

GROWERTALKS

Cover Story

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Getting to Know H-2A

Jennifer Zurko

Q&A with Craig

We asked AmericanHort's Senior VP of Industry Advocacy Craig Regelbrugge for his thoughts on H-2A and a quick update on current policy proposals from Capitol Hill.

Q. Do you think H-2A is a good option for growers who've never used a government program before?

A. "Good" is in the eye of the beholder. Put another way, it really is the "last option," after efforts to recruit U.S. workers have failed to meet the need. But growers need to go in eyes-wide-open, having done their homework. And they have to expect paperwork burdens and possible delays.

Q. Is it the best (and maybe only) option for growers who need reliable labor? Or does it depend on where they're located?

A. It's more a question of "what they do" than "where they are." We have H-2A users in our industry, and in other parts of specialty crop agriculture, all over the country. Sometimes, though, seasonality is a barrier. In essence, both the job and the worker must be temporary or seasonal (generally 10 months or less).

Proving seasonal need isn't a problem for most in our industry, but it occasionally arises as a challenge. Housing can also be a major barrier—many growers lack the required housing, and it can be a major capital expense and logistical challenge.

Q. How is H-2A different from E-Verify and H-2B?

A. H-2A is the temporary, non-immigrant visa program (meaning, the worker isn't permanently immigrating, but rather is here temporarily) that is available for jobs in production agriculture (including nursery and greenhouse). H-2B is an option for "low-skill" (I hate that term) temporary or seasonal jobs outside of agriculture, such as landscaping and hospitality. H-2B operates similarly, but there are differences.

For instance, H-2B does not require the employer to provide housing. However, H-2B does have a cap on how many visas can be issued each year. This year, the demand for visas far exceeds the cap, leaving many employers in the lurch. Both programs require an employer to actively seek willing and available U.S. workers before receiving DOL approval to petition for visas for foreign workers under these programs.

E-Verify is a federal online platform for employers to verify the work authorization status of new hires. The E-Verify system checks document numbers (such as a Social Security number) against federal databases. Use of E-Verify is generally voluntary; however, it is required for certain federal contractors and it is required in a handful of states,

typically tied to a state function, such as business licensure.

Q. Based on your discussions with growers and business owners, how could the H-2A program be improved?

A. Despite the program's flaws, H-2A use is rising fast in our industry and beyond, including in states like California where H-2A use has historically been minimal. All this reflects the dire and worsening labor situation in agriculture. AmericanHort supports reforms to H-2A that would streamline the program to make it more efficient and reliable, and to make it more cost-effective. Such reforms have been a feature of various bills —some ag-specific, and some comprehensive—over the last 15 years. While federal legislation would be needed to achieve some reforms, others could be achieved administratively (through policy and regulatory reform).

Q. What is currently happening with regard to H-2A legislatively? Anything new to report?

A. There are various legislative proposals that would improve, or in one case, replace H-2A completely. The “replacement” proposal (Rep. Bob Goodlatte's H.R.4760 bill) has some good features and some serious flaws. Among them, it would impose a statutory cap on visas, something H-2A does not now have. None of the proposals has much likelihood of going anywhere, at least until a resolution is agreed to for addressing the “deferred action” or DACA recipients.

On a very limited, but positive, note, Rep. Dan Newhouse (R-WA) successfully added an amendment to the recently passed omnibus spending bill that allows H-2A workers to occupy housing built using USDA “Section 514” loans. Housing is a major impediment to using H-2A, so this is a limited, but important, step.

Q. IF (and that's a big if) we ever get comprehensive immigration reform, would H-2A go away or just be revamped?

A. Some say “replace it” and some say “improve it.” Given what we've learned over the past 15 years, a reasonable approach would be to substantially reform H-2A, but retain its structure as an uncapped program (with a requirement to seek and hire U.S. workers first).

Q. Have you noticed an uptick in growers, especially in horticulture, applying for H-2A certification?

A. Absolutely. And we are receiving more and more calls from AmericanHort members seeking advice as they consider options. We provide AmericanHort premium members with access to a legal team with deep H-2 program expertise to help them with due diligence.

For more information, visit AmericanHort.org or email Craig at CraigR@AmericanHort.org.

