



H-2B VISA

Updated Aug. 2016

The H-2B nonimmigrant visa program allows employers to hire foreign workers for temporary or seasonal non-agricultural jobs when they cannot find enough U.S. workers.

TABLE OF CONTENTS

I. H-2B VISA	4
A. History	4
B. Duration	5
C. Annual Cap on H-2B Visas	5
D. H-4 Visa for Dependents.....	6
II. H-2B HIRING PROCESS	6
A. Steps for Employers	8
B. Steps for Workers.....	13
III. H-2B WORKERS IN THE U.S. – DATA	16
A. The Number of H-2B Workers	17
B. H-2B Worker Demographics	18
C. H-2B Employer Demographics	19
D. H-2B Job Characteristics	20
V. H-2B WORKER RIGHTS	20
A. Wages.....	21
C. Transportation Costs.....	22
D. No Job Relocating.....	22
VI. ENFORCEMENT	22
A. U.S. Department of Labor	23
B. U.S. Department of Homeland Security	24
C. U.S. Department of State.....	24
D. Private Litigation.....	24
VII. H-2B WORKER ISSUES	25
A. Fraud.....	26
B. Recruitment Fees	26
C. Wage Theft.....	27

D. Retaliation.....	28
E. Human Trafficking and Severe Labor Exploitation.....	28
F. Lack of Portable Justice	29
G. Rules Do Not Adequately Protect U.S. Workers.....	29
VIII. THE FIGHT FOR H-2B PROTECTIONS	29
A. 2012 Rules	29
B. USDOL Authority	30
C. 2015 Rules	31

I. H-2B VISA

The H-2B nonimmigrant visa program allows work in the U.S. at temporary or seasonal non-agricultural jobs as long as the wages and working conditions of U.S. workers are not adversely affected.¹ Employers must first apply to the U.S. Department of Labor (USDOL) for temporary labor certification affirming that the job is temporary or seasonal in nature, and that U.S. workers are not available for the job.² Employers then petition the U.S. Department of Homeland Security (DHS) for permission to hire foreign individuals as H-2B nonimmigrants. The H-2B visa does not offer the workers a path to lawful permanent residence or citizenship.³ There is no particular industry or job type associated with the H-2B visa. Rather, any job that is non-agricultural and meets the requirements of being temporary or seasonal in nature, may potentially be certified. Common H-2B jobs include landscaping, amusement parks, housekeeping, forestry, seafood processing, construction, ski resorts and restaurants in tourist areas. There is a statutory annual limit of 66,000 new H-2B visas available each fiscal year.⁴ In 2015, the U.S. Department of State issued 69,684 new H-2B visas.⁵ Policy analysts who study the H-2B program question whether it is used for [labor shortages or cheap, temporary labor](#). Within the past several years, the H-2B program has been [subject to scrutiny](#), regulatory reform, and [litigation](#).

A. HISTORY

[Early twentieth century agricultural labor importation schemes](#) were precursors to the current temporary foreign worker program, enacted by the Immigration and Nationality Act (INA) of 1952.⁶ Initially, foreign workers coming to the United States for both agricultural and non-agricultural temporary jobs were included in the same nonimmigrant visa category.⁷ However, in 1986, the Immigration Reform and Control Act (IRCA) separated agricultural and non-agricultural temporary workers into the current H-2A and H-2B sub-categories.⁸ This separation was marked by significant advocacy in defense of the rights of temporary agricultural workers, whereas “the existing H-2B non- agricultural temporary worker program was virtually ignored in the legislative debate.”⁹ As one scholar has put it:

Congress had determined that the regulations governing agricultural workers “[did] not fully meet the need for an efficient, workable and coherent program that protects the interests of agricultural employers and workers alike.” Regarding non-agricultural workers, however, a House Report accompanying the bill specifically noted that no changes were being made to the statutory language governing non- agricultural H-2s since the program had worked “reasonably well” with respect to non-agricultural occupations.¹⁰

Indeed, that bill made “no changes to the statutory language concerning non-agricultural H-2’s; instead it divides the program into two parts and sets forth a number of specific requirements regarding the operation of the H-2A program.”¹¹ Following IRCA, USDOL

issued H-2A regulations with an extensive scheme of worker protections.¹² No similar protections for H-2B workers were made in 1986. Several regulations regarding H-2B workers were promulgated in 2008 and took effect in 2009,¹³ though several portions of the regulations were later found to be illegal by a federal court.¹⁴ USDOL then developed more comprehensive H-2B worker protections in line with H-2A that were supposed to take effect in 2012, but USDOL did not enforce the new regulations because a federal court blocked their enforcement.¹⁵ In 2015, USDOL -- this time in conjunction with the Department of Homeland Security -- again promulgated extensive [H-2B worker protection regulations](#) (2015 Rule).¹⁶ As of January 2016, all of these regulations are in effect, though a 2015 Congressional appropriations bill temporarily prohibited USDOL from enforcing several provisions.¹⁷ Those provisions can, however, be enforced through private litigation.

B. DURATION

H-2B visas authorize work for the length of time listed on the temporary labor certification, up to nine months.¹⁸ Workers are allowed to be in the U.S. ten days before -- and ten days after -- the authorized period.¹⁹ An H-2B visa may be extended for up to one year, as long as the current or new employer applies for an extension and it is approved prior to the expiration of the current visa.²⁰ The total amount of time an H-2B worker may be continuously present in the U.S. is three years.²¹ At the end of that three-year period, the worker must depart the United States.²²

Certain time spent outside of the U.S. may not count toward the 3-year limit. The U.S. Department of Homeland Security's sub-agency, the U.S. Citizenship and Immigration Services (USCIS) has [published guidance](#) on how to calculate the amount of time of an H-2B worker's authorized stay on a visa when there are interruptions.²³ There is no limitation on a former H-2B worker's eligibility for a new H-2B visa as long as he or she has resided and been physically present outside of the U.S. for 3 months immediately preceding the new visa.²⁴ In other words, after three years, as long as the worker returns to his or her home country for three months, the worker may return on another H-2B visa.

C. ANNUAL CAP ON H-2B VISAS

In 1990, the INA was amended to set an annual cap of 66,000 for H-2B visas for each fiscal year, which runs from October through September.²⁵ Since that time, the number of H-2B visas requested each year has fluctuated, but in general, demand has exceeded supply. Some groups of workers are exempt from the cap, including fish roe processors and certain workers in the Commonwealth of Northern Mariana Islands and/or Guam.²⁶ The cap is usually met early in the fiscal year. For example, on May 19, 2016 [USCIS announced it had reached its H-2B cap](#) for FY 2016.

1. THE PEAK YEARS 2005-2007: H-2B WORKERS

As certain industries have become dependent on temporary foreign labor, some have petitioned Congress for relief from the cap.²⁷ In 2005, the Save Our Small and Seasonal Businesses Act created a temporary exemption from the annual H-2B cap

for nonimmigrants who were returning to work with the same employer.²⁸ These workers were issued H-2R visas, a practice that ultimately lasted for three years.²⁹ At its peak in 2007, 129,547 workers were admitted with either H-2B or H-2R visas – twice the annual cap.³⁰ The same rules and regulations for the H-2B program applied to H-2R workers. The official H-2R program ended in 2007.

2. APPROPRIATIONS BILL CREATES H-2R WORKERS FOR 2016

In December 2015, Congress passed an appropriations bill allowing for employers to bring in previously-employed foreign workers without counting them against the annual cap for H-2B workers.³¹ This in essence creates a new category for returning H-2B workers, much like the Save our Small and Seasonal Business Act exemption ten years earlier. While some policy analysts expect that the increase in number of H-2B workers will be less than 10,000, others contend that the number in 2016 will be similar to the peak years of 2005 to 2007.³²

D. H-4 VISA FOR DEPENDENTS

The H-4 visa category is available for spouses and minor children of any nonimmigrant worker with an H visa to stay in the U.S. as long as the principal's H visa is valid.³³ The U.S. State Department consular official may take steps to verify that the principal H worker is in fact maintaining his or her status in the United States before granting the family member's H-4 visa.³⁴ The family members are not eligible to work, but they may study.³⁵

DIGGING DEEPER: H-4 VISA NOT WIDELY USED FOR DEPENDENTS OF H-2B WORKERS

H-4 visas are available for spouses and children of all classes of H workers (among them, H-1B, H-2A, and H-2B). The H-4 visa does not authorize employment, which may be why the H-4 visa is not widely used.³⁶ The number of H-4 visa holders who are dependents of H-2B workers is hard to pinpoint, because the numbers do not distinguish between the different types of H visas. But, even when considering the total number of visas issued through H-1B, H-2A and H-2B principals all together, the number of H-4 workers is very small. For example, in 2013 there were 96,753 H-4 visas compared with 285,015 H principal visas.³⁷ The ratio of H visas to H-4 visas is much lower than the ratio of similar nonimmigrant visa categories, such as the J or L visa, which allow dependents to work on their derivative visas. This suggests that while employment authorization is only one factor that a nonimmigrant worker will consider when deciding whether family members should join him or her, it is an important consideration. It may also reflect the fact that, as workers in unskilled jobs, it is difficult for H-2B workers to afford the travel and housing costs associated with bringing family members to the U.S.

II. H-2B HIRING PROCESS

As is the case with many other nonimmigrant visa programs, employers apply for permission to import H-2B workers. Three government agencies are involved: the U.S. Department of Labor (USDOL), the U.S. Department of Homeland Security (DHS), and the U.S. Department of State.

In 2015 USDOL added a new step to the process for obtaining H-2B certification called registration.³⁸ As of September 2016, however, USDOL has not set up the registration process and registration is not mandatory.³⁹

First, the employer must obtain a prevailing wage determination for the job opportunity in the area of intended employment from USDOL. After that the employer submits its application for temporary labor certification to USDOL for review. Then the employer must recruit U.S. workers for the job opening. Finally, DHS's sub-agency, the U.S. Citizenship and Immigration Service (USCIS), reviews the employer's petition for nonimmigrant workers. While the H-2B request is pending with the various federal agencies, employers must locate and hire the foreign workers to fill the positions. Workers are usually recruited in their home countries. To assist with the process, employers may hire a labor contractor, who may also be in the business of foreign recruitment. Or, the employer may hire a foreign recruiter directly. Less commonly, employers travel abroad to find their own workers or recruit them through other known migrant workers or returning H-2B workers.

Once the USDOL and DHS approve the H-2B positions, the prospective H-2B workers apply for the H-2B visa from the Department of State at the designated U.S. consular post in their home country.⁴⁰ After a worker receives the H-2B visa, the worker may travel to the U.S. and present for admission at the U.S. border or port of entry from an inspector with DHS's sub-agency, the Customs and Border Patrol (CBP). If the inspector is satisfied that the worker is admissible, entry is allowed, and the worker travels on to the worksite.

