H.R. 1773, the Agricultural Guestworker Act
Section-by-Section Explanation

Sec. 1. Short Title. Section 1 sets forth the short title as the "Agricultural Guestworker Act" or "AG Act."

Sec. 2. H-2C Temporary Agricultural Work Visa Program. Section 2(a) adds a new definition to section 101 of the Immigration and Nationality Act (INA) for the creation of H-2C status for temporary workers who are "coming temporarily to the United States to perform agricultural labor or services."

Section 2 (b) expands the definition of "agricultural labor or services" to include work that has not traditionally been considered to be agricultural in nature (*e.g.*, forestry, shellfish processing, and the processing and manufacturing of agricultural products that were not grown by the employer). Specifically, the bill defines the term to include "the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state)," "all activities required for the preparation, processing or manufacturing of a product of agriculture . . . for further distribution," "forestry-related activities," "aquaculture activities," and "the primary processing of fish or shellfish." This definition effectively moves several industries—including logging and shellfish processing—from the H-2B program to the new H-2C program created by this bill.

Sec. 3. Admission of Temporary H-2C Workers. Section 3(a) adds new section 218A to the INA. This new section 218A creates the procedures for the admission of H-2C workers, as follows:

New section 218A(a) defines various terms used in the section. Notably, the term "special procedures industry" is defined to include "sheepherding, goat herding, and the range production of livestock, itinerant commercial beekeeping and pollination, itinerant animal shearing, and custom combining and harvesting." The term "forestry-related activities" is defined to include "tree planting, timber harvesting, logging operations, brush clearing, vegetation management, herbicide application, the maintenance of rights-of-way (including for roads, trails and utilities), regardless of whether such right-of-way is on forest land, and the harvesting of pine straw."

New section 218A(b) requires employers to submit a petition to the Department of Homeland Security (DHS) attesting the following:

1. That the employer will offer employment to the requested aliens on a contractual basis for a period of time. Such contract shall only be required to include a description of each place of employment, wages and other benefits to be provided, and the duties of the position.
2. The number of temporary H-2C workers it intends to employ and the wage rate. Temporary employment is defined as the employer's intent to employ the worker for up to the permitted time (18 months for temporary and seasonal workers; and 36 months for year-round jobs with the possibility of renewals for 18 months at a time).

3. That the employer will offer the same wages, benefits, and working conditions required by the H-2C program to all workers employed in the same "job" for which H-2C workers are sought. As defined by the bill, such a job must involve essentially the same responsibilities; be held by workers with substantially equivalent qualifications and experience; and be located in the same place or places of employment.
4. That the employer has not and will not displace U.S. workers during the H-2C period of employment, or in the 30 days prior to such employment. (For a displacement to occur, the job must involve essentially the same responsibilities, be held by workers with substantially equivalent qualifications and experience, and be located in same area of employment.)
5. That the employer has conducted recruitment, but has been unable to locate "sufficient numbers of willing and qualified United States workers." Recruitment requirements are met by submitting a local job order to the State Workforce Agency and having that order posted on-line for at least 30 days. Recruitment of U.S. workers is required until the first day the H-2C workers start.
6. That the employer has offered or will offer the job for which H-2C workers are sought to any eligible U.S. workers who are qualified and available at the time, at each place, and for the duration, of need. This requirement does not apply to workers who apply after the H-2C workers begin employment.
7. That the employer will provide insurance covering work-related injury and disease, but only if the job is not covered by State workers' compensation laws.
8. That the job is not vacant because of a strike or lockout.

New section 218A(c) requires the employer to make the petition publicly available at the employer's principal place of employment.

New section 218A(d) requires DHS to make a list of petitions available for public examination.

New section 218A(e) provides that DHS may not require employers to petition more than 28 days before the start date. DHS must approve or reject a petition within ten days, unless the petition is incomplete or obviously inaccurate, in which case DHS must notify the employer within five days and give the employer the opportunity to correct any deficiencies. By filing an H-2C petition, employers consent to inspection by the USDA and DHS.

New section 218A(f) provides that an agricultural association acting as a joint employer may file petitions for workers, and that such workers could be transferred among its members. If an association's member violates certain program rules, the USDA may invoke penalties against only that member, unless the association participated in, had knowledge of, or had reason to know of the violation. If an association violates certain program rules, the USDA may invoke penalties against only the association, unless any individual member participated in the violation.