The basics

Here's a quick rundown on what the H-2A program entails and what's required from employers, including the latest updates that went into effect March 21. For more complete information, visit U.S. Citizen-ship & Immigration Services (uscis.gov) and the U.S. Department of Labor (dol.gov).

- The employer must demonstrate the need for a specific number of workers and show that he/she has tried to recruit U.S. workers.
- It must be for temporary or seasonal work only.
- Employers cannot hire H-2A workers within 60 days of laying off any U.S. workers unless the laid-off staff was offered and rejected the agricultural jobs.
- The employer must pay all H-2A workers the highest of the following applicable wage rates at the time the work is performed: the adverse effect wage rate; applicable prevailing wage; the agreed-upon collective bargaining rate; or

the Federal or State statutory minimum wage. Not less than the applicable H-2A wage must be paid to any U.S. worker performing any job task in common with the job tasks included in the H-2A job order.

- The employer must provide each worker with a copy of their work contract in their native language.
- Employers must provide housing at no cost to the workers.
- Employers must provide workers three meals a day or access to free and convenient cooking facilities.
- Employers must pay for all the travel expenses H-2A workers incur traveling to and from their country of origin, along with daily travel to and from the worksite (if housing isn't onsite).
- A specific job opportunity must be temporary or seasonal, currently interpreted as up to 10 months; the maximum in-country stay on an H-2A visa is three years. Those who have held H-2A non-immigrant status for a total of three years must depart and remain outside of the United States for an uninterrupted period of three months before seeking readmission as an H-2A non-immigrant. Previous time spent in other H or L classifications counts toward total H-2A time.

Participation in the H-2A program is a three-step process:

1. Before requesting H-2A classification from the USCIS, the employer—referred to as a “petitioner” by the DOL—must apply for and receive a temporary labor certification for H-2A workers from the DOL.
2. After receiving a temporary labor certification for H-2A employment from the DOL, the petitioner must file Form I-129 with the USCIS. With limited exceptions, the petitioner must submit original temporary labor certification as initial evidence with Form I-129.
3. After the USCIS approves Form I-129, prospective H-2A workers who are outside the United States must either: apply for an H-2A visa with the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad and then seek admission to the United States with U.S. Customs and Border Protection (CBP) at a U.S. port of entry; or directly seek admission to the United States in H-2A classification with CBP at a U.S. port of entry, if a worker doesn't require a visa in cases where an H-2A visa isn't required.

A little history

The H-2A program was born from the Immigration & Nationality Act of 1952, which introduced a temporary, unskilled worker category in the bill, called H-2. In 1986, the Immigration Reform & Control Act—a major piece of legislation that was signed into law by the Reagan Administration giving amnesty to almost three million undocumented people—separated its guestworkers into two categories: H-2A (an uncapped category for agricultural workers) and H-2B (a capped category for temporary workers in other industries).

Originally, the number of countries eligible for H-2A visas was 28 and now includes over 80. Since it was formed in 2002, the Department of Homeland Security has been in charge of designating which countries are eligible.

H-2A by the Numbers (FY2017)

- Number of positions requested to be filled with an H-2A worker: 206,156
- Number of H-2A jobs certified: 200,049
- Increase in H-2A jobs since 2016: 14.9%
- Increase in H-2A jobs since 2006: 160%

- Top 5 states certified for H-2A visas: Florida, Georgia, North Carolina, Washington and California

Source: Office of Foreign Labor Certification

Advice from the veterans

We asked a few growers who've been using the H-2A program for some tips on what to keep in mind when you're going through the process of requesting worker visas and handling all of the requirements.

Emily Showalter

HR Manager—Willoway Nurseries, Avon, Ohio

We've been using H-2A for 20 years. I know that we wouldn't be where we are today without the program.

The best advice I would give a grower who's thinking about using H-2A is to partner with an H-2A agent that shares the same passion for H-2A that we do for horticulture. Our agent complements our business and works with us as a member of our team. They understand the importance that our H-2A employees have to the success of our business. They're always available to answer questions any time day or night and help us with compliance and all of the steps in the program (there are five government agencies you have to deal with through the process with countless steps and "gotchas" as we call them).