DIGGING DEEPER: INTERPLAY BETWEEN U.S. DEPARTMENT OF HOMELAND SECURITY AND U.S. DEPARTMENT OF LABOR

By statute, employers must petition DHS for classification of the prospective temporary worker as an H-2B nonimmigrant before that worker may obtain an H-2B visa or be granted H-2B status.⁴¹ DHS is the federal agency in charge of immigration matters that the statute authorizes to consult with other "appropriate agencies" before deciding whether to approve an H-2B petition.⁴² In this vein, DHS has determined that it should consult USDOL because of USDOL's ability to advise whether "unemployed persons capable of performing such service or labor cannot be found in this country."⁴³ According to DHS, the best way to accomplish this is to require the employer, prior to filing an H-2B petition, to first apply for a temporary labor certification from USDOL:⁴⁴

The temporary labor certification serves as USDOL's advice to DHS that the employer has tried unsuccessfully to recruit sufficient U.S. workers at a USDOL-determined prevailing wage for the position for which it now seeks H-2B workers, and that the employer has provided assurance that it will pay its H-2B workers and any successfully recruited U.S. workers at least the same prevailing wage. Thus, the certification serves as expert consultation and advice to USCIS on whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers. The fulfillment of the required consultation with USDOL in this fashion represents good and efficient government, inasmuch as it avoids potentially significant and unnecessary cost that the federal government would otherwise incur if it was required to replicate within DHS the unique expertise already existing within USDOL. . . . DHS relies on USDOL's advice in this area, as the appropriate government agency with expertise in labor market questions, to fulfill DHS's statutory duty of determining that unemployed persons capable

of performing the relevant service or labor cannot be found in the United States and to approve H-2B petitions.⁴⁵

In the 2015 regulations jointly promulgated by DOL and DHS, DHS clearly delegated certain investigatory and enforcement functions for the H-2B program to DOL.⁴⁶

A. STEPS FOR EMPLOYERS

Employers who want to hire H-2B workers may either navigate the steps themselves or hire an agent (often referred to as a labor contractor or staffing company) or lawyer to handle the process for them.⁴⁷ If the employer is a labor contractor, rather than a fixed-site employer, the contractor must list the name and location of each employer where the nonimmigrants will work.⁴⁸ The location of each actual worksite must be listed with as much geographic specificity as possible. Employers and job contractors are required to register with the National Processing Center to establish that their need for services or labor is temporary.⁴⁹ Under the 2015 regulations, participation of job contractors was restricted to only those job contractors who can demonstrate they have their own need for workers on a temporary basis (either seasonal or one-time occurrence).⁵⁰ The job contractor and the employer to whom it is supplying workers are joint employers⁵¹ and must both agree to comply with the requirements of the H-2B program.⁵²

1. U.S. DEPARTMENT OF LABOR

Employers apply for certification, or approval, of H-2B temporary nonagricultural job positions with USDOL's sub-agency, the Employment and Training Administration (ETA), which houses the Office of Foreign Labor Certification (OFLC). Employers must submit an application for temporary labor certification to the OFLC.⁵³ The application must list a job opportunity which is a bona fide, full-time, and temporary position. The application is often referred to as a "job order". Full time is defined as 35 or more hours per week.⁵⁴ Temporary means either a seasonal, peak load or intermittent need that is no more than nine months, or a one-time occurrence.⁵⁵ The employer must offer the prevailing wage for the position.⁵⁶ The prevailing wage is approved by OFLC. USDOL approves a high proportion of temporary labor certification applications for H-2B jobs.⁵⁷

A) REGISTRATION OF TEMPORARY NEED

The 2015 Rule requires employers or job contractors to registration their temporary need for workers with USDOL by no less than 120 days and no more than 150 days from the first date of need.⁵⁸ The Chicago National Processing Office may approve the application for a period of up to 3 consecutive years.⁵⁹ Once approved, the employer or contractor may seek workers for the first period of need.⁶⁰ However, as of September 2016, USDOL has not yet set up the registration process.⁶¹

B) PREVAILING WAGE DETERMINATION

The next step in the H-2B hiring process is to obtain a Prevailing Wage Determination (PWD).⁶² Employers must obtain this prior to filing an application for temporary labor certification. Employers submit the Application for Prevailing Wage Determination, [ETA Form 9141](#), to USDOL's National Prevailing Wage Center. The PWD must be valid on

the date the job order is posted. USDOL determines the prevailing wage based on one of several methods. The prevailing wage is either what is spelled out in the collective bargaining agreement in place at the worksite, if any, or it is the arithmetic mean of wages of workers similarly employed in the area of intended employment.⁶³ The wage numbers from which the mean is derived come from either the Occupational Employment Statistics (OES) Survey or a survey provided by the employer, if USDOL finds it acceptable.⁶⁴ According to DOL regulations published in 2015, employer-provided wage surveys may only be used in limited circumstances to set the prevailing wage.⁶⁵ However, Congress drastically expanded the availability of employer-wage surveys in its 2016 Department of Labor Appropriations Act.⁶⁶

DIGGING DEEPER: PREVAILING WAGE LITIGATION CHRONOLOGY

The Prevailing Wage Determination (PWD) methodology currently in effect is the result of extensive litigation. In 2008, in the case *CATA v. Solis*, non-profit law firms and advocacy groups representing unions and migrant workers challenged the way prevailing wage rates were set.⁶⁷ At that time, the regulations set the prevailing wage based on skill-levels. The plaintiffs in *CATA* argued that using that skill level breakdown resulted in wages that were much lower than what were truly the prevailing wages across industries and that this negatively impacted U.S. workers.

In August 2010, a district judge left the rule intact yet directed the agency to promulgate new regulations within 90 days.⁶⁸ In the subsequent rulemaking, USDOL found that using the skill level methodology to come up with the wage rate did indeed adversely affect wages and working conditions of U.S. works; so USDOL revised the PWD rule.⁶⁹ However, implementation of the revised rule was delayed by court order in litigation filed by employers who had sued USDOL because they were unhappy with the new rule.⁷⁰ In the meantime, [employer organizations persuaded Congress](#) to adopt a resolution barring USDOL from using appropriated funds to implement the 2011 H-2B prevailing wage rate regulations.⁷¹ That ban was continued by subsequent appropriations.⁷²

In March 2013 in response to a request from the *CATA* plaintiffs, the district court finally actually vacated the offending skill-level prevailing wage rate regulation.⁷³ As a result, USDOL issued an interim wage rule in late April 2013 that went into effect immediately.⁷⁴ The 2013 rule set the prevailing wage as the mean OES wage unless there was another statutory or union wage, but it also allowed employers to submit a private wage survey.

After the 2013 interim final rule was enacted, USDOL issued supplemental prevailing wage determinations (PWD) to H-2B employers using the new methodology. An employer filed a motion with USDOL's Board of Alien Labor Certification Appeals (BALCA), challenging the supplemental PWDs. The Board ruled that USDOL did not have the authority to increase the wage rate an employer must pay after the application for H-2B workers has been certified.⁷⁵ Worker advocates' attempt to challenge Island Holdings was blocked when the Eastern District of Pennsylvania ruled they lacked standing.⁷⁶ One court, however, denied an employer's motion to dismiss a claim for failure to pay the supplemental prevailing wage, stating that it was not bound by the Island Holdings decision.⁷⁷ The [Department of Labor responded](#) to the Island Holdings

ruling by issuing a notice indicating its intent to declare its authority to issue supplemental PWDs, but to date it has not issued a declaration.

A challenge by worker groups to the use of employer-provided surveys for prevailing wage determinations resulted in new criteria for the use of employer surveys.⁷⁸ On April 29, 2015, USDOL issued a [final rule](#) on the wage methodology, effective immediately.⁷⁹ Worker advocates challenged portions of the 2015 Rule dealing with employer-provided surveys, among other things, but their complaint was dismissed for lack of standing.⁸⁰ The 2016 DOL Appropriations Act mandates a different prevailing wage methodology than that in the 2015 Rule for FY 2016, and requires USDOL to accept employer surveys even where Occupational Employment Statistics survey data are available, “unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.”⁸¹

Worker advocates hoped that the net effect of the ongoing litigation will be H-2B workers receiving the actual prevailing wage rate for their jobs and U.S. workers’ wages not suffering as a result.⁸²

C) APPLICATION FOR TEMPORARY LABOR CERTIFICATION

After obtaining a prevailing wage determination and registering as an H-2B employer, the employer files the temporary labor certification application with State Workforce Agency and the National Processing Center in Chicago.⁸³ The application includes [ETA Form 9142B](#) and [Appendix B](#),⁸⁴ and any supporting documentation that shows the employer’s temporary need for workers.⁸⁵ Employers may submit the application either electronically or via U.S. mail to the Chicago National Processing Center.

The USDOL reviews the application for errors and compliance with H-2B program criteria, and, if everything is in order, will issue a Notice of Acceptance within 7 days of its receipt of the application.⁸⁶ The Notice of Acceptance will instruct the employer to engage in the required recruitment, and will notify the State Workforce Agency to enter the job order into interstate circulation.⁸⁷ After these steps are taken and the recruitment report is received, USDOL will issue its final decision on certification of the application.⁸⁸

1) INFORMATION ABOUT FOREIGN RECRUITMENT REQUIRED

Under the 2015 H-2B regulations, for the first time the H-2B employer must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under the temporary employment certification application.⁸⁹

During this phase of the hiring process, the employer must provide USDOL with its contracts or agreements with recruiters as well as all information required by the foreign worker recruitment disclosures. The employer must certify as part of the application process that neither they nor their agents sought or received payment for recruitment costs and that the employer has contractually forbidden its recruiters and agents from charging a fee.⁹⁰ As required under the 2015

Rule,⁹¹ the OFLC has compiled a publicly available [list of recruiters](#) identified by employers on their applications. It is possible to cross reference that list with the [online job orders](#) maintained by USDOL to determine with which employer a recruiter is associated.

D) RECRUITMENT

Employers seeking H-2B certification are required to try to recruit U.S. workers after their application temporary labor certification is accepted for processing.⁹² The employer must publish at least local newspaper advertisements on two separate days (one of which must be on a Sunday), contact former U.S. employees, post the job opportunity in at least 2 conspicuous places in the area of intended employment for at least 15 days, and contact the applicable union, if there is a collective bargaining agreement in effect at the worksite.⁹³ Recruitment must occur within 14 days of the date the Notice of Acceptance of the employer's application is issued by USDOL.⁹⁴ The employer must prepare and sign a report summarizing its recruitment efforts and the results.⁹⁵ The report must identify each U.S. worker who applied for the job, if any, and explain the lawful job-related reason for not hiring the U.S. worker. The recruitment report must be submitted to the National Processing Center by a date specified in the Notice of Acceptance.⁹⁶

DIGGING DEEPER: HISTORY OF U.S. WORKER RECRUITMENT FOR H-2B JOBS

Criticism of H-2B U.S. worker recruitment abounds.⁹⁷ Advocates have chronicled systematic "bogus advertisements in media designed to avoid U.S. workers, through unreasonable job qualifications, or through simple lack of follow up with qualified U.S. workers."⁹⁸

One media investigation reported that an East Coast visa fraud conspiracy simply scheduled interviews with U.S. applicants for inconvenient times, such as 6 p.m. on Christmas Eve. The few Americans who actually appeared reported later that the interviewers were "intimidating" and made the jobs sound "as bad as possible."⁹⁹

Economists routinely argue that at a time when unemployment rates for low-wage workers in the U.S. are high, "it is almost impossible that the importation of landscape laborers, hotel and restaurant workers, and construction workers is not 'displacing qualified United States workers available to perform such services or labor.'"¹⁰⁰

DIGGING DEEPER: PROCESS FOR JOB CONTRACTORS

Under the 2015 Rule, job contractors who are not themselves fixed site employers may apply for H-2B workers directly, as long as they are a joint employer with the fixed site employer for whom they will supply workers¹⁰¹ and they can show that they have their own temporary need (seasonal or one-time occurrence), not just that their client's need is temporary.¹⁰² Both the job contractor and the employer-client must sign the application for temporary employment certification, and there must be a signed contract between them.¹⁰³

2. U.S. DEPARTMENT OF HOMELAND SECURITY

Once the USDOL's final decision approving the temporary labor certification comes through, the next step is petitioning DHS's U.S. Citizenship and Immigration Services (USCIS) for permission to import foreign workers with H-2B nonimmigrant visas.¹⁰⁴

Along with the Petition for Nonimmigrant Worker, [Form I-129](#), petitioners must submit evidence including the USDOL-approved temporary labor certification, a statement of need, and if required, the workers' qualifications.¹⁰⁵ The documentation must include details about the temporary situation or conditions requiring the importation of foreign workers, whether the need is "a one-time occurrence, seasonal, peak-load or intermittent," and whether the petitioner expects the situation to recur.¹⁰⁶ If the petitioner is a labor contractor, the fixed site employer's name is not required on Form I-129, only the place of employment; therefore, USCIS will have the address of the worksites, but not necessarily the names of individual fixed site employers.

