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H2AUSA.COM Newsletter

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FROM: THE H-2AUSA FRONT DESK:

The Latest Thing

By Mike Nobles-President,
H2AUSA.COM
on Proposed Changes to the
H-2A Program

The latest thing is our interpretation of the proposed changes to the H-2A program, as put forth by the joint cooperation of the Department of Homeland Security and the Department of Labor. It is this: Bad, bad, and more bad—with only one or two positive points.

Let us say it is 95% bad. With much bally-hoo, the Departments of Homeland Security and Labor proposed

changes we think most farm-related interests will consider an absolute disaster.

While they claim to improve things—to make the process simpler, it does not.

Cases in point:

#1-**Attestation**

Now the farmer or agricultural interest in addition to advertising has to keep all the pertinent paperwork for five (5) years. Whoopee! So, now you can call the Department of Labor and tell them you did it. Big deal! Before the requirement, you could mail it in and forget it—no paperwork to be kept warehoused for five years.

#2-Waiting Period

Now instead of 45-days prior to the need for workers, we have the privilege of applying and advertising 75-days to 120 days prior to the day of need. How many workers who respond to the ads and agree to come to work are still going to be available 120 days later? After twenty years experience in the industry, none, I expect. All this does is give the Dept. of Labor bogus numbers and workers that will never show up. However, many of the farmers I work with have a hard time predicting even 45-days in advance of need—especially those like cucumber farmers and the like. Another negative.

#3-Vouchers

The proposed voucher system for housing; unless somebody can find out something I can't...I cannot see how things can work out with it. I have contacted several state workforce agencies, including the state of Florida's and they do not know either.

I mean...you have 100 laborers from Mexico? Do you hand them voucher credits and tell them, "Find yourself a place to stay," or do you still have to find them a place to stay and apply the voucher credit toward the payment?

I believe this could work out to be a plus instead of a negative, if handled in the correct manner. My question to H-2A revisionists is, "Will we be able to get our slots with or without these vouchers, or at a later date?" I and most farming interests are in favor of a voucher system. We are just not clear if this particular system is going to help. Perhaps I am just missing something.

#4-Extended Visas

I do not know how the 3-month instead of 6-month shortened period of being out of the country at the end of three years will help very much. I do not know any farmers this will help. In the citrus business for instance, it does not mean a lot for them with a six-to-eight month season, we are not concerned with the workers staying out of the country every 3 years and this statement applies to many other farming interests.

#5-Applying to the DOL

Under the proposal we can apply directly to the Dept. of Labor. The last time I sent an application to the DOL it took 57 days for it to clear. I hope they can improve on that time! As far as the attestation process for that 'so-called' savings in time, we are adding the possibility of perjury charges and disbarment from the program as well as severe financial penalties if we make a mistake or two.

These attestations of course will be subject to audit (as if audits by the IRS are not enough—now we have the threat of being audited by the DOL.) Of course, then there are those proposed 'additional processes' for penalizing employers who have failed to perform obligations required under the H-2A program.

We already have the rural legal services groups filing hundreds of lawsuits against farmers and farm labor contractors, and extracting large financial damages against them every year. Now we can add the DOL to the

list of those who are holding their hand out and financially penalizing farmers and farm labor contractors.

I feel that this attestation-based process, requiring longer recruitment periods, more paperwork and lengthy periods for maintaining paper records will only further bog down the H-2A program. The DOL says that it anticipates an increase in the use of the program.

I very sincerely doubt it!

Mike Nobles-President,
H2AUSA.COM

(P.S. I will comment more on this on the website and in next month's newsletter.)

What do you think?
Let us know.

Candidates Views Could Shape Future H-2A Program

Depending on which person is elected to the presidency of the U.S., we will undoubtedly see their imprint on the evolving H-2A Program—or lack thereof. So, here are recent comments by and about the three contenders for president.

First, Sen. Barack Obama:

“Democratic Presidential frontrunner Sen. Barack Obama has asked the White House to withdraw proposed changes to the H-2A program or, failing that, significantly extend the rulemaking comment period...In a letter to Secretary of Labor Elaine Chao, Obama,

D-Ill., said that comprehensive immigration reform — namely, AgJobs legislation — should be the top priority rather than through changes to the H-2A program.

