

Minimizing Your Labor Pains

AmericanHort's Craig Regelbrugge provides insight into the current policy for foreign worker programs and where they may or may not be headed.

BY ANA OLVERA

With a new administration now in place, it's time to look at current policy for foreign worker programs and the outlook on where policy could go in 2017. Craig Regelbrugge, senior vice president of industry advocacy and research at AmericanHort, says the industry should prepare for changes that could greatly impact domestic and foreign labor in horticulture.

"We're expecting a new executive order from the president that would require close evaluation of all the visa programs to determine if they're harming American workers. So, we could see potential changes, either to the good or the bad," says Regelbrugge.

H-2A AND H-2B VISA PROGRAMS

Growers should keep a lookout for changes regarding the H-2A and H-2B visa programs for foreign workers. Both visa programs are important to the horticulture industry but targeting different job categories. Labor relating to production and other work within a greenhouse falls under the H-2A program for temporary or seasonal agricultural jobs; whereas labor relating to the installation of plants and landscape work falls under the H-2B program for non-agricultural jobs.

The most important distinction between the two popular programs is the cap placed on the number of visas issued under the H-2B program, limited to 66,000 a year. The H-2A visa program does not have a yearly cap.

"Because there is no H-2A cap, we are seeing use of the program grow," says Regelbrugge. "In fiscal year 2016 about 165,000 positions were certified by the Labor Department to be filled with an H-2A worker — that's more than double the number in 2011."

Use of the H-2A program has grown in areas that traditionally did not use it, such as the states of California and Washington, Regelbrugge says. "The program is kind of straining under the pressures of more and more people turning to it."

In FY 2015, the Office of Foreign Labor Certification (OFLC) certified 139,832 H-2A positions. There was an increase of 18 percent in the number of positions requested for H-2A job opportunities and an increase of almost 9 percent in the number of H-2A temporary employment certification applications certified in FY 2015 over FY 2014, according to OFLC.

In 2015, nursery and greenhouse workers were among the top 10 occupations using H-2A labor, with 5,109 certified positions.

"The good news is [H-2A] doesn't have a cap. The bad news is it's complicated; it's expensive," Regelbrugge says. "It can be unresponsive, where you need your workers on Feb. 1 and they end up arriving three weeks late. So those kinds of things are huge challenges but in the immediate term and near term,



The More You Know

Applying for H-2A or H-2B labor can be a complicated process, with timelines and regulations established by each federal agency involved in the process. The Department of Labor, Department of Homeland Security and Department of State each have online resources for employers seeking foreign labor.

Department of Labor — foreignlaborcert.doleta.gov

Employers must first apply for labor certification through the DOL. The Office of Foreign Labor Certification page on the DOL website provides filing tips, answers to frequently asked questions and application time frames for foreign labor programs.

Department of Homeland Security — uscis.gov

Once an employer receives application approval, they must file a petition with the U.S. Citizenship and Immigration Services for a visa. On the "Working in the US" page on the USCIS website, employers can find information on qualifications for the H-2A and H-2B programs and on how to petition on behalf of a worker.

Department of State — travel.state.gov

It is the foreign worker's responsibility to apply for a visa through a U.S. Embassy or Consulate, but it is important for employers to be aware of the process. Under the "Employment" tab, the DOS website outlines the application process, fees and required documentation.

AmericanHort offers access to legal and policy experts for members seeking guidance. Learn more at www.americanhort.org.

we don't see the program fundamentally changing."

Precise timelines for application deadlines and other steps throughout the application process are specified in the OFLC's regulations, available at www.doleta.gov. Employers seeking foreign labor must first go through an extensive process of attempting to recruit any willing and available American worker.

A big challenge with H-2A is the bandwidth, the government's capacity to process applications as demand grows, according to Regelbrugge. Three government agencies are involved in the H-2A visa program. The process starts with the Labor Department, then it goes to the Homeland Security Department and then it goes to the State Department.

“Delays can occur at any stage of that process. There’s only so much bandwidth for processing and admitting these workers and those processes have always been rigorous — making sure that the people that are coming in are well-meaning farmworkers, not people with nefarious intent,” he says. “But it’s also very possible in the new administration that the review processes will be further altered and may result in even greater delays. The pipeline is only so big and the pipeline is already being strained.”

Regelbrugge says worksite enforcement by U.S. Immigration and Customs Enforcement (ICE) can have a large impact on the horticulture industry’s immigrant labor, and has the potential to push more growers toward these visa programs. “There is a huge risk of a much more aggressive stance by the federal government in terms of worksite immigration enforcement,” he says. This enforcement can play out in one of two ways, according to Regelbrugge: work-site audits where agents of the government come in and audit your paperwork, your I-9 forms; or in the form of actual raids.

“In the wave of the executive orders that the President has issued [right after taking office], one of them focuses on interior enforcement. It changes the definition on who is considered to be a target for the purpose of interior enforcement,” Regelbrugge says. “The definition of what constitutes a criminal alien is expanded tremendously to not only include those who have a criminal conviction, but also people who have

committed fraud or misrepresentation for an official purpose and a couple of other categories.”

Committed fraud or misrepresentation for an official purpose may include using a fake social security card to gain employment.

“Fifty percent or more of the agricultural workforce is believed unauthorized, and these workers may have used a fake social security card to gain employment for jobs nobody else would apply for,” says Regelbrugge. “So what the executive order technically does is it places in the bullseye of enforcement priorities 50 percent or more of the agricultural workforce in this country.”

“A substantial increase in worksite enforcement could force large numbers of people into the H-2A program as their only resort and the more people pile into it in the short term the greater the likelihood of very serious processing delays and other problems,” Regelbrugge adds.

RESOURCES FOR GROWERS

With the possibility of an overhaul of foreign labor programs, Regelbrugge says growers must use every tool in their toolkit to keep a healthy labor force, regardless of whether they get H-2A or H-2B workers.

“We’re encouraging people to be thinking about alternative labor sources. In some cases, we’ve had employers in the industry who have been successful in employing resettled refugees or returning veterans,”

Regelbrugge says. “We’re encouraging people to figure out how to work more smartly and efficiently; how to mechanize and automate processes where they can; use technology to improve the nature of jobs.”

Worker retention must also be a priority for growers, he adds. “The worst of all is that the current workforce may end up getting drawn into other industries like home building or construction.”

In addition to its labor research, AmericanHort retains a group of legal and policy experts. The group of labor and employment law lawyers is available for premium members to turn to for strategic advice and guidance.

“Anybody who’s thinking about going into one of these programs needs to go in with eyes wide open,” Regelbrugge says. “They need to do their homework, they need to do their fact checking and they need to take their time and do it right.”

AmericanHort has also placed efforts into advocating for a returning worker provision for the H-2B visa program and immigration reform to address the immigrant workforce in the U.S. The association co-chairs the Agriculture Coalition for Immigration Reform and the H-2B Workforce Coalition. AmericanHort also chairs the National Immigration Forum Action Fund board.

“The environment that we’re sailing into could create new opportunities to get to legislative [immigration] reform but we’re concerned that may only come after some severe challenges,” Regelbrugge says. ■

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