Petitioners may file for more than one worker on a single Form I-129 if all workers will perform the same services for the same period of time and in the same location.¹⁰⁷ If the employer is requesting nonimmigrant status for multiple workers who are not currently in the United States, they do not need to be named individually on Form I-129.¹⁰⁸ The petition must only list the total number of unnamed worker beneficiaries sought and specify their nationality, even if they are from more than one country.¹⁰⁹

Fees for each application (not per worker beneficiary) include a \$325 basic filing fee and a \$150 fraud detection and prevention fee.¹¹⁰ Premium processing (to speed up the review time) is available for \$1,225.¹¹¹ Form I-129 may not be filed or approved more than 120 days before the date of need.¹¹² After petitions are adjudicated, the decision is entered into the computer tracking system and if approved, the H-2B visa is ready for consular processing.

A) TWO APPLICATION PERIODS

For purposes of the annual 66,000 cap, the USCIS processes H-2B visas in two equal application periods each fiscal year. The annual H-2B visa allotment is divided into the following two application periods: 33,000 for the first half of the fiscal year and 33,000 for the second half.¹¹³ USCIS accepts applications from October 1 to March 31, until the 33,000-cap ceiling is reached. Any unallocated visa slots are rolled over into the second half of the fiscal year (April 1 through September 30) for a new count of 33,000 plus unallocated visas from the first half of the year. Unused visa slots cannot be carried over from one fiscal year to the next. USCIS maintains an updated cap count on [their website](#). As of May 12, 2016, USCIS had reached the cap for the second half of FY 2016.¹¹⁴

B) INFORMATION ABOUT FOREIGN RECRUITMENT REQUEST.

On the petition for non-immigrant workers, Form I-129, the employer must specify the country of origin of the worker beneficiaries, the name of the "staffing, recruiting, or similar placement service or agent" and the countries where the agent will recruit workers.¹¹⁵ The Department of State may deny or revoke an H-2B petition if it is discovered that the petitioner collected or entered into an agreement to collect a fee or other compensation (direct or indirect) from the beneficiary as a condition of the beneficiary obtaining or maintaining employment or if the petitioner knows or reasonably should have known at the time of filing the I-129 petition that the beneficiary has paid or

agreed to pay any facilitator, recruiter, or similar employment service as a condition or requirement of obtaining employment.¹¹⁶

B. STEPS FOR WORKERS

As mentioned above, an H-2B visa is only available for a job at a particular worksite after the employer has authorization from USDOL and USCIS. Workers usually connect with the employer through a foreign recruiter. Once a worker is offered and accepts an H-2B job, he must apply for the visa from the Department of State at a U.S. embassy or consulate in the home country where he must demonstrate nonimmigrant intent.¹¹⁷

1. U.S. DEPARTMENT OF STATE

Once Form I-129 is approved by USCIS, the employer will then communicate to the workers, either directly or through its labor contractor or recruiter, that they should apply for the visas at the U.S. consulate or visa processing location abroad.¹¹⁸ Usually an agent of the employer or recruiter will assist the workers with this process. The Department of State requires a \$190 basic filing fee, \$85 fingerprinting, and \$26 consulate interview fees.¹¹⁹ The U.S. Department of State does not have official, published policy guidance instructing consular officers to collect information about recruitment during the visa interview.¹²⁰

The Department of State reviews the application and has the final say about whether to issue the visa and whether it is credible that the worker will return home when the job period ends.¹²¹ Refusal rates have increased, especially in specific consulates with heightened concerns about fraud. Still, in 2015 the adjusted refusal rate for H-2B visas was just over 13%.¹²²

The H-2B visa itself does not guarantee entry to the United States. The worker must still pass immigration inspection at the border or port of entry; DHS's Customs and Border Protection will either permit or deny admission to the U.S. after their own inspection and may even determine the permitted time allowed in the U.S., which may be less time than what is listed on the visa itself.¹²³

DIGGING DEEPER: BODY SHOP EMPLOYERS

Agents or staffing companies who assist employers in navigating the H-2B application process profit either by charging the employer a price per worker, which is legal, or charging the prospective H-2B worker a recruitment fee, which is illegal, or some combination thereof. These so-called body shop employers petition for H-2B temporary workers as the employer, and then deploy workers out to other companies. One diplomat at a U.S. consulate in Mexico explained:

Staffing agencies advertise themselves as a "one stop shop" for clients that prefer not to recruit workers abroad or navigate the H-2B petition process themselves. Because staffing agencies typically retain the H-2 beneficiaries in their employ and "rent them out" to client firms, they relieve those clients of all the administrative work and financial responsibilities required of a direct employer. In return for supplying a temporary workforce, the staffing agency charges its clients a premium over the wage authorized by the Department of Labor. The majority of H-2B petitions received in Monterrey are for either common construction laborers or landscape laborer that list a salary as between \$8 - 11 US/hour depending on the location the work is being performed. The

*margin between what the end user pays the staffing agency and what the staffing agency pays the beneficiaries represents the staffing agency's gross income.*¹²⁴

The actual worksites must always be listed on the temporary labor certification and approved by USDOL.¹²⁵ In a leaked diplomatic cable, at least one consular official opined that only employers should be allowed to petition for H-2B workers to prevent “local recruitment agencies from charging outrageous fees.”¹²⁶

2. FOREIGN RECRUITMENT

Customarily, employers locate H-2B workers through labor contractors or recruiters who are hired by the employer to find suitable workers. Recruiters may be staffing companies or individuals who are either (1) based in the U.S., (2) both in the U.S. and abroad, (3) solely abroad, or (3) entities who subcontract with other levels of foreign recruiters – who may be individuals or business organizations.¹²⁷ Advertising may happen in many ways, whether by word of mouth or through local media outlets. Groups of workers from the same hometown will oftentimes be recruited and travel together to work for the same employer.

Problems arise when, for example, recruiters make false promises about the job in the U.S., or charge workers illegal fees to be eligible for the jobs.¹²⁸ Even though the H-2B regulations require employers to prohibit recruiters from charging fees,¹²⁹ enforcing this prohibition is difficult. Whether the employer in fact knows about the behavior of recruiters – or what steps the employer took to find this out --, is a hotly contested issue when complaints surface.¹³⁰

A) TRANSPARENCY IN FOREIGN LABOR RECRUITER SYSTEM

Both USDOL and DHS require employers to identify their recruiters by name during the temporary labor certification and nonimmigrant visa petition process. The 2015 Rule requires employers to provide a copy of any agreements with any agent or recruiter whom it engages or plans to engage to recruit H-2B workers for employment, with the identity and location of all persons and entities hired by or working for the recruiter or agent referenced.¹³¹

After USDOL approves the temporary labor certification, the employer submits Form I-129 to USCIS. That form requires employers to identify their recruiter, but that information is not public, and those recruiters are neither registered nor tracked nor is their contact information provided to the workers or to any agency in their home countries. The Department of Labor maintains a [publicly available list of recruiters](#) and their locations, but it does not include information about the employers for whom each recruiter works.¹³² However, the list includes case numbers which can be used to access the job orders associated with that particular recruiter.¹³³

B) NO FEDERAL REGISTRATION FOR FOREIGN LABOR RECRUITERS

There is no federal registration system in place for foreign labor recruiters who recruit for jobs in the United States. Put simply, the U.S. government does not regulate foreign H-2B labor recruiters at the federal level.

DIGGING DEEPER: CALIFORNIA STATE FOREIGN LABOR CONTRACTOR REGISTRATION

Beginning on July 1, 2016, any person acting as a foreign labor contractor who recruits workers for eventual employment in California must register with the California State Labor Commissioner.¹³⁴ According to the regulations, as of August 1, 2016, the commissioner should have posted on its public web site the names and contact information for all registered foreign labor contractors and a list of the names and contact information for any foreign labor contractors denied renewal or registration.¹³⁵ However, as of September 2016, the state agency in charge of this new law's implementation has not yet promulgated regulations to guide the registration process or define the contours of the public registry.

3. RECRUITMENT FEES ARE ILLEGAL

Prospective workers should not have to pay fees to a recruiter.¹³⁶ H-2B regulations explicitly state that the practice of charging recruitment fees is banned.¹³⁷ Indeed,

as a condition of approval of an H-2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H-2B employment (other than the lower of the actual cost or fair market value of transportation to such employment and any government-mandated passport, visa, or inspection fees, to the extent that the passing of such costs to the beneficiary is not prohibited by statute, unless the employer, agent, facilitator, recruiter, or similar employment service has agreed with the beneficiary that it will pay such costs and fees).¹³⁸

The regulations require employers to contractually forbid any of their recruiters from charging fees.¹³⁹ On the Form I-129 petition filed with DHS, as well as on the application for temporary employment certification filed with USDOL, employers attest that fees will not be charged. If USCIS finds out that the worker has paid a recruitment fee and that the employer either collected the fee or knew or should have known that an “agent, facilitator, recruiter or similar employment service” had collected a fee, the H-2B petition will be denied unless the petitioner shows that the beneficiary was reimbursed.¹⁴⁰ Even though recruitment fees are banned, prospective H-2B workers often still pay them, with or without the employer's knowledge. The recruiter may simply call the fee that is paid a “service fee” or tell the worker to keep it secret or lie at their visa interview.¹⁴¹

DIGGING DEEPER: DENYING VISA APPLICATION WHEN RECRUITMENT FEE PAYMENT DISCOVERED

When workers reveal in their visa interviews at DOS the fact that they have paid a recruitment fee, their visa applications are often denied.¹⁴² A leaked cable from the Consulate in Sao Paulo, Brazil describes how recruiters and agencies abused “poor, desperate people who borrowed

money to pay outrageously high brokerage fees,” as high as “\$3,000 for a chance to apply for a temporary work visa”:

Invariably, applicants have borrowed money or sold a car to fund the visa application and can never hope to make enough money in the four or five months the petition is valid to make a round-trip worthwhile. *We deny most of these applications.* Some of the ones that are issued arrive in the U.S. to find they have no job. In the end, the recruiters have made a fortune preying on the unsuspecting public, consulate visa appointments are swelled with these terrible cases, and few are issued visas. Only the recruiters benefit.¹⁴³

DIGGING DEEPER: REVOCATION OF H-2B APPROVAL WHEN RECRUITMENT FEE PAYMENT DISCOVERED

If the H-2B worker who has paid a recruitment fee makes it through the visa application process but DHS finds out about the fee once the worker is here, the petition may still be revoked. If this happens, the worker’s continued stay will be limited to just 30 days “for the purpose of departure” and the employer will have to pay for the worker’s travel home.¹⁴⁴ If the worker finds another H-2B job, he or she may stay in the U.S. during the 30-day period until the new employer’s application is approved.¹⁴⁵

Before hiring H-2B workers within one year of a revocation, an employer will have to demonstrate that “the petitioner or agent, facilitator, recruiter, or similar employment service” reimbursed each worker for the prohibited fee that was collected previously or that the worker was not able to be located despite the petitioner’s reasonable efforts to locate them.¹⁴⁶ If the employer either waits more than a year or chooses not to re-enter the H-2B program, there is no regulation requiring the employer to reimburse the worker for the unlawful fees charged.