New section 218A(g) provides for an expedited appeals process for denied petitions.

New section 218A(h) requires that fees be assessed to recover the reasonable costs of processing petitions.

New section 218A(i) authorizes the USDA to conduct investigations and audits. If after notice and opportunity for a hearing, the USDA finds that the employer (1) failed to fulfill an attestation required by this section or (2) made a material misrepresentation of a material fact in the H-2C petition, the USDA may impose administrative remedies (including fines not to exceed $1000 per violation) and may bar the employer from the program for 1 year. For willful violations, the USDA may fine the employer up to $5,000 per violation, or up to $15,000 if the violation involved the displacement of a U.S. worker. The USDA may bar an employer from the H-2C program for two years for a willful violation, for five years for a subsequent violation, and permanently for a subsequent willful violation.

New section 218A(j) authorizes the USDA to order back wages, or other required benefits, if it finds that the employer failed to provide the benefits, wages, or working conditions promised in the H-2C petition. An award for back wages is limited to the difference between the amount paid to the worker and the amount that should have been paid.

New section 218A(k)(1) requires that U.S. workers be provided the same wages, benefits and working conditions as provided to H-2C workers; and no job offer may impose restrictions or obligations on U.S. workers that are not imposed on H-2C workers. This provision also includes language to change current FLSA case law under the *Arriaga* case, which currently prevents employers from imposing transportation and relocation costs on workers when such costs would bring workers' wages below required minimum wage rates. By stating that such transportation and relocation costs "mutually benefit" workers and employers, the provision allows these costs to be imposed on workers, even if the costs would bring the workers wages below the required minimum wage.

New section 218A(k)(2) requires the employer to offer H-2C workers the greater of: (a) the applicable state or local minimum wage; (b) 115 percent of the federal minimum wage (or 150 percent for workers in meat or poultry processing); or (c) the actual wage level paid by the employer to all other individuals in the job. (For actual wage purposes, the relevant job must involve essentially the same responsibilities, be held by workers with substantially equivalent qualifications and experience, and be located in same area of employment.) An employer can utilize a piece rate or other alternative wage system so long as the employer guarantees a minimum wage consistent with the prior sentence. Compensation from a piece rate or alternative wage payment system must include time spent during rest breaks, moving from job to job, clean-up, or any other nonproductive time, but only if it does not exceed 20 percent of total hours in a work day.

New section 218A(k)(3) requires that employers provide at least 50 percent of the hours promised to the worker in the contract, or pay the equivalent. Workers who are terminated for cause, or due to the lack of need resulting from any form of natural disaster, are not entitled to the protection of the 50 percent work guarantee.

New section 218A(l) states that the USDA and DHS may not delegate their enforcement or administrative functions to other federal government agencies.

New section 218A(m) states that except in an emergency, any federal or contract personnel seeking to determine employer compliance must make their presence known to the employer and "sign-in in accordance with reasonable bio-security protocols" before proceeding to the place of employment. This subsection effectively prohibits effective inspections that prevent employers from covering up violations.

New section 218A(n) sets visa periods at 18 months for temporary or seasonal work. For year-round work, the visa period is set at 36 months, with possible subsequent extensions of up to 18 months each. For workers engaged in temporary or seasonal work whose H-2C status has expired, they cannot regain eligibility for H-2C status until they leave and remain outside the country for $1/12^{th}$ of the duration of their previous H-2C status (up to 45 days). For workers engaged in permanent work whose H-2C status (including any extensions) has expired, they cannot regain eligibility for H-2C status until they leave and remain outside the country for the lesser of (a) 45 days or (b) $1/12^{th}$ of the duration of their previous H-2C status. Sheepherders, goatherders, livestock workers, and workers near the border who return to the worker's place of permanent residence outside the country each day, have no period of maximum stay.

New section 218A(o) provides H-2C workers with: (1) an additional period of admission of up to seven days before the commencement of work for the purpose of travel to the worksite, and (2) an additional period of admission of up to 14 days after the period of employment to leave the country, or up to 30 days if they are seeking another H-2C employment opportunity. If a worker stays one day over these authorized periods, he or she is subject to removal and is barred from the United States for three years.

