



## **H-2A AND TEMPORARY AG WORKER PROGRAMS**

The H-2A foreign worker program has been essential to the sheep farmers and ranchers dependent on temporary labor to help care for over 1/3 of the ewes and lambs in the U.S. and, for over 50 years, have used the current provisions of the program. While it historically fulfilled its purpose, the program has become a heavy regulatory and cost burden for employers. Last year the Department of Labor (DOL) amended the non-range worker rule to reflect a more realistic wage and experience-based methodology better suited to agricultural workers. However, the compensation factor for range workers was not adjusted and the program remains cost prohibitive and continues to harm the ability of American sheep producers to compete with imported lamb. While the program remains critical for a secure American supply of food and fiber, that criticality will disappear without the regulatory and statutory changes needed to provide an affordable and stable workforce that shores up a producer's ability to continue delivering a high quality, affordable product. Congress, the DOL and the Department of Homeland Security (DHS) must address the following to achieve this mission:

### **Dept. of Labor (DOL) Request to Improve the Existing H-2A Program**

**The Adverse Effect Wage Rate (AEWR).** The Immigration and Nationality Act (INA) delegates authority to DOL to (1) determine there are not sufficient able, willing and qualified U.S. workers available to perform the agricultural labor or services of a temporary or seasonal nature for which an employer desires to hire temporary foreign workers; and (2) the employment of the H-2A worker(s) will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. The INA is silent as to how the Secretary of Labor is to determine the effect of U.S. employers hiring H-2A employees, whether adverse or not. However, it clearly places an affirmative duty to the Secretary to ensure any effect is not adverse, resulting in the Adverse Effect Wage Rate (AEWR).

New regulations promulgated by the DOL last October made a standard downward adjustment to the hourly AEWR's based on annual Fair Market Value (FMV) data from HUD to account for the compensation disparity U.S. workers face when H2A workers are being paid for the same work and receive free housing. Skill-based adjustments were also made based on job qualifications and duties performed for most of the workday. Similar adjustments need to be made to the range worker rule even though a monthly wage is used when formulating those rates. Some of the same disparity factors also come into play for range workers. Consideration should also be given to production-based wage calculations recently developed by the University of Idaho.

Ironically, these mandated minimum wages have not proven to have had any adverse impact resulting from the employment of H-2A employees. Rather than performing an accurate evaluation of the potential effects of the H-2A program, the DOL forced an arbitrary minimum wage on employers that is often compounded by unrealistic state overtime wage rules devoid of economic rationale. The livestock range industry petitions the Secretary to amend or repeal existing regulations to conform to the INA requirement. If an adverse effect is found, all current methods used to determine the various AEWR levels warrant amendment to reflect applicable market conditions and sound economic rationale.



**Special Procedures.** A portion of the livestock industry utilizes special provisions within the broader H-2A program. The ability to hire temporary foreign herders dates to World War II, years before the INA and the current H2A created in 1986, when Congress directed that DOL use “special procedures” in recognition that range herding is significantly different than crop agriculture. DOL issued special provisions beginning in 1989. Their existence is a direct result of the unique requirements of range production and shearing. Adjustments and updates to the current special procedures are needed to better serve the needs of today’s livestock producers. Some of the more urgent needs would be:

- An adjustment of the required “on call” work schedule to qualify for a range herder occupation.
- Afford Sheep Shearers the exemption from filing deadlines that range herders already have.
- Recognize the exemption from Migrant and Seasonal Protection Act given to Sheep Shearers and remove the requirement for employers to carry multiple and overlapping surety bonds.

### **DEPT. OF HOMELAND SECURITY (DHS) REQUEST TO IMPROVE THE EXISTING H-2A PROGRAM**

**Asylum Fees.** As of April 1, 2024, U.S. Citizenship and Immigration Services (USCIS) arbitrarily began assessing an “Asylum Fee” to each petition submitted for approval to employ an H-2A. In addition to the regular fee increases, the cumulative cost impact ranges from an 83% increase for a small employer to 268% increase for large employers. While USCIS cites increasing costs of processing forms to justify the fee increase, there is no clear nexus to form processing expenses. Employers are assessed a fee (\$300 per form for small employers/\$600 per form for employers with more than 25 FTE) each time a nonimmigrant form is filed. DHS fees should reflect actual costs, and any increase must result in improvements and efficiency. Shifting the cost of other immigration programs to H-2A program users by adding onerous fees is patently unfair. The asylum fee should be removed immediately.

### **REQUEST FOR STATUTORY CHANGES TO THE H2A TEMPORARY AG WORKER PROGRAM**

**Create a Workable H-2A Temporary Ag Guestworker Program.** The current program is broken, expensive, flawed and plagued with red tape. A guestworker program should help sheep producers who are willing to pay a fair wage, employ law abiding, dependable noncitizen workers when no American workers are available or in the case of range herders, do not exist. Instead, H-2A employers are burdened with costly mandates and exposed to frivolous litigation. Employers must pay an artificially inflated wage rate (some states require additional overtime payments) that is higher than the prevailing wage in their region as well as housing, food, clothing, and transportation for their workers. These unnecessarily burdensome requirements place H-2A employers at a competitive disadvantage in the marketplace and threaten the future of over one third of U.S. sheep producers. A new H-2A guestworker program must be reliable, efficient, and fair, ensuring sheep farmers and ranchers legal access to a seasonal and year-round workforce. Key components of any legislation should include the following industry specific provisions:

- A fair wage rate based on production cost limitations and marketplace realities that is not artificially inflated or subject to unreasonable overtime requirements and accounts for all employer borne costs.
- Codification of the specific Special Procedures for Herders.
- A streamlined process to allow Herders to return to the same farm or ranch year after year.
- Extended stays for Herders up to 3 years.
- Allocation of a minimum of 2500 visas for “range herders” subject to the Special Procedures.
- Elimination of unnecessary fees and advertisement requirements.

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