

H.R. ____
The Agricultural Guestworker Act
Section-by-Section Analysis
Ver. 9.28.17

Sec. 1. Short Title.

Section 1 provides that this Act may be cited as the “Agricultural Guestworker Act” or the “AG Act.”

Sec. 2. H-2C Temporary Agricultural Work Visa Program.

Subsection (a) amends the INA to add a new visa category for individuals coming temporarily to the U.S. to perform agricultural labor or services.

Subsection (b) expands the definition of “agricultural labor or services” relative to its meaning under the existing agricultural guestworker program. For the purposes of the Agricultural Guestworker Act, “agricultural labor or services” includes temporary, seasonal, and year-round agricultural and horticultural work as well as the handling, packing, and processing of unmanufactured agricultural and horticultural products, forestry-related activities, aquaculture activities, and the primary processing of fish or shellfish.

Sec. 3. Admission of Temporary H-2C workers.

Subsection (a) amends the INA by adding a new section (section 218A) establishing the H-2C temporary agricultural guest worker program. The following is a section-by-section analysis of the amendment made by this section:

Section 218A. Admission of temporary H-2C workers.

Subsection (a) defines “displace,” “job,” “employer,” “forestry-related activities,” “H-2C worker,” “lay off,” “United States worker,” and “special procedures industry.”

Subsection (b) requires an employer seeking to hire an H-2C worker to file a petition with the Secretary of Agriculture in which the employer attests:

- *To the terms of the employer’s offer of employment to the aliens, including that the employer will employ aliens on a contractual basis as H-2C workers for a specific period of time during which the aliens may not work on an at-will basis, and a description of the place of employment, period of employment, wages and other benefits to be provided, and the duties of the positions;*
- *That the employer will provide the benefits, wages, and working conditions required under the law to all workers employed in the job for which the H-2C workers are sought;*
- *That no U.S. workers will be displaced during the 30-day period preceding the employment period or during the employment period;*

- *That the employer recruited U.S. workers and was unsuccessful in locating sufficient numbers of willing and qualified U.S. workers for the job;*
- *That the employer will offer the job to any U.S. worker who applies, is qualified, and is available at each place, and for the duration of, the need, until the first day that work begins for the H-2C worker (This provision specifically precludes regulations implementing any variation of the “50% Rule.” See 20 C.F.R. 655.135(d));*
- *That insurance covering injury and disease arising out of the job will be provided if the work is not covered by State workers’ compensation law; and*
- *That the vacant job is not the result of a strike or lockout in the course of a labor dispute.*

Subsection (c) requires the employer to make a copy of the employer’s petition available for public examination.

Subsection (d) requires the Secretary of Agriculture to maintain a list of the petitions filed and make it available for public examination.

Subsection (e):

- *Prohibits the Secretary of Agriculture from requiring that petitions be filed more than 28 days in advance.*
- *Requires the Secretary to approve or reject a petition, or notify a petitioner that a petition is incomplete or inaccurate, within 10 business days.*
- *Provides that by filing a petition, an employer consents to allow access to the site where work is being performed to the Department of Agriculture and the Department of Homeland Security for compliance investigations.*

Subsection (f):

- *Allows associations to transfer workers among its members.*
- *Provides that violations by a member will not necessarily disqualify an association and vice versa.*

Subsection (g) requires the Secretary of Agriculture to promulgate regulations to provide for the expedited review of a denial of a petition and for the examination of new evidence provided by the petitioner.

Subsection (h) permits the Secretary of Agriculture to charge petitioners a fee to cover the cost of processing petitions.

Subsection (i):

- *Provides that the Secretary of Agriculture shall be responsible for conducting investigations and audits to ensure compliance with the requirements of the H-2C program and designates that fines paid to the Department of Agriculture shall be used to enhance the Department’s investigatory and auditing power.*
- *Sets penalties for failure to meet a condition of the petition and material misrepresentations with fines of up to \$1,000 and a 1-year disqualification.*

- *Sets penalties for willful failures to meet conditions of the petition and willful misrepresentations with a fine of up to \$5,000 as well as a 2-year disqualification for an initial violation, a 5-year disqualification for an second violation, and a permanent disqualification for a third violation.*
- *Sets penalties for willful failures and misrepresentations that result in displacement of a U.S. worker with a fine of up to \$15,000 as well as a 5-year disqualification for an initial violation, and a permanent disqualification for a second violation.*

Subsection (j) provides that the Secretary of Agriculture shall require the payment of back wages, or other required benefits, due any worker, if the Secretary finds an employer failed to provide the required benefits, wages, and working conditions.

