

# **National Hispanic Leadership Agenda**

## MEMBER ORGANIZATIONS

Alianza Americas  
American G.I. Forum  
ASPIRA Association  
Avance Inc.  
Casa de Esperanza: National Latin@ Network  
Congressional Hispanic Caucus Institute  
Farmworker Justice  
Green Latinos  
Hispanic Association of Colleges & Universities  
Hispanic Federation  
Hispanic National Bar Association  
Hispanics in Philanthropy  
Inter-University Program for Latino Research  
Labor Council for Latin American Advancement  
LatinoJustice PRLDEF  
League of United Latin American Citizens  
MANA, A National Latina Organization  
Mexican American Legal Defense and Educational Fund  
Mi Familia Vota  
NALEO Education Fund  
National Association of Hispanic Federal Executives  
National Association of Hispanic Publications  
National Association of Latino Arts and Culture  
National Association of Latino Independent Producers  
National Conference of Puerto Rican Women, Inc.  
National Day Laborer Organizing Network  
National Hispanic Leadership Institute  
National Hispanic Caucus of State Legislators  
National Hispanic Council on Aging  
National Hispanic Environmental Council  
National Hispanic Foundation for the Arts  
National Hispanic Media Coalition  
National Hispanic Medical Association  
National Institute for Latino Policy  
National Latina Institute for Reproductive Health  
National Latina/o Psychological Association  
Presente.org  
SER Jobs for Progress National  
Southwest Voter Registration Education Project  
U.S.- Mexico Foundation  
UnidosUS  
United States Hispanic Chamber of Commerce  
United States Hispanic Leadership Institute  
United States-Mexico Chamber of Commerce  
Voto Latino

September 24, 2019

*Submitted via regulations.gov*

Adele Gagliardi  
Administrator, Office of Policy Development and Research  
Employment and Training Administration  
U.S. Department of Labor  
200 Constitution Avenue NW, Room N-5641  
Washington, DC 20210

Re: Temporary Agricultural Employment of H-2A Nonimmigrants in the United States RIN 1205-AB89

Dear Ms. Gagliardi:

The National Hispanic Leadership Agenda submits these comments in response to the request for comments regarding the Department of Labor's proposed changes to the H-2A temporary foreign agricultural worker program. The NHLA in these comments strongly objects to major components in the proposal and calls on the Department to change its proposal accordingly.

NHLA is a coalition of 45 of the most prominent Latino civil rights organizations across the country. Collectively, NHLA leads advocacy regarding the pressing civil rights and policy issues affecting the 59 million Latinos living in the United States. Several of the members of NHLA and their affiliates across the country serve farmworkers, their families and their organizations on a range of issues.

Eighty-three percent of all farmworkers in 2015-16 were Latino according to the Department's most recent report from the National Agricultural Workers Survey. Sixty-nine percent of hired farmworkers were born in Mexico. Of the 24% of farmworkers who were born in the U.S., over one-third were Latino.<sup>1</sup>

The NHLA Public Policy Agenda,<sup>2</sup> which sets the coalition's priorities on key policy issues, addresses labor and immigration policies that affect farmworkers and that are directly relevant to the proposed rule. The NHLA Public Policy Agenda includes the following positions on government policy regarding agricultural workers:

<sup>1</sup> U.S. Department of Labor, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers, Research Report No. 13 (2018), p. i.

<sup>2</sup> Available at [https://nationalhispanicleadership.org/images/Agenda/NHLA\\_2016\\_Hispanic\\_Policy\\_Agenda.pdf](https://nationalhispanicleadership.org/images/Agenda/NHLA_2016_Hispanic_Policy_Agenda.pdf).

- Ensure that any temporary worker program protects temporary workers and protects against adverse effects on the wages and working conditions of domestic workers. Temporary workers should only be brought in when there is a true market need.
- Ensure that internationally recruited workers are protected from workplace abuse, including all forms of discrimination in recruitment and placements.
- Grant farmworkers parity with other occupations under employment laws and regulations.
- Defend the right of workers to join labor unions and to participate in collective bargaining.
- Support gender equity in the workplace.
- Address the issue of fissured workplaces, including by using and enforcing the joint employer concept.
- Increase the quality and quantity of housing for farmworkers and other rural Latinos.

Major components of the Department of Labor proposal are unfair and would worsen living and working conditions for both U.S. and foreign workers. The proposed regulations are devastating to farmworkers because they would decrease their wages, increase their costs, worsen their housing conditions, reduce job opportunities for U.S. farmworkers and weaken oversight and enforcement of program protections. In these ways, the proposal is arbitrary, capricious and/or contrary to law.