“Congress must change immigration law to ensure that those who harvest our fruits and vegetables are here legally,” Obama wrote in a letter to Chao Feb. 20. “Imposing new costs on foreign farm workers and lowering their wages is an inadequate solution and if not done thoughtfully could do more harm than good.”¹

Obama much prefers AgJobs legislation. Two important figures in the industry see his position this way:

“While Obama’s suggestion to drop reforms to the H-2A program won’t find agreement in the industry, Robert Guenther, senior vice president of public policy for the United Fresh Produce Association, Washington, D.C., said Obama has clearly been listening to agriculture when it comes to the AgJobs legislation.”²

Paul Schlegel, director of public policy for the American Farm Bureau Federation in Washington, D.C. is somewhat more subdued in his outlook:

“Schlegel said the Farm Bureau supports some aspects of the administration’s proposed changes to H-2A but

it has questions about other proposed changes, including higher fees for employers and a new wage formula for guest workers.

“He noted that some farm worker advocates would like to see proposed reforms to the H-2A program — and indeed, the program itself — “go away” and might seek to delay the rulemaking until the end of the Bush administration.

“Importantly, however, Schlegel said that the last three remaining viable presidential candidates — Sen. Hillary Clinton, D-N.Y.; Obama; and Sen. John McCain, R-Ariz. — all support comprehensive immigration reform.”³

Next, Sen. Hillary Clinton:

“A recent poll by Texas A&M University showed Clinton leading Barack Obama by a 3-1 ratio among Latinos in Texas, but her early lead among the whole population has evaporated as the Illinois senator poured resources into the delegate-rich state...Los Angeles Mayor Antonio Villaraigosa has been crisscrossing the state for Clinton, as has Assembly Speaker Fabian Núñez and Dolores Huerta, the iconic co-founder of the United Farm Workers.”⁴

Among the candidates, she has been singled out by both friendly and unfriendly media for her outrageous political vacillation on the subject of immigrants as far

back as 2006. Here’s one such blurb from what is normally her great ally—

The Washington Post:

“And after weeks of sitting on the sidelines, Sen. Hillary Rodham Clinton (D-N.Y.) jumped into the immigration debate...She declared that Republican efforts to criminalize undocumented workers and their support networks “would literally criminalize the good Samaritan and probably even Jesus himself.”⁵

And what of this election year? Here is a synopsis from Wikipedia’s site on Clinton:

“In May and June 2007, Clinton cast preliminary votes (in terms of amendments and [cloture](#)) in support of the high-profile, compromise-based but very controversial, comprehensive immigration reform bill known as the [Secure Borders, Economic Opportunity and Immigration Reform Act of 2007](#).^[46] When the bill was again brought forward, she continued to vote in favor of cloture motions to consider it.^[47] In October 2007, Clinton voted in favor of a small subset of the previous bill, the [DREAM Act](#).^[48]

“At a debate at [Drexel University](#) in [Philadelphia](#) on [October 30, 2007](#), Clinton committed to support of New York Governor [Eliot Spitzer](#)'s plan to give driver's licenses to illegal immigrants. Two

minutes later, she recanted the position and blamed the Bush administration for not passing immigration reform.^[49] The following day, she clarified her position in a prepared statement by coming out in support of Spitzer's bill.^[50] Two weeks later, after Spitzer abandoned the plan due to widespread opposition, Clinton reversed her position on the issue once again, stating: "I support Governor Spitzer's decision today to withdraw his proposal. As president, I will not support driver's licenses for undocumented people and will press for comprehensive immigration reform that deals with all of the issues around illegal immigration including border security and fixing our broken system."^[51] At a [University of Nevada, Las Vegas](#) debate on [November 16](#), when asked again if she supported granting driver's licenses to illegal immigrants, she gave a one-word answer: "No."^[52]^{6,6}

So, what about the Republican nominee?

Recently, an "audience included several students from Impact 360, a nine-month program for students ages 18-20, affiliated with Chick-fil-A. Students from the program asked McCain several questions, ranging from the war in Iraq to his role models.

"One employee, standing at the second floor railing, asked

McCain his position on illegal immigration.

"McCain responded with a joke.

"Yes," McCain said, "illegal immigration. This meeting is adjourned."

"The levity was meant to mask the fact that McCain's bid for the nomination was nearly derailed by his earlier support for an immigration reform bill that critics said offered amnesty for illegal workers.

"It is an emotional issue with America," McCain continued. "It is a national security issue with America and it is also a Judeo-Christian issue with America."



"He said the first duty is to secure the nation's borders and that only once that was done to the satisfaction of border state governors would he work to create a temporary worker program.

"I believe we need temporary workers," he said. "I

believe I can back that up with statistics."⁷

Huh?

¹ Tom Karst, "Obama pushes for AgJobs over H-2A changes," March 3, 2008. Website at: http://thepacker.com/icms/_dtaa2/content/wrapper.asp?alink=2008-122325-490.asp&styp=recentnews&fb=. (accessed on 3-7-08)

² Karst, Ibid.