Subsection (k):

- *Requires employers to offer U.S. workers no less than the same benefits, wages, and working conditions that the employer offers to H-2C workers.*
- *Provides that every interpretation made under this section or under any other law regarding the provision of benefits, wages, and other conditions of H-2C workers shall reflect that the services of workers to their employers and the employment opportunities afforded to workers by the employers mutually benefit the workers and their employers and principally benefit neither worker nor employer and that employment opportunities within the U.S. benefit the U.S. economy.*
- *Requires employers to pay H-2C workers a wage that is not less than the State or local minimum wage, or 115 percent of the applicable Federal minimum wage, whichever is greatest.*
- *Permits employers to pay via a piece rate system as long as that rate equals or exceeds the applicable wage rate.*
- *Requires the employer to guarantee the worker employment and pay for at least 50 percent of the work days of the total contract period.*
- *Provides that any hours the worker fails to work may be counted by the employer in calculating whether the period of guaranteed employment has been met;*
- *Provides that a worker who abandons his or her employment before the end of the contract or is terminated for cause is not entitled to the 50 percent guarantee; and*
- *Provides that if, before the 50 percent guarantee is fulfilled, the services of the worker are no longer required for reasons beyond the control of the employer, the employer may terminate the worker's employment, but shall apply and fulfill the 50 percent guarantee for the period before termination, make efforts to transfer the United States worker to other comparable employment acceptable to the worker, and shall notify the Secretary of Homeland Security of the termination.*

Subsection (l) prohibits the Department of Agriculture and the Department of Homeland Security from delegating their investigatory, enforcement, or administrative functions relating to the H-2C program to other agencies or departments of the Federal government

Subsection (m) requires any personnel from a Federal agency or Federal grantee visiting an H-2C employer's farm or facility to make their presence known and sign-in in accordance with reasonable bio-security protocols before proceeding to any other area.

Subsection (n):

- *Permits H-2C workers to be admitted for up to 18 months to work in a job that is temporary or seasonal.*
- *Permits H-2C workers to be admitted initially for up to 36 months to work in a job that is not temporary or seasonal and for up to 18 months subsequently.*
- *Requires H-2C workers who were employed in a temporary or seasonal job to remain outside the U.S. for period equal to at least 1/12th of the duration of their previous period of authorized status as H-2C workers.*
- *Requires H-2C workers who were employed in a non-temporary or seasonal job to remain outside the U.S. for period equal to at least 1/12th of the duration of their previous period of authorized status as H-2C workers or 45 days.*
- *Requires the Secretary of Homeland Security to deduct absences from the United States during an H-2C worker's period of authorized status from the period the worker is required to remain outside the U.S. if the worker or the worker's employer requests such a deduction, and provides proof that the alien qualifies for such a deduction.*
- *Provides that shepherders, goatherders, workers employed in the range production of livestock, and workers who return to their permanent residence outside the U.S. each day are not subject to a maximum continuous period of authorized status or a requirement to remain outside the U.S.*

Subsection (o):

- *Provides that, in addition to the maximum period of admission, a worker's authorized period of admission includes an additional period of 1 week before the work begins (for inbound travel) and 2 weeks following the work (to be granted for the purpose of departure) or 30 days (for the purpose of seeking a subsequent job offer).*
- *Provides that an alien who does not depart within these periods shall be considered to be inadmissible for having been unlawfully present and deemed unlawfully present for 181 days as of the 15th day following the period of employment for the purpose of departure or as of the 31st day following the period of employment for the purpose of seeking a subsequent job offer; and*
- *Provides that an alien may not be employed during the 14-day departure period except in the employment for which the alien is otherwise authorized.*

Subsection (p):

- *Requires employers to notify the Secretary of Homeland Security within 72 hours after learning of the abandonment of employment by an H-2C worker;*
- *Permits an employer to designate an eligible alien to replace an H-2C worker who abandons employment, and provides that the replacement worker shall not count against the numerical cap*

Subsection (q) provides that aliens who are unlawfully present in the U.S. on October 2, 2017, are eligible to adjust status to that of H-2C workers despite their unlawful presence.