DIGGING DEEPER: CONTRATADOS.ORG

In February 2015, the non-profit Centro de los Derechos del Migrante, Inc. launched a [website](#) for workers to anonymously rate recruiters and employers for the H-2A, H-2B, and J-1 visa programs. The website operates as a “yelp” type review board, with ratings along with short audio segments of workers providing advice and resources on the process. With reviews written by workers themselves, the site is an attempt to allow them to share experiences to prevent others from falling victim to abuse.¹⁴⁷

C. JOB CHANGES ONLY ALLOWED WITH GOVERNMENT APPROVAL

An H-2B worker is authorized to work for a single employer for a specific period. If he or she quits his or her job or is fired, the visa is no longer valid. If a worker seeks to change employers prior to the completion of the original work period, the prospective new employer must go through all the regular hiring steps, first filing a temporary labor certification with USDOL and then filing a Form I-129 petition for H-2B approval and an extension of the worker’s stay in the United States.¹⁴⁸ While the worker doesn’t necessarily have to return to his country of origin, he may not begin the new job until the USDOL certifies the job and DHS approves the employer’s petition and the worker’s extension.¹⁴⁹ Neither USDOL nor DHS publish information on how often this happens.

III. H-2B WORKERS IN THE U.S. – DATA

The three federal agencies that share responsibility for the H-2B program each publish a variety of data. The U.S. Department of Labor (USDOL) publishes the number of

applications for certification and the number of H-2B job positions requested and certified. In addition, USDOL provides information on employers, job type, location, and wages offered. The U.S. Department of State (DOS) annually presents data on the number of visas actually issued and the nationality of the workers that receive them. The U.S. Department of Homeland Security (DHS) publishes the number of workers requested on petitions for H-2B nonimmigrant status as well as the number of admissions for individuals with H-2B visas, and the countries they came from.

Because each agency counts something different, none alone offers an accurate number of H-2B workers. Read together, the data illustrates the scope of the H-2B program. In 2013, the USDOL certified 82,307 H-2B jobs, DHS (USCIS) approved petitions on behalf of 72,086 H-2B worker beneficiaries, the Department of State issued 57,600 H-2B visas, and DHS (CBP) counted 104,993 H-2B admissions. At any given time, estimates are that there are 115,000 H-2B workers present in the United States. Several U.S. states in the South have the largest number of H-2B workers, with Maryland following closely behind.¹⁵⁰ Every year, over 70% of H-2B workers are Mexican nationals.¹⁵¹ No agency publishes data on the age or gender of H-2B workers, despite the fact that this information is routinely gathered and maintained by the government.

NOTE: Updated charts, infographics, and data for 2014-16 are forthcoming; data will be updated periodically.

A. THE NUMBER OF H-2B WORKERS

1. U.S. DEPARTMENT OF LABOR

USDOL certified 93,649 H-2B positions in 2014; 5,464 applications for temporary labor certification (ETA Form 9142) were submitted, and 4,638 were certified.¹⁵² On each application, employers request that a certain number of positions be certified as H-2B eligible. If the requirements are met, USDOL will certify the number of positions requested. The number of H-2B positions certified through the temporary labor certification process is just that, and is not necessarily the same as the actual number of workers who are either granted a visa or come to the United States to work. USDOL apparently does not distinguish whether temporary labor certifications are filed for workers who are currently abroad or who are present in the U.S. already and who are seeking to change jobs to work with a new employer.

2. U.S. DEPARTMENT OF STATE

The Department of State tracks the numbers of H-2B visas issued to foreign workers each year. In 2015, State issued 69,684 new H-2B visas.¹⁵³ This number has been relatively stable but slowly rising since 2009, after the H-2R program ended. The number of visas issued does not include the workers who entered with H-2B visas in previous years and extended their stay into the present year. Furthermore, even if a worker is issued a visa, it does not necessarily mean that he or she actually entered the

United States; DOS does not publish data on the number of workers who actually enter.¹⁵⁴

3. U.S. DEPARTMENT OF HOMELAND SECURITY

DHS has two agencies involved in the H-2B program and thus two sets of data. The U.S. Citizenship and Immigration Services (USCIS) receives the petitioner's Form I-129, which requests that a certain number of nonimmigrant visas be made available for worker beneficiaries. The Customs and Border Patrol (CBP) interviews at the border or port of entry the workers who have received H-2B visas from their local U.S. Consulates, and decides whether to grant their admission and issues an entry document, or I-94.

A) U.S. CITIZENSHIP AND IMMIGRATION SERVICES

USCIS publishes a [current-year running H-2B cap count](#) totaling the number of beneficiaries approved and petitions pending. In 2014, USCIS issued visas to 68,681 worker beneficiaries, including those who are exempt from being included in the cap.¹⁵⁵

DIGGING DEEPER: H-2B DATA COLLECTION REQUIRED

DHS's sub-agency, the U.S. Citizenship and Immigration Services (USCIS), is required to submit annually to Congress the number of approved H-2B petitions and the number of workers included in each, by occupation.¹⁵⁶ These annual reports are not routinely published on the USCIS website.¹⁵⁷ With respect to H-2B in particular, Congress mandates semi-annual and annual reports about a wide variety of H-2B data, including the number of visas issued or H-2B status provided, the number of revocations, and information on the countries of origin, occupations, and compensation paid to H-2B workers.¹⁵⁸

B) CUSTOMS AND BORDER PATROL

CBP counted 104,993 H-2B visa admissions in 2013.¹⁵⁹ The Office of Immigration Statistics publishes these I-94 statistics in their annual Yearbook. The number of nonimmigrant admissions refers to the number of admissions rather than the number of individuals.¹⁶⁰ These numbers are different because a worker may enter more than once during a single year, but the published data counts initial and return entries as separate admissions. There were 104,993 H-2B admissions to the U.S. in 2013, not necessarily 104,993 different workers.

B. H-2B WORKER DEMOGRAPHICS

USCIS may approve petitions for H-2B nonimmigrant status only for individuals from certain countries designated annually by DHS and DOS¹⁶¹. Individuals from other countries are allowed only if DHS determines that it is in the U.S. interest.¹⁶² For the year 2016, DHS has [identified the countries](#) whose nationals are eligible to participate in the H-2B program. Even though dozens of potential source countries are on the authorized list, more than 70% of H-2B workers in 2015 were from Mexico.¹⁶³ Jamaica, Guatemala, the Philippines, and Great Britain are the next largest sending countries for H-2B workers. The high percentage of H-2B workers from Mexico has been a constant throughout the H-2B program's existence.

DIGGING DEEPER: GENESIS OF SOURCE COUNTRY REGULATION

Since 2008, DHS has specified certain source countries for H-2B workers.¹⁶⁴ Employers may still attempt to seek workers from a non-designated country, but without prior permission it is not likely that the visas will be issued. This rule change was intended to encourage foreign countries to be more cooperative in accepting their nationals being deported from the U.S. The U.S. had “faced an on-going problem of countries refusing to accept or unreasonably delay[] the acceptance of their nationals who have been ordered removed.”¹⁶⁵ In promulgating the rule, DHS stated that even though it was attempting to revise the H-2B program to encourage lawful immigration, it was still expecting that some foreign workers would “abscond from their workplace or overstay their immigration status. Therefore, the success of the program will depend significantly upon countries accepting the return of their nationals.”¹⁶⁶

1. AGE AND GENDER

The U.S. government does not regularly publish information about the age and gender of H-2B workers. Because an employer does not have to list individual beneficiaries on Form I-129, this information is not maintained by USCIS in the same manner as with other nonimmigrant visa categories, such as H-1B. Nevertheless, DHS does possess this information, as Customs and Border Patrol tracks land border admissions with a computer system that “includes arrival and departure dates, port of entry, class of admission, country of citizenship, state of destination, age, and gender.”¹⁶⁷

Likewise, when prospective workers apply for their visas at the U.S. consulates abroad, personal information for every individual, including age and gender, is gathered on his or her individual visa application, the DS-160. The Department of State maintains this information and releases it only after Freedom of Information Act requests.¹⁶⁸ The data shows disparities in the issuance of H-2B visas according to age and gender. The preference for young, male workers seems clear. In 2010, most workers were between the ages of 19 and 28, and the age of the average worker was 32.¹⁶⁹ Moreover, males accounted for 40,982 of the visas issued compared with 6,536 H-2B visas for females (13.8% of all H-2B visas issued in 2010).¹⁷⁰ Multiple U.S. and international organizations and individuals [recently petitioned](#) the National Administrative Office of Mexico under the North American Agreement on Labor Cooperation to investigate gender discrimination within the H-2A and H-2B programs.

C. H-2B EMPLOYER DEMOGRAPHICS

USDOL publishes information on employers who request temporary labor certification under the H-2B program, the type of job, and where the job is located. The employers with the most H-2B positions are consistently those in the landscaping and forestry industries.¹⁷¹

1. LOCATION

In 2014, Texas, Florida, Louisiana, Maryland and Pennsylvania were the five states with the most H-2B jobs certified by USDOL.¹⁷²

D. H-2B JOB CHARACTERISTICS

The H-2B visa is for any non-agricultural job that is temporary and seasonal in nature. Although there is no exhaustive list of jobs that qualify for the program, it has been geared towards low-skilled occupations that do not require advanced degrees. H-2B certifications have been approved in a variety of low-wage occupations.¹⁷³ Jobs in landscaping, forestry, amusement parks, housekeeping, meatpacking, seafood processing, and hotels and restaurants are common, while positions as athletic instructors, electricians, bartenders and truck drivers seem rare.¹⁷⁴ The top occupations have been consistent over time.