³ Karst, Ibid.

⁴ Carla Marinucci, "For Clinton, they're crucial - Texan Latinos," March 3, 2008. Website at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/03/MNKDVC57R.DTL&type=politics>. (accessed on 3-7-08)

⁵ Jonathan Weisman and Jim VandeHei, "Immigration Debate Is Shaped by '08 Election," March 24, 2006. <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/23/AR2006032301785.html>. (accessed 3-7-08)

⁶ "Political positions of Hillary Rodham Clinton," From Wikipedia, the free encyclopedia, This page was last modified on 7 March 2008. Website at: http://en.wikipedia.org/wiki/Political_positions_of_Hillary_Rodham_Clinton#Immigration. (accessed 3-7-08)

⁷ Aaron Gould Sheinin, "McCain holds town hall meeting at Chick-Fil-A headquarters," March 07, 2008. Website at: http://www.ajc.com/business/content/metro/stories/2008/03/07/mccain_0308.html. (accessed 3-7-08)

Three Government Figures and Others on H-2A Changes

With the recent suggestions out in the public arena reference the changes promoted by the government for the H-2A program, now is the time for a reflective look at the entire arena of ideas swirling out there. The following are the comments and viewpoints of some of the most prominent voices and organizations involved in the present struggle to make sense of it all.

All those quoted are charged with looking for a workable and easy system. Here are the quotes.

The following is redacted from 'Remarks prepared for delivery by U.S. Secretary of Labor, Elaine L. Chao' at a press Conference in Washington, D.C. on February 6, 2008:

"The proposed changes have four main goals:

"First, to provide the steady and timely flow of legal workers American agriculture needs to fill the hundreds of thousands of agricultural jobs for which no U.S. worker can be found;

"Second, to better protect the wages and working conditions of U.S. workers by encouraging farmers to hire *legal* workers through the H-2A program who have guaranteed wages and guaranteed legal rights;

"Third, to bring the Labor Department into compliance with its legal obligation to process H-2A applications within the statutory timeframes set by Congress. The Department is required to process H-2A applications within 15 days, but under the current regulations this is almost never met.

"And fourth, to strengthen enforcement of workers' rights by expanding advertising and

recruitment requirements for U.S. workers and increasing the penalties for employers who violate program requirements.”¹

And her mission statement in accomplishing this, so-to-speak? It is this quote, from another site, citing Secretary Chao:

“The DOL's Employment and Training Administration (ETA) and Employment Standards Administration (ESA) have proposed rules to modernize the H-2A program. “This issue must be addressed now, or our country will see eroding competitiveness in its agricultural sector, crops being left to rot in the fields, and increasing shifting of domestic food production to overseas,” said Secretary of Labor, Elaine L. Chao. “These proposed changes to the H-2A program will provide farmers with an orderly and timely flow of legal workers and increase protections for both U.S. and foreign workers.”²

Meanwhile, at the Department of Agriculture, USDA Deputy Secretary, Chuck Conner, has this to say in a released statement regarding the H-2A farm worker program revisions:

“The changes will streamline and simplify the program. Yet they will also provide new protections to U.S. workers by

assuring them wider opportunities to learn about farm labor jobs that are available in their area. By utilizing the Department of Labor’s Occupations Employment Survey data we will get more graduated and finely tuned wage data. The data will be linked to specific job categories and descriptions and should allow us to bring H-2A wage rates much closer to actual prevailing wages.

“I also believe farmers will welcome the new attestation approach to certifying their need for foreign workers. We are also requiring them to keep records on hand for five years to prove that they did in fact comply with all the requirements of the law. We are making them subject to audits to confirm that they have in fact been doing the right thing.

“What we are offering them is an opportunity to get their hiring back inside the law-without compromising their business needs. And we are offering farm workers who are now illegal the chance to get inside the law as well and take advantage of the protections and certainty it allows. I believe both groups have a great deal to gain here and will seize this opportunity. The nation as a whole will benefit when they do”³

Michael Chertoff, Secretary of Homeland Security, sees his mission differently—as a law enforcement functionary:

“These proposed changes are designed to provide an efficient and secure program for farmers to legally fulfill their need for agricultural workers within the law rather than outside the law,” said Homeland Security Secretary, Michael Chertoff. “This common-sense simplification of H-2A will provide farm employers with a more orderly and timely flow of legal workers, while continuing to protect the rights of laborers and promoting legal and secure methods for determining who is coming into the country.”⁴

And what do the programs accomplish that he finds beneficial from his vantage point as the nation’s protector of our borders?