Subsection (r):

- *Establishes a trust fund for the purpose of providing a monetary incentive for H-2C workers to return to their home countries upon expiration of their visas.*
- *Requires employers to withhold 10 percent of the wages of H-2C workers, except those employed as shepherders, goatherders, in the range production of livestock, or who return to their permanent residence outside the United States each day, and pay the amount into the trust fund.*
- *Requires employers of H-2C workers employed in jobs that are not temporary or seasonal, other than those employed as shepherders, goatherders, in the range production of livestock, or who return to their permanent residence outside the United States each day, to pay an amount equivalent to certain Federal taxes on wages (that such employers are not obligated to pay) into the trust fund.*
- *Provides that amounts paid into the trust fund on an employee's behalf shall be transferred from the Trust to the Secretary of Agriculture, who shall distribute them to the worker if the worker applies to the Secretary within 120 days of the worker's authorized expiration of stay at a U.S. embassy or consulate in the worker's home country, establishes that they have complied with the terms and conditions of the program, physically appears at the U.S. embassy or consulate in their home country, and established their identity.*
- *Provides that the other amounts paid into the trust fund shall be distributed annually to the Secretary of State, Secretary of Agriculture, and the Secretary of Homeland Security in amounts proportionate to the expenses incurred in the administration of the H-2C program.*
- *Provides that any money left over in the trust fund – after the appropriate agencies have been reimbursed for the expense of administering the guestworker program – shall be distributed to the Department of Homeland Security to apprehend, detain, and remove aliens unlawfully present in the U.S.*
- *Requires the Secretary of the Treasury to invest any portion of the Trust Fund not needed to meet withdrawal demands.*
- *Provides that interest and proceeds shall be credited to the account.*
- *Requires the Secretary of the Treasury to hold the Trust Fund and report to Congress each year on the financial condition of the Fund.*

Subsection (s):

- *Requires the Secretary of Agriculture to permit an employer in a Special Procedures Industry that does not operate at a single fixed place of employment to provide, as part of its petition, a list of places of employment, which may include an itinerary and may subsequently be amended at any time by the employer.*

- *Permits the Secretary of Agriculture to establish monthly, weekly, or biweekly wage rates for occupations in a Special Procedures Industry for a State or other geographic area.*
- *Permits an employer engaged in the commercial beekeeping or pollination services industry to require that job applicants be free from bee-related allergies, including allergies to pollen and bee venom.*

Subsection (b) of section 3 of the bill amends chapter 2 of title II of the INA by adding another new section (section 218B) providing for the at-will employment of temporary H-2C workers. The following is a section-by-section analysis of the amendment made by this section:

Sec. 218B. At-will Employment of Temporary H-2C Workers.

Subsection (a):

- *Permits registered agricultural employers to employ a worker already lawfully present in the U.S. as an at-will H-2C worker if the worker was admitted under the H-2C program and completed the period of the job offer or had his or her employment terminated because his services were no longer needed for a reason beyond the employer's control.*

Subsection (b):

- *Provides that H-2C workers performing at-will labor for a registered agricultural employer are subject to the same period of admission, limitation of stay in status, and requirement to remain outside the U.S. as contract H-2C workers, except that they are not permitted to accrue time toward their touchback requirement.*

Subsection (c):

- *Requires the Secretary of Agriculture to establish a process for accepting and adjudicating applications by employers to be designated as registered agricultural employers.*
- *Requires the Secretary of Agriculture to collect a fee to recover the cost of processing the application.*
- *Provides five conditions that must be met in order the Secretary of Agriculture to designate an employer as a registered agricultural employer.*

Subsection (d):

- *Provides that an employer's designation as a registered agricultural employer is valid for 3 years and can be extended for additional 3-year terms.*
- *Requires the Secretary of Agriculture to revoke a designation before the expiration if an employer is subject to disqualification.*

Subsection (e):

Provides that the Secretary of Agriculture will be responsible for conducting investigations and random audits of employers to ensure compliance.

Provides that all fines levied against employers shall be paid to the Department of Agriculture and used to enhance its investigatory and audit power.

Subsection (c) prohibits spouses and children of H-2C workers from being admitted to the U.S. along with H-2C workers as accompanying family members.

Subsection (d) establishes a limit of 500,000 on the total number aliens who may be issued visas under the H-2C program in any fiscal year, but gives the Secretary of Agriculture authority to decrease the limit depending on certain factors and conditions in the agricultural employment sector or increase the number on an emergency basis. Subsection (d) provides for an automatic cap escalator for when the base allocation is exhausted and an automatic de-escalator following a period when the allocation is underutilized. It also provides that aliens who performed agricultural labor or services for at least 5.75 hours during each of at least 180 days during the 2-year period beginning on the date of enactment, and H-2A or H-2B workers returning under the H-2C program to work for their previous employers, are not counted toward numerical limitation.