DIGGING DEEPER: COMPENSATION DATA

USDOL publishes information from approved temporary labor certifications, including hourly wages promised -- by state -- for various occupations commonly certified for H-2B workers.¹⁷⁵ As the H-2B visa encompasses a wide variety of occupations, compensation varies. For example, in 2013, millwrights in Oregon earned \$21.13 an hour and coaches and scouts in California received \$21.89 an hour.¹⁷⁶ Despite these wages that represent the top reach of H-2B wages, most occupations pay much less. The vast majority of landscapers and forestry workers appear to fall into the lower wage-ranges, as do many other H-2B certified occupations.¹⁷⁷ For instance, meat, poultry, and fish cutters and trimmers in North Carolina earned just \$7.55 per hour, while amusement and recreation attendants throughout the Midwest, dishwashers in Michigan and dining room, cafeteria workers, and bartenders in Indiana all earned under \$8.50 per hour.¹⁷⁸

Even though these hourly wages are based on findings of a prevailing wage survey, many advocates claim that H-2B workers remain underpaid. Actual wages paid to H-2B workers are almost always less than the wage rates for U.S. workers who do the same jobs, according to occupational survey wage rates.¹⁷⁹ One study revealed that employers who pay U.S. workers the average prevailing wage rate are at a relative disadvantage to H-2B employers who almost always pay 10% less than the average wage for the occupation and often pay up to 25% less.¹⁸⁰

V. H-2B WORKER RIGHTS

H-2B program regulations were recently revised in 2015. While the program regulations have always required that a certain wage be paid to H-2B workers, for the first time, by regulation, the employer must provide workers with a written statement describing the job terms, at the time the worker applies for the visa.¹⁸¹ The regulations also now require employers to reimburse their H-2B workers for the costs of their visa application in the first paycheck, and to pay their inbound and outbound transportation expenses.¹⁸² Employer must now also guarantee that the worker will be provided with a certain number of hours of work when they are in the United States.¹⁸³ There is still no requirement that employers provide their H-2B workers with housing, however.¹⁸⁴ And neither is there any regulation which requires that the worker be provided with an employment contract that is enforceable in court.

The Department of Homeland Security has delegated some enforcement authority to the U.S. Department of Labor's Wage and Hour Division (WHD).¹⁸⁵ However, in fiscal

year 2016, the U.S. Congress blocked WHD from being able to enforce some of these new provisions in an appropriations bill.¹⁸⁶ H-2B workers may be able to enforce those regulations through private litigation. However, the only H-2B workers eligible for representation by federally funded legal services organizations are those working in the forestry industry.¹⁸⁷

In addition to these regulatory protections, H-2B workers are covered by various federal and state employment statutes and common law rights, including but not limited to the Fair Labor Standards Act, the Age Discrimination Employment Act, Title VII of the Civil Rights Act, the Trafficking Victims Protection Act, the Racketeer Influenced Corrupt Organizations Act, and state wage and hour and discrimination laws. Whether specific statutes or common law rights apply to any given worker will depend on the facts of each particular situation.

A. WAGES

H-2B workers must be paid “free and clear” for all work performed when the wages are due.¹⁸⁸ The wage rate must equal or exceed the highest of the prevailing wage or federal, state, or local minimum wage.¹⁸⁹ If wages are based on commissions or other incentives, pay must be at least as high as this offered prevailing wage on a weekly basis.¹⁹⁰ If the employer is going to impose a productivity standard (a requirement that the workers produce a certain amount of work in a specified period of time) as a condition of keeping the job, then that must be specified in the job order, and the employer must show that productivity standards are customary in the same occupation in the area.¹⁹¹ While wages must be computed over a single workweek (seven consecutive days),¹⁹² the employer may set the frequency of pay at least every two weeks or according to the prevailing practice in the area, whichever is more frequent.¹⁹³ The job order must specify all deductions not required by law which the employer will make from the worker’s pay and all deductions that are not disclosed are prohibited.¹⁹⁴ USDOL approves the prevailing wage and any conditions for each particular H-2B job when the employer files its temporary labor certification.

DIGGING DEEPER: PIECE RATE WORK

When H-2B workers are paid on a piece rate basis¹⁹⁵ the average hourly earnings over a workweek must still result in an amount at least equal to the offered wage.¹⁹⁶ Workers who earn wages on a piece rate basis may end up earning more than what they would earn if they were paid the hourly required prevailing wage, but they may never earn less.¹⁹⁷ The federal wage law, the Fair Labor Standards Act, may also apply and require that an employer supplement earnings so that the workweek’s average wage is at least the minimum wage.¹⁹⁸

1. EARNINGS STATEMENTS

The employer must keep accurate records about the amount of work performed and the wages that are due¹⁹⁹ and must provide to each worker on or before each payday a written statement which details the basis of the wages earned.²⁰⁰ Neither employers nor their agents or attorneys may impose on H-2B workers any costs associated with the certification, including attorney/agent fees, application costs, and recruitment fees.²⁰¹ If

the Fair Labor Standards Act (FLSA) applies, any deductions from wages must be disclosed ahead of time and must be reasonable and allowable under the FLSA.²⁰²

C. TRANSPORTATION COSTS

H-2B program regulations require employers to pay for a worker's inbound and outbound travel expenses.²⁰³ If the worker pays for these costs up front, the employer must reimburse the worker for the total amount of their inbound travel expenses upon completion of half of the contract period.²⁰⁴ If the Fair Labor Standards Act applies, the employer generally must reimburse workers' inbound travel expenses in the first paycheck, to at least the amount needed to ensure the worker earns at least the federal minimum wage after subtracting the expenses he or she paid.²⁰⁵

D. NO JOB RELOCATING

Employers may not place H-2B workers outside the geographic area of intended employment or planned itinerary that is listed on the H-2B job order.²⁰⁶

DIGGING DEEPER: AGRICULTURAL WORKER PROTECTION ACT MAY APPLY TO H-2B NON-AGRICULTURAL WORKERS

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) may apply to some H-2B workers, even though most H-2B jobs that are certified are non-agricultural in nature.²⁰⁷ The AWPA's requirements may apply to H-2B workers who work in agriculture. This is because the AWPA defines agriculture more broadly than the H-2A visa definition.²⁰⁸ The AWPA requires farm labor contractors to register with the Department of Labor, and entitles workers to receive a written disclosure of work terms, among other things.²⁰⁹ Some examples of H-2B workers who are covered by the AWPA are forestry and pine straw workers.²¹⁰ H-2B workers who are covered by the AWPA have the right to sue – in federal court -- their farm labor contractor, or employer, and any housing provider.²¹¹

VI. ENFORCEMENT

H-2B worker protections and the Fair Labor Standards Act are enforced by the U.S. Department of Labor. If an H-2B worker claims any sort of discrimination, the Equal Employment Opportunity Commission is typically the federal agency in charge of enforcement. State attorneys general and agencies customarily will have the authority to enforce any state laws that may apply to the situation.

Workers themselves may enforce their own employment and civil rights by filing a lawsuit in federal or state court as long as there is jurisdiction and a private right of action. As is the case with all foreign temporary workers, it is oftentimes challenging for workers to find a lawyer, and then continue pursuing litigation after they return home when their visas expire. As mentioned above, only H-2B workers who work in forestry can be represented by federally funded legal aid programs who are familiar with the challenges that accompany representation of temporary foreign workers.²¹²

A. U.S. DEPARTMENT OF LABOR

Until 2009, the U.S. Department of Labor (USDOL) did not have formal responsibility to enforce the H-2B program regulations; that power rested with the Department of Homeland Security (DHS).²¹³ However, DHS has since delegated enforcement authority over the H-2B regulations to the USDOL's Wage and Hour Division (WHD).²¹⁴ A WHD enforcement action may result from a routine inspection or an informal complaint from any person. If a worker complains, efforts are made to protect the confidentiality of the complainant. An employer being investigated must produce to WHD the information that is requested within 72 hours of notice. No employer or agent may interfere with any official investigating the H-2B program.²¹⁵ WHD may seek injunctive relief and recover unpaid back wages and other money owed to workers, or assess civil monetary penalties of up to \$10,000 per violation.²¹⁶ Workers do not receive any portion of civil money penalties. Rather, the penalties are paid to the U.S. Treasury.

To help workers access wages collected by U.S. DOL, In January 2015 the agency launched the "Workers Owed Wages" (WOW) web-based application. The system was previously known as the Back Wage Employee Locator System (BWELS), available here: <http://webapps.dol.gov/wow/>. The updated and streamlined WOW system enables workers or advocates to answer a series of questions to determine whether Wage and Hour Division (WHD) has collected and is holding back wages for the workers; if so, the system helps connect workers with the relevant WHD office to receive their check. It is not clear how WHD handles the distribution of back wages to workers who have returned to their home countries.

1. DEBARMENT

While WHD has no independent authority to revoke an existing temporary labor certification or bar an employer from future participation in the H-2B program, it may make that recommendation to USDOL's Employment and Training Administration (ETA) after a final determination of violations.²¹⁷ The ETA may also bar any agents and attorneys who assisted the employer. The debarment period must begin within two years of the violation and may endure from one to three years.²¹⁸ USDOL publishes the [debarment list](#) on its website.

The Government Accountability Office issued recommendations in 2015 for enhanced enforcement of H-2B and H-2A violations by USDOL and DHS. Among other things, the agency advocated for greater information sharing between the agencies, publication of information on jobs and recruiters, and collection of data by USDOL on cases affected by the debarment statute of limitations.²¹⁹

DIGGING DEEPER: USDOL EFFORTS TO IMPROVE ENFORCEMENT

Since 2009 the U.S. Department of Labor (USDOL) has attempted to improve enforcement of H-2B workers' rights. Overall, the agency added about 300 investigators from 2009 to 2012 to help enhance enforcement, which included the H-2B program.²²⁰ In 2010, USDOL's Inspector General challenged the agency to make better use of its suspension and debarment authority within the foreign labor certification programs.²²¹ In 2011, Secretary Solis travelled to Central America to

initiate a [cross-border campaign](#) to inform low-wage migrant workers in targeted sectors such as construction, janitorial work, hotel services, food services and home health care about their rights.²²² That same year, USDOL debarred its first five H-2B contractors.²²³ USDOL does not publish a list of employers found to have violated H-2B rules but who are not debarred.²²⁴

B. U.S. DEPARTMENT OF HOMELAND SECURITY

If an employer is found to have substantially failed to meet any of the conditions of the H-2B program or willfully misrepresented a material fact in their petition, the U.S. Department of Homeland Security may deny future petitions from that employer for one to five years.²²⁵ In 2010, DHS was involved in several investigations and prosecutions for construction workers on H-2B visas.²²⁶

DIGGING DEEPER: ICE ENFORCEMENT NOT FOCUSED ON H-2B

The U.S. Department of Homeland Security's sub-agency, Immigration and Customs Enforcement (ICE), has a compliance unit that investigates nonimmigrant visa issues and conducts onsite investigations.²²⁷ Rather than focusing on making sure H-2B workers' rights are protected, however, the ICE investigations aim to target "aliens who pose dangers to national security or risks to public safety; recent illegal entrants; repeat violators of immigration law; and aliens who are fugitives from justice or otherwise obstruct immigration controls."²²⁸

DIGGING DEEPER: DHS'S BLUE CAMPAIGN

The U.S. Department of Homeland Security (DHS) runs a project known as the [Blue Campaign](#), designed to help combat human trafficking. The awareness campaign includes multi-lingual public service announcements, billboards, newspaper advertisements, victim assistance materials, and indicator cards for law enforcement. DHS's online resources include social media, and toolkit for employers in the lodging, transportation, entertainment, agricultural, manufacturing and construction industries.²²⁹

C. U.S. DEPARTMENT OF STATE

The Department of State does not play a significant role in enforcing H-2B workers' rights. The agency continues to distribute [anti-trafficking brochures](#) to workers when they apply for their visas at the consular posts abroad. The Department of State does have a specific fraud prevention unit in certain U.S. Embassies abroad to verify visa application and petition information, but there is no published data about its impact on fraud within the H-2B program.