While I absolutely love our agent and the service they provide is outstanding, it's also vital that the company understands the rules and regulations, asks questions and becomes familiar with the steps. Get involved with your legislators as well. Almost every year we've had to call our State or U.S. Representative to help us with a glitch or hold up in the approval process. They've established relationships with the right people at the different government agencies to get the answers we need to move our application forward.

Mark Sellew

Owner—Prides Corner Farms, Lebanon, Connecticut

This program is vital for the future success of our industry. It's a sustainable model to employ an incredibly motivated, stable, hard-working and legal labor force for our business.

The same workers come back every year. They arrive from Mexico in March very close, most years, to the time we need them and then we send them all home in the fall exactly when our work load lessens, knowing that over 95% will return the following year. That's unheard of with a local labor force.

The challenges with H-2A are that it's expensive and somewhat complicated with the approval process. I believe that the positives far outweigh the negatives. The extra cost and regulatory process are minor when considering the positives—a legal labor force, a high-quality labor force and a stable, returning labor force.

Art Parkerson

Owner—Lancaster Farms, Suffolk, Virginia

The one thing I wish somebody told me was that the moment you sign the contract you are no longer innocent until proven guilty. From now on, you'll have to prove you're doing everything right. Study the rules like you're preparing for the LSAT and document everything.

The most important thing to remember when you enter the H-2A program is that you're making a contract with the Federal Government and all your rights go out the window once you sign on the dotted line. Suddenly, your rights are limited to what Uncle Sam says they are, as spelled out in the contract you just signed.

You can no longer hire (or decline to hire) who you want, pay them what you want, offer them the hours you want, house them like you want. Your judgement and common sense no longer matter. You are bound by the rules and terms of the contract—and there are a lot of rules! Many won't make sense or seem to really apply to you, but they do.

The Department of Labor is going to pay you a visit—not the first year, maybe not the second—but they will show up for an audit. And you'll have to prove you've done everything right. (Documentation!)

We made the decision about 15 years ago to use the program because I couldn't in good conscience hire workers with dubious documents. I got tired of the whole “Wink, wink, I'm not a document expert!” act.

The good news is the workers are the best—better than you can imagine. They will work hard. They will work as many hours as you'll give them. It's better for them and much better for their families they left behind.

The sad truth is that an awful lot of farmers mistreat, cheat and exploit their foreign workers every chance they get. They'd make their workers live in a chicken coop—and charge them rent, too—if they could get away with it. Now, you might provide your workers with luxuries (we do) like central air and heating, high-speed Internet and satellite TV with all the Spanish channels, but that doesn't give you a gold star. You still have to make sure every window has a screen (even though they never open a window) and every bed is the right distance apart (even if the workers unbunk the beds themselves, you'll still be in violation).

It won't be business as usual. It will be a hassle. It's worth it.

Ed Overdevest

Owner—Overdevest Nurseries, Bridgeton, New Jersey

For growers facing the challenges of today's Ag Labor situation, H-2A offers both salvation and peril.

At its best, this federal program allows you to access highly willing and able workers whose legal presence spares you the insecurity of the current immigration dilemma. But this security comes at a cost. Besides the legal expenses involved in walking the regulatory minefield of the program, participating employers pay total compensation costs that run approximately 30% to 50% higher than the industry median—a considerable competitive disadvantage considering that labor costs can be 25% to 40% of overall operating costs. Despite that, the talent and dedication of a properly recruited and inspired workforce can allow for productivity and plant quality levels that make the program economically doable.

For those looking to achieve this Holy Grail of survival, be sure you seek out the best possible legal assistance to guide you every step of the way. Even at that, you'll need to be mindful that the Catch-22 nature of current regulations could have you facing unexpected enforcement actions. As an overall consideration, you must prioritize the prerogative of domestic workers—despite the reality that too few are willing or able to do the physical work of our industry.

After 19 years in the program, we've found that every year the application process presents new challenges. Inevitably, these confounding delays result in anxiously needed workers arriving late.

In the final analysis, H-2A can provide the security of an ample and legal workforce whose dedication and skill can

allow for a sufficient increase in productivity to afford the added costs. Nonetheless, reform of H-2A is essential to properly deal with the excessive regulatory and financial perils inherent in the current rules of the program. **GT**