

# GROWERTALKS

JZ on D.C.

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## H-2A Changes Ahead

*Jennifer Zurko*

The Department of Labor (DOL) has finalized updated regulations for the H-2A visa program for temporary agricultural workers, capping off a process that started in 2019. The Department published the final rule in the Federal Register on October 12. The new program rule went into effect on November 11, with a 90-day transition period for implementation. In practice, this means all H-2A applications with start dates on or after February 10, 2023, will need to comply.

The final rule amends the H-2A program in several ways, including the following:

- Codifies that farm associations who file H-2A applications on behalf of individual members would be liable for the actions of those members.
- Increases surety bonds for H-2A labor contractors, the employers driving most of the growth in H-2A visas. H2ALCs are growing in importance, and these changes may hinder their role and the services they provide to growers.
- Eliminates an employer's ability to appeal a Notice of Deficiency (NOD). Taking away the right to appeal at this step gives the applicant the bad choice of either accepting an unfavorable DOL interpretation or awaiting a final denial and then seeking resolution through appeal to an administrative law judge.
- Changes prevailing wage survey standards and expands the universe of state entities that may conduct wage surveys. Because H-2A requires payment of the highest applicable wage, a local prevailing wage determination can only make the required wage higher, not lower. The rule makes it easier to conduct such surveys with rather few data points, which is a cause for concern.
- Drops a proposal to allow "staggered entry," which enables a grower to bring workers in over a period of weeks as their need builds rather than all at once.
- Allows for electronic/digital signatures and processes, and does away with the digital scans of original "wet signatures." This is a positive change.
- Clarifies that pick-up and delivery points are not limited to within the area of intended employment, allowing growers to include truck driving in H-2A job duties. This, too, is a positive change.

It is worth noting that this H-2A program final rule is separate from a new wage rule, which was expected to be released before press time. While AmericanHort continues to comb through and analyze the 594-page rule, a top

line summary by our counsel provides more details. [DOL also offers an FAQ sheet on their website](#). Watch for further information in the coming weeks.

—Sara Neagu-Reed, Director of Advocacy and Government Affairs, AmericanHort

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## Additional H-2B Supplemental Visas Coming

AmericanHort welcomed an announcement by the Departments of Homeland Security (DHS) and Labor (DOL) that they will make an additional 64,716 H-2B temporary nonagricultural worker visas available for fiscal year (FY) 2023. These visas are on top of the 66,000 H-2B visas normally allocated each fiscal year. The agencies believe acting early will streamline the process of meeting employers' needs for seasonal workers in a record-low-unemployment economy.

Twenty thousand visas will be set aside for workers from Haiti, Honduras, Guatemala and El Salvador. The remaining balance will be available for returning workers who received an H-2B visa or were otherwise granted H-2B status during one of the last three fiscal years.

DHS and DOL also will convene a new White House "Worker Protection Taskforce" that will focus on H-2B workers' fundamental vulnerabilities, threats to H-2B program integrity and the use of the program to avoid hiring U.S. workers.

Lastly, DHS announced plans to issue a notice of proposed rulemaking relating to the H-2B program in the coming months. AmericanHort will be closely monitoring this process and will provide further updates, as well as details on the eligibility and filing requirements for the supplemental visas.

—Sara Neagu-Reed

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