D. PRIVATE LITIGATION

Even though H-2B program regulations do not give workers the ability to sue their employer for violations of those regulations, private litigation is still one of the main vehicles to enforce an H-2B workers' employment and civil rights. An H-2B worker may have rights under several federal or state employment and civil rights laws that allow a worker to sue his or her employer in court. When a contract exists, workers may bring a common law contract claim in state court, or in federal court if there are federal statutory claims involved as well.

1. FEDERAL STATUTES

The Fair Labor Standards Act (FLSA) is the federal wage and hour law that is probably most often used by H-2B workers to recover unpaid minimum and overtime wages.²³⁰ However, there are exemptions from the FLSA; for example, certain seasonal recreational establishments do not have to follow the FLSA's minimum wage requirements.²³¹ Other examples of federal statutes that may offer H-2B workers the ability to enforce their rights in court include, among others, Title VII of the Civil Rights Act, the Age Discrimination and Employment Act, the Trafficking Victims Protection Act, and the Racketeer Influenced and Corrupt Organizations Act.

2. CLAIMS FOR BREACH OF CONTRACT

Filing a breach of contract claim is another option for an H-2B worker to directly enforce any rights in the application for temporary labor certification or job order. However, the H-2B program regulations do not explicitly state that a contract is created when a foreign worker accepts an H-2B job and travels to the U.S. to begin employment.²³² Whether the job order is an enforceable contract is a matter of state law.²³³

3. ACCESS TO COUNSEL

As is the case with most temporary nonimmigrant workers, finding a lawyer may be difficult for an H-2B worker due to language barriers, cultural differences, and geographic isolation. Moreover, generally cases for migrants are complicated because most will have to return to their home countries at some point during the case and will face a geographical divide from their U.S.-based lawyers and the court itself. Transnational litigation can be complicated. Many lawyers simply are not up to the cost and logistical challenges of managing pending cases for clients who live abroad. Furthermore, because H-2B workers' jobs are low-wage, many workers are owed damages that are small in size relative to the expense of litigation.

A) LEGAL SERVICES LAWYERS

Federally funded lawyers may represent only certain classes of immigrants.²³⁴ With the exception of forestry workers, individuals with H-2B visas are ineligible for these free legal services.²³⁵ However, there may be an exception if the worker is a victim of domestic violence, human trafficking or another crime.²³⁶ USDOL was frank in its assessment that H-2B workers cannot fully defend their legal rights when it stated in 2011 that "few legal options exist for H-2B workers who feel their work contracts have been violated."²³⁷ Even if H-2B workers are courageous enough to speak out about unlawful conduct at work, they have limited legal options to hold recruiters or employers accountable by themselves.²³⁸

VII. H-2B WORKER ISSUES

H-2B workers have long suffered violations of their labor rights. As with other temporary work visas, lawful immigration status for H-2B workers is tied to a specific employer. The visa is only valid as long as the worker is employed by the entity that received permission from the U.S. Department of Labor and the U.S. Department of Homeland

Security (DHS) to import the worker. In fact, if an H-2B worker does not report for duty on five consecutive days, the employer must report the absence to DHS.²³⁹ H-2B workers may not switch jobs without permission. Because H-2B workers are in this way tethered by their visas to a single employer, they are vulnerable to abuse. Many arrive in the U.S. already in debt because they have had to borrow money to pay fees in order to get the job. Various federal agencies, workers' rights advocates, and non-profit groups have reported on the ongoing mistreatment of H-2B workers generally and in specific industries, such as [forestry](#), [fairs and carnivals](#), and [crab processing](#). [These reports](#), as well as the criminal prosecutions and federal lawsuits themselves, document a history of issues with the H-2B program.

A. FRAUD

The current structure of the H-2B system does practically nothing to prevent outright fraud. With no requirement for public disclosures, recruiters are able to make false promises about jobs.²⁴⁰ The U.S. Department of Labor (USDOL) has noted the “increasing evidence of employers and agents filing fraudulent applications — involving hundreds or thousands of requested employees — for non-existent job opportunities.”²⁴¹ There is no official mechanism to discern the legitimacy of a recruiter who sets up shop in a small rural village and offers jobs in the U.S. Recent [reports](#) suggest prospective H-2B workers are too often defrauded in large migrant sending countries, such as Mexico.

DIGGING DEEPER: FRAUDULENT JOB CHANGES AND EXTENSIONS

H-2B workers may only change jobs or extend their immigration status after an employer obtains permission from the U.S. Department of Labor and the U.S. Department of Homeland Security. Advocates report that in some industries, labor contractors and staffing agencies take advantage of this process and will line-up new jobs for H-2B workers after finishing the initial placement, for a fee.²⁴² For example, in Florida, individuals with one such body shop employer were criminally convicted of alien smuggling and worker visa fraud when they supplied “foreign workers to more than 100 hotels and allowed more than 1,000 foreign workers to enter and remain in the United States illegally using fraudulently obtained H-2B employment-based visas.”²⁴³ The workers filed a private lawsuit against the hotel chains where they worked to try to recoup money owed to them.²⁴⁴ More recently, [a North Carolina H-2B recruitment company was ordered to pay](#) a \$1.12 million fine and its principals were fined and sentenced to prison in a scheme involving bringing workers to the U.S. for one type of employment and then placing them elsewhere, in order to avoid the visa cap.

B. RECRUITMENT FEES

Despite that fact that recruitment fees are illegal, the problem continues. Workers may even have to take out loans in order to pay fees they are told are necessary to work in the U.S. Even though the fee amount may seem excessive, workers often believe it is worth it because of recruiters' false promises about the amount of money to be earned and the possibility of gaining lawful permanent residence in the United States. Some advocates report that because most prospective H-2B workers are from impoverished communities and are in dire need of jobs, this problem is exacerbated:

[K]ey aspects of the program have long led to human rights violations such as debt peonage, labor trafficking and involuntary servitude. These include the use of an often criminal band of labor recruiters . . . who lure impoverished and desperate foreign workers to jobs [in the U.S.]. . . Too often, the opportunity to work in the U.S. comes with an intolerably high price tag, for inflated transportation, visa, border crossing and other costs, and for recruitment fees. Too often, workers literally mortgage family properties in order to meet these obligations.²⁴⁵

When H-2B workers are in debt they are more susceptible to forced labor.²⁴⁶ Even the Department of State observed “indebtedness prior to arrival in the United States is a common mechanism of making victims vulnerable to control.”²⁴⁷ USDOL has noticed that the effects of this reach beyond foreign workers.

Workers who have heavily indebted themselves to secure a place in the H–2B program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.²⁴⁸

No federal agency oversees or regulates foreign recruiters or their actions and there are significant issues enforcing the ban on recruitment fees.

1. PRACTICAL ISSUES WITH ENFORCING RECRUITMENT FEE BAN

Even though H-2B program rules ban recruitment fees and require the petitioning employer to tell the recruiter to not charge fees, fees are difficult to eradicate as a practical matter.²⁴⁹ Recruiters are not regulated directly and USDOL has little power to “enforce regulations across international borders.”²⁵⁰ However, a scheme that relies only on an employer’s instruction to refrain from doing something is problematic.

C. WAGE THEFT

Wage problems are common in the H-2B program. Often simply referred to as “wage theft,” this practice means workers are not receiving wages that are required by law. It may be that the hours are not recorded accurately or that there are unlawful deductions from wages for housing, tools, safety equipment or travel.²⁵¹ Sometimes when workers are paid on a piece rate basis and their rate of work or production level is low (through no fault of their own), employers fail to make up the difference in their wages so that the hourly minimum is received.²⁵² Moreover, H-2B workers are often not reimbursed for money spent on items which are really for the employer’s benefit, for example the cost of inbound transportation and visa applications, which effectively puts the first week’s pay below the federally required minimum level.²⁵³

Many [lawsuits have been filed](#) and enforcement actions brought on behalf of H-2B workers for wage theft.²⁵⁴ For example, in 2012, USDOL recovered \$93,000 in back wages for overtime that was not paid to 72 H-2B workers from Indonesia and the Philippines.²⁵⁵ Over the course of a dozen years, advocates fought for minimum and overtime wages owed to hundreds of [H-2B forestry workers](#) employed by several different companies, resulting in several million-dollar settlements. In 2011, workers' rights groups filed a [complaint](#) under the North American Agreement on Labor Cooperation against two amusement park companies alleging numerous wage violations. On January 16, 2015 [a New York federal court approved a final \\$1.2 million settlement](#) against a landscape company which had for almost a decade forced H-2B workers to pay their own visa, recruitment, and transportation fees to the U.S. and effectively brought their wages below the federal and state minimums in addition to the prevailing minimum wage in their contracts.

D. RETALIATION

H-2B program regulations do not protect workers from retaliation. However, various federal statutes that may apply do prohibit any retaliation against workers who assert their rights. Even so, H-2B workers are reluctant to complain. This is due in no small part to their cultural, linguistic and often geographical isolation, as well as being unaware of protections from retaliation under various federal laws that may apply to them. Furthermore, the Department of State recently found that “recruiters discouraged former workers from reporting labor violations, claiming that U.S. embassies or consulates would not grant future visas for those who complain.”²⁵⁶ To be sure, there have been instances of outright intimidation. For example, after one federal wage case was filed, “a labor recruiter threatened to burn down a worker’s village in Guatemala if he did not drop his case.”²⁵⁷ While U.S. workers may freely change jobs when dissatisfied with conditions on the job, H-2B workers are confronted with the stark choices of suffering in silence, deportation, or joining the ranks of the undocumented.²⁵⁸

E. HUMAN TRAFFICKING AND SEVERE LABOR EXPLOITATION

Numerous H-2B workers have been victims of [human trafficking](#).²⁵⁹ A case in Louisiana provides a compelling example of severe labor exploitation faced by many H-2B workers that borders on modern day slavery.²⁶⁰ The lawsuit alleged that hundreds of Indian workers paid recruiters up to \$20,000 each to work repairing damaged oilrigs after Hurricane Katrina. The workers were promised lawful permanent residence for themselves and their families. However, they received only temporary H-2B visas and were required to pay \$1,050 a month to live in “overcrowded, unsanitary, racially segregated and guarded” labor camps.²⁶¹ Their passports and visas were confiscated to guarantee payment of their recruitment fees and when they complained about the situation, they were threatened with deportation.²⁶² The employer asked DHS for advice on how to fire the H-2B workers. An official advised as follows: “Don’t give them any advance notice. Take them all out of the line on the way to work; get their personal belongings; get them in a van, and get their tickets, and get them to the airport, and send them back to India.”²⁶³ A jury [awarded the workers \\$14 million](#) in compensatory and punitive damages in February 2015.

F. LACK OF PORTABLE JUSTICE

As with other nonimmigrant visa programs, the H-2B scheme does not set up a way for workers to enforce their rights or denounce abuses when they return home after the work period ends, as the terms of their visa require. Still, lawyers who represent H-2B workers routinely continue advocating for their clients even after the workers return to their homes abroad. However, transnational litigation is wrought with challenges. For example, H-2B workers who are plaintiffs in lawsuits regarding problems with their job and need to return to the U.S. to give testimony at trial must apply for a separate visa or humanitarian parole. The same is true for workers who are injured on the job and require continuing medical treatment in the United States. The process of seeking this sort of immigration relief is complicated and costly, oftentimes itself preventing access to justice for employment and civil rights suffered while working in the United States.

