

# Evidence Development for H-2A Reform

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## Tier A (Operational changes that have been in the past such as during 2013 government shutdown.)

- ▶ ID peak periods for H-2A applications and request adjudicators and other agencies/people involved in the H-2A process give priority to H-2A during these periods (DOL/DHS/State.)
- ▶ ~~Eliminate wet signature requirements on “blue sheet” --- use iCERT portal scanned signature to be transmitted electronically.~~
- ▶ *Option of using digital signatures when signing the I-129 and supporting documentation when submitting to USCIS*
- ▶ Allow to submit I-129 to USCIS prior to receiving OFLC certification which would allow processing to begin sooner. I-129 would still require OFLC certification before finalization. (USCIS & DOL.)

## Tier A (Operational changes that have been in the past such as during 2013 government shutdown.)

- ▶ ~~Implement interview waivers for returning H-2A workers (State Department.)  
This is currently allowable and State has streamlined the interview process~~
- ▶ Work with USDA and White House to ensure OFLC is declared 'essential' in case of future government shutdowns.

## Tier B (operational changes that would not require regulatory change but have not been implemented during this administration):

- ▶ Allow employer-initiated pre- or post-certification amendments to H-2A work orders that do not materially or negatively impact terms or conditions of employment as set out in the original application (DOL)
  - ▶ Allow contractors to add business with same duties in same area during season (minor amendments)
- ▶ Allow electronically filing I-129s and send all requests for evidence (RFEs) by email instead of US mail and allow responses to be sent back in electronic format. (DHS)
- ▶ Send I-129 approval notices via email (State already accepts email as proof of approvals) (DHS) - Use fax/e-mail or overnight delivery for all communications in connection with H-2A

## Tier B (operational changes that would not require regulatory change but have not been implemented during this administration):

- ▶ Establish more open dialogue between the federal agencies (i.e. Chicago Natl Processing center, USCIS, H-2A processing center in Laguna Niguel, and US Consulates abroad) and the H-2A employer/agent/attorney community through telephone and email as a more efficient means to resolve concerns and questions than the current formal of deficiency/RFE practices. (DOL/DHS/State.)
- ▶ Do not reduce the number of positions needed on the temporary labor certification by the number of applicants hired in advance of the employment start date, OR, only make the reduction where hires are from outside of the community area and eligible for housing.

## Tier B (operational changes that would not require regulatory change but have not been implemented during this administration):

- ▶ Do not prohibit staggered entry/exit. Hiring already required up until the 50% point. It would help growers and all the gov't agencies if we could file 1 contract (per each unique job description), and list overall start/end dates and the maximum number of visas, with flexibility for entry/exit within that range.
- ▶ Exclude apprentices from corresponding employment
- ▶ Exclude workers that do not accept all terms and conditions of employment from corresponding employment

## Tier B (operational changes that would not require regulatory change but have not been implemented during this administration):

- ▶ Streamline DS-160 information submission to State Department - possibly through filing Excel document with all visa applicants' information together.
- ▶ Increase transparency of consulate wait-times, particularly for the 7 Mexican consulates handling the greatest H-2A processing volume, and ideally for 2, 3 or 4 weeks from the present date.

## Tier C (would require policy change but not necessarily regulation changes. Would probably require DOL to get buy-in from unions/advocacy groups.)

- ▶ New wage survey to break down wage rate categories (field workers, equipment operators, and skill/experience levels) DOL and USDA
- ▶ Permit use of industry prevailing productivity standards and experience requirements. (DOL)
- ▶ ~~Advertising exemption for small employer recruiting. A small employer hiring only one or two workers incurs the same advertising expense as a large multi-employer application. This significantly disadvantages smaller growers. (DOL) [fixed with online-only advertising NPRM?]~~

## Tier C (would require policy change but not necessarily regulation changes. Would probably require DOL to get buy-in from unions/advocacy groups.)

- ▶ Expand the enhancements to the iCert system that permit SWA staff to electronically upload supporting documentation or other information directly to the employer's pending application to allow the employer to see whether or not responsive documents have been submitted by the SWA (i.e., referrals and housing inspections).
- ▶ Require SWA staff to share information regarding qualified and available U.S. workers that they provide to the Chicago National Processing Center with employers.
- ▶ Allow employers to file one application for temporary employment certification and list all start dates instead of having to resubmit the full application separately for each group of workers.

## Tier C (would require policy change but not necessarily regulation changes. Would probably require DOL to get buy-in from unions/advocacy groups.)

- ▶ Require the SWA to inspect all non-public housing in their state where an employer intends to house H-2A workers.
- ▶ Accept the I-94 card as evidence of previous worker departure in petitions to transfer and extend the stay of H-2A workers already in the United States in status, unless evidence to the contrary is in the record, until a reliable system for workers to have their departure recorded at land borders is implemented.
- ▶ Improve departure tracking by CBP and information-sharing to USCIS.
- ▶ Go back to the interpretation of the limitation of stay that counted time spent outside of the United States towards the three month readmission wait time instead of using the current recapture method.

## Tier C (would require policy change but not necessarily regulation changes. Would probably require DOL to get buy-in from unions/advocacy groups.)