New section 218A(p) requires employers to notify USDA and DHS of any H-2C workers who abandon employment before the conclusion of their work contracts. Employers may designate eligible aliens to replace such H-2C workers, and such replacement workers will not count towards the H-2C visa cap.

New section 218A(q) allows aliens who are unlawfully present on October 23, 2017 to obtain temporary H-2C status. Eligible individuals are those who performed agricultural labor or services in the United States for at least 5.75 hours during each of at least 180 days during the 2-year period prior to enactment. Such individuals who are provided H-2C status must depart the United States for a period within 180 days of receiving such status. Those who do not depart within 180 days are deemed to have violated their nonimmigrant status and are subject to removal.

New section 218A(r) requires employers to deduct 10 percent from H-2C wages, with exceptions for sheepherders, goatherders, livestock workers, and those who return to their permanent residence outside the United States each day. The deducted amount is placed a trust fund, even it if brings the worker below the federal minimum wage (the bill creates an exemption from the Fair Labor Standards Act (FLSA) as well as state and local wage laws). To apply for the return of these wages (and any interest earned thereon), H-2C workers would be required to file an application with DHS, travel to a U.S. embassy or consulate in their homeland within 120 days of the expiration of their visa, in order to demonstrate to the satisfaction of the Secretary of Homeland Security that they have complied with the with the terms of the H-2C program. For

jobs that are not seasonal or temporary (other than sheepherders, goat herders, and livestock workers), employers must also pay into the Trust Fund an amount equal to the federal tax on wages paid to H-2C workers that the employer would have been obligated to pay under chapters 21 (FICA) and 23 (FUTA) of the Internal Revenue Code if the workers were subject to those chapters. These funds are to be divided proportionally by USDA and DHS to cover their respective expenses in administering and enforcing the H-2C program. Any remaining funds are to be provided to DHS for the general enforcement of the immigration laws.

New section 218A(s) sets forth special rules for employers in Special Procedures Industries (i.e., sheepherding, goat herding, itinerant commercial beekeeping and pollination, the open range production of livestock, itinerant animal shearing, and custom combining and harvesting). An employer in such an industry that does not operate at a fixed place of employment may include in its H-2C petition an itinerary for workers, which may be subsequently amended by the employer. The USDA may set special wage rates for H-2C workers in such industries. And employers engaged in commercial beekeeping or pollination may require job applicants to be free from bee-related allergies.

Section 3(b) adds new section 218B to the INA. This new section 218B creates the procedures for "at-will employment" of temporary H-2C workers, as follows:

New section 218B(a) provides that an H-2C worker who has completed the H-2C contract (or who has been laid off due to natural disaster) may engage in "at-will" work for a "registered agricultural employer," so long as the worker does not exceed his or her maximum period of stay. The worker has 30 days from the completion of the contract employment to find new work with a registered agricultural employer. An H-2C worker who abandons employment with the petitioning employer may not engage in at-will employment under this section until she returns to her home country, is readmitted in H-2C status, and completes an H-2C work contract.

New section 218B(b) states that H-2C workers engaged in at-will employment are subject to the period of admission, limitation of stay in status, and requirement to remain outside the United States that applies to other H-2C aliens under new section 218A.

New section 218B(c) establishes the application process to become a registered agricultural employer. Applicants must pay a fee; show that they employ, or plan to employ, agricultural workers; show that they have not been barred from the H-2A or H-2C programs within the last three years; agree to fulfill the terms of the attestations for H-2C workers under section 218A (except for the 50% work guarantee); and notify the USDA and DHS when they first employ and cease to employ H-2C workers.

New section 218B(d) provides that registration is valid for three years, with three-year extensions. The USDA shall revoke such registration if the employer becomes disqualified from participating in the H-2C program.

New section 218B(e) includes identical enforcement provisions described above for new section 218A.

Section 3(c) of the bill prohibits the use of H-2C visas for the spouses and children of H-2C workers.