G. RULES DO NOT ADEQUATELY PROTECT U.S. WORKERS

There is a concern that employers will prefer H-2B workers instead of U.S. workers simply because they are less expensive over the long run. Between 2008 and 2015, the petitioning employer is only required to state that it attempted to find U.S. workers to fill the jobs. This previous so-called “attestation-based process” inadequately protected U.S. workers from discrimination. One audit found “a pattern of noncompliance or avoidance of demonstrating compliance,” as well as “increasing evidence . . . of violations rising to the criminal level.”²⁶⁴ Some employers have signed attestations when they did not in fact comply with the rule and did “not appear to be recruiting, hiring and paying U.S. workers, and in some cases the H-2B workers themselves, in accordance with established program requirements.”²⁶⁵ A second audit confirmed that the attestation model was weak and in need of reform.²⁶⁶ The 2015 Interim Final Rule reverts to the certification model that was in effect prior to the 2008 final rule.²⁶⁷

VIII. THE FIGHT FOR H-2B PROTECTIONS

A. 2012 RULES

During the first Obama administration, the U.S. Department of Labor (USDOL) undertook an extensive review of the H-2B program regulations and decided that new substantive rules were necessary to protect workers from exploitation.²⁶⁸ Behind the proposed changes was the notion that the USDOL should not ignore “successful criminal and civil prosecutions, which demonstrate the abuse of the H-2B program.”²⁶⁹ The [massive new rules](#) included a number of [worker safeguards](#), including, for example, disclosing to workers the terms of their employment, wage guarantees, explicitly placing the obligation to pay visa fees on the employer, anti-retaliation protection, and barring employers from confiscating workers’ passports.²⁷⁰ The new H-2B rules would have also included important changes strengthening U.S. worker recruitment and requiring disclosure of information related to foreign recruitment. These rules were controversial and while they were set to take effect in April 2012, they never did.²⁷¹

B. USDOL AUTHORITY

Federal agencies cannot make administrative rules to implement and enforce a law unless Congress has authorized the agency to do so. In the Immigration Reform and Control Act of 1986 (IRCA), Congress instructed the U.S. Department of Homeland Security (DHS) to consult with other appropriate agencies in making nonimmigrant H, L, O and P visa determinations.²⁷² With respect to the H-2A visa program, Congress specified that appropriate agencies meant the USDOL and the U.S. Department of Agriculture.²⁷³

The question of whether USDOL has authority to regulate the H-2B program is complicated. By statute, DHS is the federal agency in charge of immigration matters and may consult with other “appropriate agencies” before adjudicating an H-2B petition.²⁷⁴ Employers must petition DHS for classification of the prospective temporary worker as an H-2B nonimmigrant before the worker may obtain an H-2B visa or be granted H-2B status.²⁷⁵

Employers and various industry interest groups filed a lawsuit against USDOL, challenging the agency’s authority to write and implement any substantive H-2B worker protection rules.²⁷⁶ A federal district court in Florida agreed and issued a preliminary injunction stopping the 2012 H-2B rules before they even went into effect.²⁷⁷ In April 2013, the Eleventh Circuit Court of Appeals affirmed that decision,²⁷⁸ and in December 2014 a Florida district Judge permanently vacated the DOL 2012 H-2B rules.²⁷⁹ That decision was vacated and remanded by the Eleventh Circuit after the 2015 H-2B rules were promulgated.²⁸⁰

In *Bayou*, the Eleventh Circuit found it significant that the USDOL was mentioned with respect to H-2A program, but not H-2B.²⁸¹ The USDOL argued that IRCA’s requirement that DHS consult with other agencies about the issuance of H visas implied the right to make substantive rules for temporary labor certification applications, which included worker protections. The appeals court dismissed this argument as “an absurd reading of the statute,” concluding that “DHS was given overall responsibility, including rulemaking authority, for the H-2B program. USDOL was designated a consultant. It cannot bootstrap that supporting role into a co-equal one.”²⁸²

On March 4, 2015, the U.S. District Court in the Northern District of Florida found that the USDOL had no authority to issue rules governing the temporary labor certification process for H-2B petitions.²⁸³ The case, *Perez v. Perez*, brought by a U.S. worker complaining of irreparable harm because of the process, brought the H-2B visa program to a halt.²⁸⁴ In *Perez*, the court followed its reasoning in a previous decision finding that USDOL has no authority to issue regulations with regard to the H-2B program.²⁸⁵

However, the court in the Northern District of Florida found that although the statute directs DHS to consult with other agencies in deciding whether to grant H-2B visas, the statute does not clearly indicate Congressional intent for those agencies to have rulemaking authority or to allow DHS to delegate its rulemaking authority to them.²⁸⁶

Because of the decision in *Perez*, DHS suspended adjudication of H-2B petitions for a short time in order to consider the “appropriate response.”²⁸⁷

A similar challenge over the issue of whether the USDOL has rulemaking authority for the H-2B program went to the Third Circuit Court of Appeals, which in February 2014 held that the USDOL does in fact have this authority.²⁸⁸ This was a case involving the DOL’s H-2B 2011 rule regarding the determination of prevailing wages, thus disagreeing with the Eleventh Circuit Court of Appeals decision. While the DOL welcomed the 3rd Circuit decision, which enabled it to increase consistency in determining the prevailing minimum wage for H-2B workers and affirmed its broader authority to implement worker protections, the Third Circuit acknowledged that its ruling might cause conflict within the courts of appeals. However, the Third Circuit noted that the Eleventh Circuit decision in fact did not directly rule on whether the DOL had rulemaking authority but only on whether the District Court had abused its discretion.

C. 2015 RULES

In April 2015, the USDOL and DHS jointly issued new rules to govern the H-2B program.²⁸⁹ DHS determined that it should consult USDOL because of USDOL’s ability to advise whether “unemployed persons capable of performing such service or labor cannot be found in this country.”²⁹⁰ According to DHS, the best way to accomplish this is to require the employer, prior to filing an H-2B petition, to first apply for a temporary labor certification from USDOL.²⁹¹

The 2015 rules contained significant changes to the H-2B program, including many more protections for foreign workers and U.S. workers alike.²⁹² These were supported by many advocates as going a long way towards curbing H-2B worker abuse, in part because of the changes to promote transparency in the recruitment process.²⁹³ In December 2015, the U.S. Congress rolled back some of the new rules for fiscal year 2016, during the budget appropriations process.²⁹⁴

Worker advocates, while welcoming the many enhanced protections in the 2015 Rule, filed a complaint challenging the continued use of employer surveys to determine wage rates as set forth in the rules, as well as the ability to use a lower collective bargaining agreement rate and the elimination of the use of some wage rates that are higher than the OES rate provided for in the rule.²⁹⁵ The District Court in New Jersey ruled that plaintiffs lacked standing to bring their action, and later denied a motion for reconsideration. Employer groups have likewise challenged the 2015 Rule.²⁹⁶

DIGGING DEEPER: CONGRESSIONAL OPPOSITION

Some members of Congress have opposed USDOL’s 2012 H-2B worker protection rules. Even those with voting records that reflect consistent support for U.S. workers have entered the fray, insisting that higher wages and enhanced enforcement will be too much of a burden on employers.²⁹⁷ “Temporary workers can’t vote, they are isolated and don’t tend to have a substantial community that will vote in their name, and so they have no voice in the political process,” was how one government staff person described the dynamic.²⁹⁸ Some scholars claim elected leaders continue to “defend the program as it stands, talking about the risks of foreign competition, the cost to small businesses of any change, and the unreliability of the U.S.

workforce... There is lots of sympathy for mistreated workers, but there is reluctance to change the basic architecture of the program.”²⁹⁹

This concern carried over to the 2015 Rule. Members of Congress opposing the latest rule added an appropriations rider to the budget that restricted USDOL’s ability to enforce parts of the 2015 Rule for FY 2016, as well as changing the substance of some of the rules.³⁰⁰

ENDNOTES

- ¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(1)(ii)(D), (6)(i)(A).
- ² *Id.*; 8 C.F.R. § 214.2(h)(iv)(A) (employer must certify “qualified workers in the United States are not available and that the [terms] of employment will not adversely affect the wages and working conditions of similarly employed U.S. workers”).
- ³ 8 C.F.R. § 214.2(h)(16)(ii). In fact, if an H-2B worker finds an employer willing to sponsor them for employment-based status while they are in the U.S., they may not extend their H-2B status while their permanent immigration application is pending.
- ⁴ However, in FY 2016, there is an exception to the annual cap for returning workers who were previously counted against the cap during FY 2013, 2014, or 2015. 2016 Department of Labor Appropriations Act, (Division H, Title I of Public Law 114-113) (2016 DOL Appropriations Act) (Dec. 18, 2015).
- ⁵ U.S. Department of State, *Worldwide H1B, H2A, and H2B Visa Issuances, Fiscal Years 2010-2015 available at <https://travel.state.gov/content/dam/visas/Statistics/Graphs/H%20VisasWorldwide.pdf>*
- ⁶ Immigration and Nationality Act of June 27, 1952, ch. 477, codified at 8 U.S.C. § 1101 et seq.; Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL’Y 79, 82–88 (2004).
- ⁷ Andorra Bruno, *Immigration: Policy Considerations Related to Guest Worker Programs*, Congressional Research Service Report for Congress, 1 (2006), available at <http://fpc.state.gov/documents/organization/62664.pdf>.
- ⁸ Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 301(a), 100 Stat. 3359, 3411, 8 U.S.C. § 1101(a)(15)(H); Mike Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guestworkers From Enforcing Their Rights*, 18 Hofstra Labor & Employment Law Journal 2001, 581-583 (detailing history of guestworkers leading up to the modern H-2 programs); see also *Martinez v. Reich*, 934 F. Supp. 232, 237 (S.D. Tex. 1996) (discussing how Congress made changes to H-2A programs, but not H-2B programs).
- ⁹ Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 Temp. Pol. & Civ. Rts. L. Rev. 423, 430, 432. (2007); Charles C. Mathes, *The Department of Labor’s Changing Policies Toward the H-2B Temporary Worker Program: Primarily for the Benefit of Nobody*, 80 Fordham L. Rev. 1801, 1807-08 (2012).
- ¹⁰ Mathes, 80 Fordham L. Rev. at 1807-08, citing to H.R. REP. NO. 99-682, pt. 1, at 50–51, 80 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5654–55, 5684.
- ¹¹ *Id.* at 1807, FN 38, citing to H.R. REP. NO. 99-682, pt. 1, at 80 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, at 5684.
- ¹² 20 C.F.R. § 655 Subpart B.
- ¹³ 73 Fed. Reg. 78020 (December 19, 2008), 20 C.F.R. § 655 Subpart A.
- ¹⁴ *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, No. 2:09-cv-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (CATA I).
- ¹⁵ *Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 81 F. Supp.3d 1291 (N.D. Fla. 2014) (Bayou II).
- ¹⁶ 80 Fed. Reg. No. 82, April 29, 2015.
- ¹⁷ 2016 Department of Labor Appropriations Act, (Division H, Title I of Public Law 114-113) (2016 DOL Appropriations Act) (Dec. 18, 2015).
- ¹⁸ While USDOL has defined temporary need as nine months or less in the 2015 Rule, 20 C.F.R. § 655.6, Congress prevented its enforcement of that definition. 8 C.F.R. § 214.2(h)(9)(iii)(B)(1)(A) (beneficiary shall be admitted to the United States for the validity period of the petition.).
- ¹⁹ 8 C.F.R. § 214.2(h)(13)(i)(A) (However, “the beneficiary may not work except during the validity period.”).
- ²⁰ 8 C.F.R. § 214.2(h)(14), (15).
- ²¹ 8 C.F.R. § 214.2(h)(13)(iv).
- ²² 8 C.F.R. § 214.2(h)(14), (15).
- ²³ 8 C.F.R. § 214.2(h)(13)(iv)-(v).
- ²⁴ 8 C.F.R. § 214.2(h)(13)(iv).
- ²⁵ Immigration Act of 1990, Pub. L. 101-649, § 205(a), 104 Stat. 4978, 5019, 8 U.S.C. § 1184(g)(1)(B).
- ²⁶ Department of Defense Appropriations Act of 2005, Pub. L. 108-287, §14006.
- ²⁷ Lindsay N. Pickral, *Close to Crucial: The H-2B Visa Program Must Evolve, But Must Endure*, 42 Univ. of Richmond Law Rev. 1011 (2008) (Noting that the crab processing industry in Maryland was behind the push for annual cap exemptions).
- ²⁸ See Pub. L. 109-13, § 402, 119 Stat. 231, 318 (2005).
- ²⁹ *Id.* The initial legislation provided for a sunset after two years and Congress renewed it by incorporation into an unrelated bill for an additional year. Pub. L. 109-364, § 1074, 120 Stat. 2083, 2403 (2006). Therefore the H-2R visas were in effect for three years, 2005 through 2007.
- ³⁰ U.S. State Department, *Nonimmigrant Visa Spreadsheet FY 97-12*, available at http://www.travel.state.gov/visa/statistics/nivstats/nivstats_4582.html.