Subsection (e) amends the INA to require the Secretary of Homeland Security to waive the 3- and 10-year bars to admissibility solely in order to allow an alien to come to the U.S. to work in the H-2C program. Subsection (e) also amends the INA to require aliens for whom a bar of admissibility is waived to remain outside the U.S. for an unspecified period by not later than 6 months after being issued a visa or otherwise being provided with status as an H-2C worker. The amendment also makes a technical change to reflect that it is the Secretary of Homeland Security, not the Attorney General, who has discretion under the law to waive the bars against inadmissibility.

Subsection (f) amends the Immigration and Nationality Act to exclude H-2C workers from the requirement that they must disprove the presumption of immigrant intent at the time of application for admission.

Subsection (g) amends the table of contents for the INA to include references to the new sections comprising the H-2C program.

Sec. 4. Mediation.

Section 4 prohibits an H-2C worker, or an attorney representing an H-2C worker, from bringing a civil action for damages against an H-2C employer unless the parties have attempted to reach a satisfactory resolution of the issues through mediation.

Sec. 5. Migrant and Seasonal Agricultural Worker Protection.

Section 5 exempts H-2C workers from the definition of “migrant agricultural worker” under the Migrant and Seasonal Agricultural Worker Protection Act. This provision has the effect of barring an entity receiving funding from the Legal Services Corporation from representing an H-2C worker in an action against his or her employer.

Sec. 6. Binding Arbitration.

Subsection (a) of section 6 permits employers to require that workers be subject to mandatory binding arbitration and mediation of any grievances as a condition of employment.

Subsection (b) provides that any cost of arbitration or mediation shall be equally shared by the employer and H-2C worker, except that each party shall be responsible for the costs of their own counsel.

Subsection (c) defines the terms “condition of employment” and “H-2C worker.”

Sec. 7. The Performance of Agricultural Labor or Services by Aliens Who Are Unlawfully Present.

Subsection (a) requires the Secretary of Homeland Security to waive certain grounds of inadmissibility and deportability with respect to certain illegal entrants and immigration violators, aliens not in possession valid documents, and aliens unlawfully present solely for the purpose of allowing such aliens to work in agricultural jobs as defined by this Act.

Subsection (b) limits the class of aliens eligible for such waivers to those who were both physically present in the U.S. on October 2, 2017, and who performed agricultural labor or services in the U.S. for at least 5.75 hours during each of at least 180 days, during the 2-year period ending on the date of enactment of this Act.

Sec. 8. Eligibility for Federal Public Benefits and Refundable Tax Credits.

Subsection (a) provides that H-2C workers are not eligible for Federal public benefits, including subsidies under the Patient Protection and Affordable Care Act.

Subsection (b) provides that H-2C workers are not eligible for refundable tax credits such as the Earned Income Tax Credit and the Child Tax Credit.

Sec. 9. Immigrant Visas for Agricultural Workers.

Subsection (a) amends a heading in the INA.

Subsection (b) amends the INA to convert the existing category of green cards available for unskilled workers to a category available exclusively for qualified agricultural workers who have performed agricultural labor or services for at least 5.75 hours during each of at least 90 days, during the preceding 4 year period, and who continue to be capable of performing such labor or services. Subsection (b) also directs the Secretary of Homeland Security to waive certain grounds of inadmissibility and deportability solely as necessary to allow an alien to receive a visa or otherwise be provided with status under this visa category.

Sec. 10. Effective Dates; Sunset; Regulations.

Subsection (a):

- Provides that the new H-2C program shall take effect 2 years after enactment of the Act, and directs the Secretary of Agriculture to accept petitions for H-2C workers beginning 28 days earlier.
- Provides that sections 8 and 9 shall take effect on the date of enactment of the Act.
- Provides that provisions allowing for the at-will employment of H-2C workers will become effective when E-Verify becomes mandatory and is capable of indicating whether the individual in question is eligible to be employed in all occupations or only to perform agricultural labor or services.
- Restricts provisions allowing for the performance of agricultural labor or services by aliens unlawfully present to a timeframe beginning on the date of enactment and ending 2 years later, except in the case of an alien who is the beneficiary of a petition that has not yet been adjudicated.

Subsection (b):

- Reinstates H-2A regulations implemented by the Bush administration in 2008 for all petitions (except with respect to employers seeking to hire workers for sheepherding, goatherding, range production of livestock, and itinerant animal shearing jobs) beginning on the date of enactment of the Act,
- Permits an alien unlawfully present on the date of enactment of this Act to adjust status to that of an H-2A worker beginning on the date of enactment of this Act and ending 2 years after the date of enactment.
- Provides that 2 years after the date of enactment no new petitions to import H-2A workers will be accepted.

Subsection (c) requires the Secretary of Agriculture to promulgate regulations to implement the Secretary's duties under this Act not later than 18 months after the date of the enactment.