- ▶ Direct that enhanced enforcement measures include a preventive inspection program for all non-public migrant agricultural housing including issuance of occupant certificates that meet OSHA (or ETA if this is still available) standards.
- ▶ Allow FLC's to apply without listing every single location. Most FLC's don't know who their customers will be 3-4 months in advance. Possible alternatives: list regions (states, counties, etc.) of intended employment? Maybe we report (after the fact) the locations worked - whether via email during season or at season-end?

## Tier D (would require policy AND regulatory change and probably buy in by advocates too. All are DOL.)

- ▶ Housing allowance in lieu of physical housing being provided (same concept was in 2013 stakeholder agreement in Senate.) DOL has statutory authority to write regulations on the nature of housing. There are several options that could be considered:
  - ▶ Housing allowance to be allowable in states where the governor certifies that sufficient housing is available (similar language to S744)
  - ▶ Pilot an at-will visa program that includes a housing allowance in lieu of a physical housing requirement.
  - ▶ Pilot a housing allowance (option A) but only in one or two regions--- i.e. Oxnard/Ventura or Salinas.

## Tier D (would require policy AND regulatory change and probably buy in by advocates too. All are DOL.)

- ▶ Housing allowance in lieu of physical housing being provided (same concept was in 2013 stakeholder agreement in Senate.) DOL has statutory authority to write regulations on the nature of housing. There are several options that could be considered:
  - ▶ Pursue allowing the value of housing to offset a portion of the AEWR (FLSA currently regards provided housing as part of wages.)
  - ▶ Make the petition remand process more transparent and set reasonable timeframes for due process.
  - ▶ Require a group scheduling process that allows employers to pay visa application and reciprocity fees on behalf of workers in all countries that process H-2A workers.

# Other

- ▶ 514 Housing: Have USDA approve 514 housing finance for use in H-2A housing.
- ▶ Tax Credits: Tax credits for worker housing and utilities.
- ▶ Use prevailing wage instead of AEWR--- or limit AEWR increase to COLA or inflation (as is done for retirees and government employees.)
- ▶ ~~When new AEWR announced, need delay in effective date (next pay period, 15 or 30 days from announcement, etc. Current practice of announcing in FR effective that day is extremely disruptive to payroll management.)~~

# Other

- ▶ Absconding: Address absconding issue (may be growing in some geographies or industries.)
- ▶ Consulate Process: More thought and consideration of how workers are treated in Consular process (long waits, Friday interviews that get put off till Monday leaving workers in strange/dangerous city, workers separated from their group by interview schedule, etc.)

# Other

- ▶ Capacity and Infrastructure: H-2A doubled past 4 years, will double again in 2 years or less if CA makes next jump--- and FL could dbl in 2 years--- (see WA State experience.) **Capacity and infrastructure issues** with CIS, State, and DOL. CIS and State upgrading infrastructure and US Consulates in MX intentionally upgrading processing/interview capacity and formats. Currently experiencing up to 30 day delays at CIS (H-2B and A)--- DOL under-resources, particularly CHI--- how to fund them AND get:
  - ▶ All e-mail communications
  - ▶ Reasonable mandatory processing times
  - ▶ Staggered entry on single application
  - ▶ DOL/OFLC to be essential employees in event of shutdown
  - ▶ Allow contractors to add business during season (minor amendments)

# Other

- ▶ Other NCAE Member suggestions/”asks” (noting that these may be more long-term):
  - ▶ Tax credit for housing & utilities for workers
  - ▶ Incidental work
  - ▶ Dairy and other “year-around”
  - ▶ Start/End dates--- “reasonable” and workable/simple flexibility based on weather/crop conditions/etc.
  - ▶ Experience requirements allowed---
  - ▶ W/CIS - 797 Electronic printing capabilities if one has an electronic account

# AEWR

- ▶ The AEWR is the biggest concern from two perspectives:
- ▶ a. If the AEWR continues to grow the U.S. will become more reliant upon imported food, flowers, etc. Hand harvested crops in the U.S. especially cannot continue to compete against imports with the rising cost of labor. Because of the limited control/awareness of the agricultural growing practices utilized in foreign countries, it should be a top priority of the U.S. to do what it can to maintain agricultural production within the U.S.
- ▶ b. AEWR wage inconsistencies between states. We live in a global economy with most growers competing and shipping their agricultural products nationwide. So how is it fair for states like Arizona to have the advantage of a \$10.46/hour AEWR compared to other states being forced to pay an AEWR of \$14.12/hour?

# 50% Rule

- ▶ Farmers having to reimburse transportation upfront when H2A workers arrive for employment rather than at the 50% point of employment puts farmers in a vulnerable position of reimbursing individuals for transportation not knowing if they will even perform a day of work on the farm.

# Miscellaneous

- ▶ Section 514 Housing. This agricultural employee housing, built to government specifications, restricts use by H2A employees. With much of American agricultural turning to H2A for employees, many of these Section 514 agricultural housing units are not being effectively utilized because the government forbids they be occupied by H2A workers.
- ▶ THIS RESTRICTION HAS BEEN REMOVED - have to monitor how it is implemented and if it benefits the H-2A community

# Miscellaneous

- ▶ H-2A Requirement for placing job advertisements in local print media.
- ▶ H-2A Housing (as per conversation with H-2A Committee on 4-17-18, this continues to be a major issue and many employers are having a hard time getting the permits or zoning to create h-2A housing).

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