The H-2A law requires employers who would like to hire temporary foreign workers to obtain a labor certification from the Department of Labor (DOL) stating that they face a labor shortage and are offering wages and working conditions that will not “adversely affect” U.S. farmworkers’ wages and working conditions. DOL’s proposal violates this requirement by weakening existing protections meant to ensure the effective recruitment of U.S. workers and stop employers from hiring foreign guestworkers at exploitative wages and under harsh conditions. Farmworkers’ living and working conditions, including conditions under the H-2A guestworker program, are already exploitative - they need to be improved, not worsened.

**The proposal would deny U.S. workers access to needed jobs by reducing growers’ obligations to recruit and hire U.S. workers and deterring U.S. workers from applying.**

For decades, the H-2A program’s regulations have included certain protections to ensure U.S. workers’ access to jobs at H-2A employers. These protections include recruitment of farmworkers inside the U.S. before employers receive approval to hire H-2A workers. Many employers’ preferences for guestworkers and discrimination against U.S. workers are implemented through ineffective recruitment, refusal to hire qualified U.S. workers, onerous job qualifications for U.S. workers, and making the workplace so inhospitable that U.S. workers quit or avoid seeking jobs at H-2A employers.

One of the most important recruitment protections has been the “50% rule,” which gives U.S. workers preference for these jobs for the first half of the work contract period. A Congressionally-required study found the 50% rule to be valuable to U.S. workers and not costly to employers. On many farms, hiring continues beyond the first day of work before the peak of the harvest season. In spite of this, the DOL proposal seeks to eliminate the “50% rule.” The proposal would replace the 50% rule with a requirement to hire U.S. workers only for the first 30 days of a contract. This change means that U.S. workers applying for work at an H-2A employer with jobs lasting multiple months would be ineligible for the job after the first 30 days. The proposal also includes a “staggered entry” provision, a new system that would allow employers to bring in their H-2A

workers at any time up to 120 days after the advertised date of need. Allowing H-2A workers to come in after the date of need in the proposed manner would undermine the labor market test, as U.S. farmworkers would lack clear information about work availability and start dates.

There are other provisions regarding the recruitment process that would negatively impact U.S. workers' access to jobs at H-2A employers and deter them from even applying. For example, the DOL proposal would allow mid-season changes to job terms. It has long been understood that U.S. and foreign workers need to know the job terms before accepting an H-2A job, including the location of worksites. However, the proposal would allow employers to amend their initial applications and job terms to add additional work sites, even after the positions have already been reviewed and certified.

**The proposal will increase uncertainty regarding farmworkers' wages and will likely result in wage decreases for many workers.**

The proposal regarding wage rates would result in lower wages for many farmworkers. The DOL's proposal for the Adverse Effect Wage Rate is focused on breaking down, or disaggregating, the USDA Farm Labor Survey category of "field and livestock workers" into a larger number of job categories for purposes of setting the AEWRs. The manner in which DOL would set the AEWR based on this disaggregation would reduce the required wage rates under the H-2A program for many farmworkers and would create greater confusion about wage rates.

That result is not consistent with the statutory obligation to protect U.S. workers' wages against adverse effects and is not necessary or reasonable. DOL's preference for disaggregation can be accomplished in accordance with its statutory obligations if its approach is revised. The revisions could include ensuring that the AEWR is based on the highest of the two methodologies so that farmworkers do not experience wage cuts while other workers receive the benefit of the higher wage based on the specific category of their jobs in the USDA survey.

The proposal would also eliminate the longstanding requirement that employers must offer a local prevailing wage (if it is the highest wage) by eliminating the requirement to conduct surveys of prevailing wages paid to U.S. workers, making it optional instead. In the absence of prevailing wage determinations, H-2A employers could lawfully offer below-market wage rates. For farmworkers, these could be very harmful pay cuts. DOL should not weaken the prevailing wage requirement, but instead ensure that prevailing wage determinations are made and implemented.

The wage proposal would perpetuate a basic problem in the H-2A program that will only get worse as the program continues to grow and expand geographically. Guestworkers generally lack bargaining power to demand higher wages, due to their restricted non-immigrant, temporary status and other factors, including the debt they often owe upon arriving in the U.S. As guestworkers become concentrated in a sector, the wages tend to stagnate and in real economic terms become depressed. The system permits H-2A employers to reject as "unavailable" for work those U.S. workers who seek jobs but are unwilling to accept the allowable H-2A rate, even if it is depressed. Moreover, H-2A employers tend to offer the minimum allowable H-2A wage. The proposal should be revised to fulfill the statutory requirements.