Section 3(d) provides for a cap of 450,000 H-2C visas per fiscal year, except that such cap may be adjusted based on program use. Of the 450,000 visas made available in the first fiscal year, a maximum of 40,000 is available for meat or poultry processing and a maximum of 410,000 is available for all other covered employment. If either base allocation (40,000 for meat and poultry workers, or 410,000 for other workers) is exhausted in a fiscal year, the allocation for that year and the following year must be increased by up to ten percent. Increases of up to ten percent must be made to these base allocations in subsequent years if all available visas continue to be used. If a base allocation is not used in a fiscal year, the base allocation for the subsequent fiscal year must be reduced by the greater of 5 percent or a percentage equivalent to the number of visas that went unused in the preceding year. But in no event may the base allocations fall below the original 450,000 (40,000 for meat and poultry workers, and 410,000 for other workers). These caps also do not apply to any workers (with or without status) who were physically present in the United States on October 23, 2017 and who worked for at least 5.75 hours during each of at least 180 days in the two-year period before enactment. The cap also does not apply to any H-2A or H-2B worker who is the subject of an H-2C petition filed by the worker's former H-2A or H-2B employer who employed the worker before October 23, 2017.

Section 3(e) amends the INA to allow H-2C workers to remain on H-2C status if they are sponsored for lawful permanent residence.

Section 3(f) makes technical amendments to the INA's table of contents.

Sec. 4. Mediation. Section 4 provides that an H-2C worker may not bring a civil action for damages against an employer unless mediation through the Federal Mediation and Conciliation Service has been attempted at least 90 days before filing the action.

Sec. 5. Migrant and Seasonal Agricultural Worker Protection. Section 5 provides that H-2C workers are not covered by the Migrant and Seasonal Agricultural Worker Protection Act, the main law protecting farmworkers.

Sec. 6. Binding Arbitration. Section 6 provides that at the time of employment, employers may require workers to submit to mandatory binding arbitration and mediation of any grievance relating to the employment relationship, the cost of which would be equally divided between the employer and the H-2C worker, except that they would each pay for their own counsel, if any.

Sec. 7. Eligibility for Health Care Subsidies and Refundable Tax Credits; Required Health Insurance Coverage.

Section 7(a) excludes H-2C workers from eligibility for Affordable Care Act subsidies, as well as the individual mandate.

Section 7(b) prevents such workers from being eligible for Child Income Tax Credits and Earned Income Tax Credits.

Section 7(c) requires such workers, within 21 days of obtaining H-2C status or an H-2C visa, to obtain health insurance coverage accepted in their State(s) of employment for the

duration of their H-2C employment. Section 7(c) also waives the Fair Labor Standards Act (FLSA), as well as State and local wage laws, with respect to the health care coverage requirement. This allows employers to escape any of the costs related to health insurance, and it allows workers' effective wages to fall far below applicable minimum wage requirements. Workers who fail to obtain and maintain the required insurance coverage are deemed to have violated their nonimmigrant status and are subject to removal.

Sec. 8. Study of Establishment of an Agricultural Worker Employment Pool. Section 8 requires the Secretary of Agriculture to conduct a study on the feasibility of establishing an agricultural worker employment pool and an electronic Internet-based portal to assist and match H-2C workers and employers. The Secretary of Agriculture must issue a report with the results of the study within 1 year of enactment.

Sec. 9. Effective Dates; Sunset; Regulations. Section 9(a) sets forth various effective dates for the legislation. Most provisions become effective on the date that DHS issues final rules implementing the act, which DHS is required to do within 7 months of enactment. The health insurance requirement (section 7 of the bill) would become effective on the date of enactment. The provisions concerning at-will employees (section 3(b) of the bill) would become effective only after an E-verify system is made mandatory, can specify whether individuals are authorized to work only in agriculture, and can track the maximum continuous period of authorized status for workers and out-of-country requirements.

Section 9(b) provides that the George W. Bush Administration's H-2A regulations from 2008 will be in force for the H-2A program as of the date of enactment, with exceptions for some of the regulations relating to sheepherders, goat herders and livestock workers; that aliens who were unlawfully present on October 2, 2017 shall be eligible to become H-2A workers despite their unlawful presence for the 2-year period beginning on the date of enactment; and that the H-2A program shall sunset when the H-2C program is fully operational.

Section 9(c) requires the Secretary of Homeland Security to issue final regulations within 7 months of the date of enactment of this legislation.