“Under our proposed rule, which we announced in February, an employer will only need to identify an H-2A worker by name in its petition if the worker is already in the United States, even if there is only one worker. It is unreasonable to expect - given the realities of labor recruitment in the agricultural industry - that an agricultural employer in the U.S. would know the names of all the workers it hires from abroad. We have proposed to extend the amount of time a

worker can remain in the United States after the end of his or her employment from 10 days to 30 days. This will make it easier for H-2A workers to extend their stay through a job with a new agricultural employer.

“In addition, we have proposed to shorten the time period that a worker must wait outside our country before U.S. agricultural employers may petition again for that worker. Currently, workers must wait six months after their H-2A status expires before they can return. We want to cut that time in half to three months.

“Of course, while it is important to make the H-2A process as flexible as possible for U.S. agricultural employers, we also want to protect workers. Our proposal requires an employer to attest, under penalty of perjury, that it will not materially change the scope of the foreign worker’s duties and place of employment. This will help prevent the employment of H-2A workers in a manner different from what the employer stated on the petition. Employers will also be required to identify any labor recruiter they used to locate foreign workers to fill the H-2A positions. And employers and labor recruiters will be prohibited from imposing fees on foreign workers as a condition for H-2A sponsorship.”⁵

Next, an examination of the user-side of the policies: Three agricultural customers and users of the program.

The American Farm Bureau, one of our favorite sources for comment has this take on the present situation—this is from the *AG Weekly Online* site, from an article written by Frank Priestly, Idaho Farm Bureau president:

“American Farm Bureau President Bob Stallman may have summed up our nation’s immigration situation best this week saying up to \$9 billion in agricultural production and the nation’s food security are at risk if immigration laws are not reformed.

“Either we can make it possible for temporary foreign workers to help us grow the food in the U.S. or they will stay in their country and grow food for the U.S.,” he said.”⁶

From Priestly’s own viewpoint (as Idaho Farm Bureau President) comes this:

“AFBF economists have outlined three major points that American agriculture needs from immigration reform. First, a simplified guest worker program must be developed to allow 500,000 to 750,000 legal migrant and stationary foreign agriculture workers every year. The current H-2A program is burdened with bureaucratic red

tape and unrealistic expectations. Second, agriculture needs an effective guest worker wage set in accordance with the prevailing market wage. A lot of farm workers are being courted by higher wages in the construction and hospitality industries. Third, a compromise is needed with labor rights groups to allow a reformed guest worker program to work and to help farms operate

... “So where do we go from here? Barring wholesale legislative reform, some of what’s needed can be accomplished through piecemeal changes to the existing federal H-2A guest worker program. What farmers and ranchers would like American citizens to give consideration to is where the majority of your food supply comes from today and where you would like it to come from tomorrow. Without a reliable workforce, our domestic food supply faces an uncertain future.”⁷

At their official website, Christine Souza Assistant Editor of The California Farm Bureau voices her concerns like this:

“California farmers and ranchers, who for many years have been advocating for a legal agricultural work force to produce the nation's food supply, guardedly welcomed a

proposal by federal agencies to change the nation's H-2A guest-worker program.

“However, the California Farm Bureau Federation says this is just a necessary first step in creating a solution to meet the labor needs that works for all farmers.

"Certainly it is a step in the right direction, but it is a small step," said CFBF President Doug Mosebar. "There's still a long road ahead toward creating a system that provides agriculture with a legal work force. Bigger steps are needed and they need to be taken soon."⁸

At *Workforce.com*, Mark Schoeff, Jr., sees the regulations this way:

“A government proposal for streamlining the hiring process for foreign agricultural workers could make life easier for employers but also increase the costs and hassles of maintaining a workforce for harvesting crops.

“Regulatory changes announced in early February by the Departments of Labor, Homeland Security and Agriculture would reduce the limitations and delays associated with [H-2A](#) visas for temporary farmhands.

“The effort is another attempt at immigration reform through regulation [now that broad legislation appears to be dead on Capitol Hill](#).

... “The public has until late March to comment on the proposed changes. A final rule may go into effect by August.

“It’s not clear whether employers will benefit or be set back by the regulatory changes, according to Hector Chichoni, manager of the East Coast immigration practice at Squire, Sanders and Dempsey in Miami.

“Everything depends on how they implement it,” Chichoni says. “In the long run, you can see a reduction in costs; in the short run, I’m not so sure. Every time you have bureaucrats dealing with the market, it is complex.”

“For instance, Chichoni is concerned that one important agency was left out of the reform announcement.

“There was no presence from the Department of State,” he says. He wonders whether consulates will change their rules for approving H-2A visas.”⁹

But, no matter whose word you take on the present situation, four facts remain:

#1-There are 1.2 million agricultural workers in the U.S.

