Institute), April 13, 2017; Philip Martin and Daniel Costa, “[Agricultural Guestworkers: The Challenge of the Expanding H-2A Program](#),” *Working Economics* blog (Economic Policy Institute), August 1, 2017.
4. See, for example, Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, “[The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare](#),” *BuzzFeed News*, July 24, 2015; Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*, February 2013; U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154, reissued May 2017.
5. See, for example, Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*, n.d.; United Nations Office of the High Commissioner for Human Rights, “[End of Visit Statement, United States of America \(6–16 December 2016\) by Maria Grazia Giammarinaro, UN Special Rapporteur in Trafficking in Persons, Especially Women and Children](#),” Washington, D.C., December 19, 2016. See also United Nations Office of the High Commissioner for Human Rights, “[Debt Bondage Remains the Most Prevalent Form of Forced Labour Worldwide—New UN Report](#)” (press release), September 15, 2016; United Nations Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences*, Thirty-third session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, July 4, 2016, downloadable from [https://ap.ohchr.org/documents/sdpage\\_e.aspx?m=160](https://ap.ohchr.org/documents/sdpage_e.aspx?m=160) (HRC 33rd Session 04/07/2016, A/HRC/33/46); United Nations Office on Drugs and Crime, *The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons*, 2015.
6. See, for example, Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, “[All You Americans Are Fired](#),” *BuzzFeed News*, December 1, 2015; U.S. Department of Justice, “[Justice Department Settles Claim Against Florida Strawberry Farm for Discriminating Against U.S. Workers](#)” (press

release), June 11, 2019.

7. See, for example, Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, “[Employers Abuse Foreign Workers. U.S. Says, by All Means, Hire More](#),” *BuzzFeed News*, May 12, 2016.
8. U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, “[2015 H-2B Interim Final Rule FAQs, Round 9: Staggered Crossing of H-2B Nonimmigrants Working in the Seafood Industry](#).”
9. 84 Fed. Reg. 36172.
10. Public Law 113–235, 128 Stat. 2130, 2464.
11. The AEWR is “the minimum wage [rate] the Department [of Labor] has determined must be offered and paid by employers to H-2A workers and workers in corresponding employment so that the wages and working conditions of similarly employed workers in the United States (U.S.) will not be adversely affected” (83 Fed. Reg. 66307), and in most cases is “equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the United States Department of Agriculture (USDA)” (Employment and Training Administration, “[Adverse Effect Wage Rates—Year 2019](#)” (online table), U.S. Department of Labor, last updated December 21, 2018).
12. 8 U.S.C. §1188.
13. Daniel Costa, “[H-2B Crabpickers Are So Important to the Maryland Seafood Industry That They Get Paid \\$3 Less per Hour Than the State or Local Average Wage](#),” *Working Economics Blog* (Economic Policy Institute), May 26, 2017; Daniel Costa, *The H-2B Temporary Foreign Worker Program: For Labor Shortages or Cheap, Temporary Labor?* Economic Policy Institute, January 2016.
14. See <https://flcdatacenter.com>.
15. 73 Fed. Reg. 77173 (Dec. 18, 2008).
16. 84 Fed. Reg. 36241.
17. Lauren A. Apgar, *Authorized Status, Limited Returns: The Labor Market Outcomes of Temporary Mexican Workers*, Economic Policy Institute, May 2015.
18. Steven Zahniser et al., *Farm Labor Markets in the United States and Mexico Pose Challenges for U.S. Agriculture*, EIB-201, U.S. Department of Agriculture, Economic Research Service, November 2018.
19. U.S. Department of Agriculture, “[U.S. Net Farm Income Forecast to Increase in 2019](#)” (online data chart), Economic Research Service (last updated August 30, 2019).