**The proposal would shift transportation costs on to workers.**

The proposed regulations would unfairly and unwisely shift certain H-2A program costs from employers on to H-2A workers. The H-2A program for decades has required employers to reimburse workers for their long-distance travel costs to the place of employment. Now, DOL proposes to only require employers to pay the costs of transportation for H-2A workers to and from the U.S. consulate or embassy in their home country, rather than their homes. Yet workers often live far from consulate locations and are recruited where they live. DOL acknowledges that farmworkers will lose tens of millions of dollars per year from this change, which is money they cannot afford. Many H-2A workers borrow money to pay such costs and arrive in the U.S. under great pressure not to risk employer retaliation due to their fear of their inability to repay their loan. This change will only drive foreign workers further into debt to travel to jobs in the U.S. and make them more vulnerable to exploitation than they already are.

The DOL should withdraw the proposed changes to the transportation reimbursement. This cost should continue to be covered by employers, not workers.

**The proposal would reduce the frequency of inspections for farmworker housing and allow employers to “self-inspect” their housing, increasing the risk of dangerous conditions.**

Despite high-profile stories of dangerous and substandard housing under the H-2A program, the proposed regulations would allow housing to be provided to farmworkers without annual inspections by government agencies. If a state workforce agency (SWA) notifies the DOL that it lacks resources to conduct timely, preoccupancy inspections of all employer-provided housing, DOL would allow housing certifications for up to 24 months, during which time conditions could deteriorate to unsafe levels. Further, following a SWA inspection, DOL would permit employers to “self-inspect” and certify their own housing. Given the high rates of violations of the minimal housing standards that apply, it is deeply troubling that DOL could allow vulnerable H-2A workers to live in housing that has not been inspected annually by a responsible government entity.

The proposed changes do include some modest improvements to address health and safety concerns regarding housing that must be provided to H-2A workers and long-distance, migrant U.S. farmworkers. In a very troubling development as the H-2A program spreads to new areas where there is limited housing, some H-2A employers have been housing workers in motels or other rental or public accommodations. Under the proposal, where there is a failure of the applicable local or state standards to address issues such as overcrowding, adequate sleeping facilities, and laundry and bathing facilities, among others, DOL would require that the housing meet certain OSHA standards addressing those issues. While this is a step in the right direction, greater protections, including improved standards, are needed for H-2A housing. Furthermore, the effectiveness of these improved standards could be undercut if there is not a sufficiently strong system for and commitment to inspections and enforcement of housing violations.

**The proposal makes modest improvements to surety bonds for H-2A labor contractors, but these are not sufficient to fully compensate workers.**

One modest improvement in the proposal is an increase in the bond amounts required to be posted by H-2A labor contractors (H-2ALCs). This is important because H-2A labor contractors are often undercapitalized and unable to pay back workers for labor violations. DOL has recognized the need

for higher surety bonds, but the increases are insufficient. Improvements are also needed to help victimized workers access the bonds. Finally, the proposal fails to address the number of other significant challenges workers face with H-2ALCs, and the already troubling lack of transparency with H-2ALCs will be exacerbated by the proposed changes. Too often farm operators seek to keep their labor costs low by hiring H-2ALCs and seeking to use the H-2ALCs as a shield to escape responsibility. The DOL is well aware that labor contracting is a notorious method for farmers to evade responsibility for the mistreatment of farmworkers, but its responses to these abuses are utterly inadequate.

## Conclusion

The Department of Labor should withdraw the harmful proposed changes to the H-2A program consistent with these comments. In addition, there are serious shortcomings in the program's policies, administration and enforcement that this proposal utterly fails to address. For example, in many locations around the country there are no prevailing wage surveys being done and therefore the prevailing wage is not required to be paid by H-2A employers, who are allowed to undercut the labor market. The Department and other agencies have also failed to prevent recruitment fees being charged to many farmworkers under the H-2A program, which leads to greater debt and contributes to the workers' vulnerability and fear of challenging unfair or unlawful conduct. Discriminatory job qualifications are applied to U.S. workers by employers that prefer guestworkers. There are also rampant violations of farmworkers' labor rights, including occupational safety protections.

The proposed rule contravenes the Department's legal obligations under the H-2A program and the Administrative Procedure Act toward farmworkers, the large majority of whom are Latino. The answer to America's need for agricultural workers is not to make wages and working conditions worse. The Department of Labor should not spend its limited resources removing and weakening protections for U.S. and foreign workers under the H-2A program.

Sincerely,



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MALDEF, President and General Counsel  
NHLA Chair  
Immigration Committee, Co-Chair



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