#2-About 600,000 to 800,000 are illegal.

#3-Even though the program is uncapped, only 75,000 H-2A visas were used in 2007.

#4-Things have to change!

¹ U.S. Department of Labor Website, "Remarks Prepared for Delivery by U.S. Secretary of Labor Elaine L. Chao H2A Roll Out Press Conference Washington, D.C.", February 6, 2008. Website at: http://www.dol.gov/sec/media/speeches/20080206_h2a.htm. (accessed 3-8-08)

² "DOL, DHS propose changes to improve H-2A program," on <http://hr.cch.com> website. 2/26/08. <http://hr.cch.com/news/payroll/022608a.asp>. (accessed 3-8-08)

³ "Statement by USDA Deputy Secretary Chuck Conner regarding H-2A farm worker program revisions," Source: pr-usa.net, reposted at: <http://www.freshplaza.com> website at: http://www.freshplaza.com/news_detail.asp?id=17481. (accessed 3-8-08)

⁴ "DOL, DHS propose changes to improve H-2A program."

⁵ Homeland Security Website, "Testimony of Secretary Michael Chertoff before the House Committee on the Judiciary," Release Date: March 5, 2008. Website at: http://www.dhs.gov/xnews/testimony/testimony_1204746985090.shtm. (accessed 3-8-08)

⁶ Frank Priestly, "Action on immigration reform long overdue," on AG weekly website at:

<http://www.agweekly.com/articles/2008/03/06/news/opinion/opin26.txt>. (accessed 3-8-08)

⁷ Priestly, Ibid.

⁸ Christine Souza, "Federal agencies propose fix to H-2A program," February 13, 2008. Website at: <http://www.cfbf.com/agalert/AgAlertStory.cfm?ID=982&ck=FEC8D47D412BCBEECE3D9128AE855A7A>. (accessed 3-8-08)

⁹ Mark Schoeff, Jr., "Visa Rules May Ease Hiring of Farmworkers But Raise Costs," February 19, 2008. <http://www.workforce.com/section/00/article/25/37/18.html>. (accessed 3-8-08)

Lawsuit News

Although technically speaking, the following articles involve a complaint and a fine, we include these under our 'Lawsuit News' items, as they certainly have the potential for future lawsuits.

UFW Files Complaint

(From the United Farm Workers website at: <http://www.ufwaction.org/campaign/dol308>)

"Last month more than 5,000 UFW supporters sent e-faxes to the Department of Labor (DOL) telling them instead of gutting the current guest worker program, they should be enforcing the regulations that are currently on the books to protect farm workers.

"Yesterday the UFW filed a complaint with the DOL charging that Salinas based Tanimura & Antle—one of the largest vegetable growers in the country--violated federal law by denying jobs to

qualified U.S. farm worker--including its own laid-off employees--while hiring temporary foreign workers under the H-2A program. Tanimura & Antle had received approval from the DOL to bring in workers for the 2007-2008 lettuce season based on their claim that they faced a shortage of labor and needed to hire guest workers.

“This is a prime example of the problems with the current H2A program. **Rather than enforcing the laws currently on the books, the new proposed law weakens enforcement standards** and makes it easier for some growers to break the law by not attempting to hire US workers first.

“The Department of Labor already does little to stop employer abuses under the H-2A program. If violations like this are happening under the current law, just imagine the difficulties local US farm workers would face if the changes proposed by the Bush Administration go into effect.”

Farmworker Death Sparks Fine

And from the *Fresno Bee Newspaper*, an article by Dennis Pollock: “*State acts after the death of farmworker in Fresno Co.; company disputes findings,*” 1/18/08. Website at: <http://www.fresnobee.com/business/story/334514.html>.

“A Kingsburg-based farm labor contractor has been fined

nearly \$26,000 in connection with the death of farmworker Eladio Hernandez.

“Hernandez died while working in a Fresno County orchard May 9.

“YNT Harvesting is appealing and disputing findings made by the California Division of Occupational Safety and Health, said Yolanda Calvillo, who owns the company with Kenneth Anthony Duerksen.

“The death pinpoints the need for better enforcement of state laws to prevent fatalities tied to heat stress, said Armando Elenes, a United Farm Workers organizer, and Silas Shawver, a lawyer with California Rural Legal Assistance in Fresno.

“Hernandez, 54, died from cardiac arrhythmia while working in a peach orchard in the Kettleman Hills area. The state agency fined YNT for not providing employees with written emergency procedures, for not making sure Hernandez was acclimatized to temperatures in the mid-90s that day and for not providing the crew boss with equipment needed to summon medical help to the remote orchard.”