31 2016 Department of Labor Appropriations Act, (Division H, Title I of Public Law 114-113) (2016 DOL Appropriations Act) (Dec. 18, 2015).

32 Jed Lipinski, [Foreign Guest Workers to Triple under New Federal Budget Bill](#), *The Times-Picayune* (Dec. 21, 2015), available at http://www.nola.com/politics/index.ssf/2015/12/congress_passes_h-2b_worker_ex.html.

33 8 C.F.R. § 214.2(h)(9)(iv).

34 9 FAM 402.10-14(B).

35 9 FAM 402.10-14(C); 8 C.F.R. § 214.2(h)(9)(iv).

36 8 C.F.R. § 214.2(h)(9)(iv).

37 U.S. Department of State, NIV Workload by Category 2013 (last visited February 2015)

38 20 C.F.R. § 655.11.

39 See https://www.foreignlaborcert.doleta.gov/2015_H-2B_IFR.cfm#

40 U.S. consulates, embassies and visa processing locations abroad are all part of the Department of State consular affairs. See the organizational chart available at <http://www.state.gov/documents/organization/187423.pdf>.

41 8 U.S.C. § 1184(c)(1).

42 *Id.*

43 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

44 8 C.F.R. § 214.2(h)(6)(iii)(A).

45 78 Fed. Reg. 24047, 24048-49 (April 24, 2013).

U.S. consulates, embassies and visa processing locations abroad are all part of the Department of State consular affairs. See the organizational chart available at <http://www.state.gov/documents/organization/187423.pdf>.

46 20 CFR 655.2(b)

47 8 C.F.R. § 214.2(h)(2)(i)(F) and (6)(iii)(B).

48 8 C.F.R. § 214.2(h)(2)(i)(B). See also ETA Form 9142B, No. 7a.

49 20 C.F.R. §§ 655.11.

50 20 C.F.R. § 655.6(c).

51 20 C.F.R. § 655.19(a).

52 20 C.F.R. § 655.19(d)(1).

53 20 C.F.R. § 655.1; 8 C.F.R. § 214.2(h)(6)(iii)(A). Employers in Guam seek temporary labor certification for H-2B workers from the Governor of Guam. 20 C.F.R. § 655.2.

54 20 C.F.R. §§ 655.5.

55 While 20 C.F.R. § 655.6 says only applications for nine months or less are considered to meet the temporary need definition, the enforcement of that provision was blocked by 2016 Department of Labor Appropriations Act, Sec. 113.

56 20 C.F.R. § 655.10(a) (“The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H-2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.”). Note that Congress explicitly refused to fund the enforcement of the definition of corresponding employment found in 20 C.F.R. § 655.5. Division H, Title I of Public Law 114-113 (2016 DOL Appropriations Act), Sec. 113.

U.S. Department of Labor, Office of Foreign Labor Certification, Office of Foreign Labor Certification Annual Report - 2014, available at https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2014.pdf (accessed September 2, 2016).

58 20 C.F.R. § 655.11.

59 20 C.F.R. § 655.11(h)(1).

60 *Id.*

61 See https://www.foreignlaborcert.doleta.gov/2015_H-2B_IFR.cfm#

62 20 C.F.R. § 655.10.

63 20 C.F.R. § 655.10(b); 78 Fed. Reg. 24047, 24055 (April 24, 2013). This rule took effect immediately but is actually just an interim rule. USDOL and DHS will promulgate a final rule following their review of public comments that as of June 2013 are pending.

64 *Id.*

65 20 C.F.R. § 655.10(f).

66 2016 Department of Labor Appropriations Act, (Division H, Title I of Public Law 114-113) (2016 DOL Appropriations Act) (Dec. 18, 2015), Sec. 112.

67 *Comite de Apoyo a Los Trabajadores Agricolas v. Solis*, No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).

68 *Id.*

69 76 Fed. Reg. 3452, at 3463 (Jan. 19, 2011) (“Therefore, it follows that if the employer must only offer and pay Level I wages, wages below what the average similarly employed worker is paid, those wages will make the U.S. workers less likely to accept those job opportunities or will require them to accept the job at a wage rate less than the market

has determined is prevailing for the job. The net result is an adverse effect on the worker's income. While an arithmetic mean is not an indicator of the single best wage at which U.S. workers are considered to be adversely affected, by its placement at the average wage rate it establishes a more accurate wage for the average U.S. worker.”)

⁷⁰ See Julia Preston, Louisiana Business Owners Sue Over New Rules for Guest Workers, N.Y. Times, (Sept. 12, 2011), available at <http://www.nytimes.com/2011/09/12/us/12alligator.html?pagewanted=all&r=0>.

⁷¹ See Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112-55, div. B, tit. V, § 546, 125 Stat. 552 (Nov. 18, 2011) (“None of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012 the [2011 Wage Rule].”).

⁷² See Consolidated Appropriations Act of 2012, Public Law 112-74, 125 Stat. 786, (December 23, 2011); Continuing Appropriations Resolution, 2013, Public Law 112-175, 126 Stat. 1313 (September 28, 2012); and Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113-6, 127 Stat. 198 (March 26, 2013) (effective until September 30, 2013).

⁷³ *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, No. 09-240, 2013 WL 1163426 (E.D. Pa. March 21, 2013).
⁷⁴ 78 Fed. Reg. 24047 (April 24, 2013).

⁷⁵ In the Matter of Island Holdings, LLC, BALCA Case No.: 2013-PWD-00002 (Dec. 3, 2013).

⁷⁶ *CATA v. Perez*, 46 F.Supp.3d 550, 561 (E.D. Pa. 2014) (CATA III).

⁷⁷ *Moodie v. Kiawah Island Inn Co., LLC*, 124 F. Supp.3d 711, 724 (D. S.C. 2015).

⁷⁸ *Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 191 (3rd Cir. 2014) (CATA III).

⁷⁹ 80 Fed. Reg. 24146 (April 29, 2015).

⁸⁰ *Comite de Apoyo a los Trabajadores Agricolas v. Perez*, No. 1:15-cv-04014 (D.N.J. June 12, 2015) (CATA IV).

⁸¹ 2016 DOL Appropriations Act, Sec. 112.

⁸² *Centro de los Derechos del Migrante*, Federal Court Orders the U.S. Department of Labor to Stop Using Invalid Wage Determinations for Temporary Workers, Press Release (March 22, 2013), available at <http://www.cdmigrante.org/press-release-federal-court-orders-the-u-s-dep...>

⁸³ 20 C.F.R. § 655.30..

⁸⁴ 20 C.F.R. § 655.48.

⁸⁵ 20 C.F.R. § 655.6.

⁸⁶ 20 C.F.R. § 655.33(a).

⁸⁷ 20 C.F.R. § 655.33(b).

⁸⁸ 20 C.F.R. § 655.50.

⁸⁹ 20 C.F.R. § 655.9(a).

⁹⁰ H-2B Application for Temporary Employment Certification Form ETC 9142B, Appendix B, Nos. 9 and 23.

⁹¹ 20 C.F.R. § 655.9(c).

⁹² 20 C.F.R. § 655.40.

⁹³ 20 C.F.R. § 655.42- 655.45.

⁹⁴ 20 C.F.R. § 655.40(b).

⁹⁵ 20 C.F.R. § 655.48.

⁹⁶ *Id.*

⁹⁷ David Seminara, Center for Immigration Studies, Dirty Work: In-Sourcing American Jobs with H-2B Guestworkers, Jan. 2010, available at <http://www.cis.org/h-2b-guestworkers>. See also U.S. Department of Labor, Office of Inspector General, Top Management Challenges, Nov. 15, 2011, at 12, available at <http://www.oig.DOL.gov/public/topchallenges/2011.pdf> (employers did not hire any of the 187 U.S. workers it contacted about forestry jobs, but instead hired 323 guest workers for these jobs); and Mark Morris, Kansas City Star, Work visa program is rife with problems, Dec. 14, 2009, available at <http://www.kansascity.com/2009/12/14/1630974/work-visa-program-is-rife-w...> (e.g., conducting interviews on Christmas eve).

⁹⁸ National Employment Law Project, Comments on RIN 1205-AB58, Temporary Non-Agricultural Employment of H-2B Aliens in the United States (May 17, 2011), available at <http://www.nelp.org/page/-/Justice/2011/CommentsonProposedRulesTemporary...>

⁹⁹ *Id.*

¹⁰⁰ Economic Policy Institute, Proposed Rule: Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States, at 3 (Nov. 15, 2010), available at http://www.epi.org/files/2011/EPI_H2B_Comments%20%2817%20May%202011%29.pdf.

¹⁰¹ 20 C.F.R. § 655.19.

¹⁰² 20 C.F.R. § 655.6(c).

¹⁰³ 20 C.F.R. §§ 655.19(d) and (b).

¹⁰⁴ 8 C.F.R. § 214.2(h)(6)(iii)(E).

¹⁰⁵ 8 C.F.R. § 214.2(h)(6)(vi).

106 8 C.F.R. § 214.2(h)(6)(vi)(D).

107 8 C.F.R. § 214.2(h)(2)(ii).

108 8 C.F.R. § 214.2(h)(2)(iii). However, there are exceptions. H-2B petitions must include the name of each beneficiary who is currently in the United States and USCIS may still require the worker's name if it is needed to establish eligibility.

109 *Id.*

110 The fraud fee is mandated by 8 U.S.C. 1184(c)(13)(A).

111 Form I-907, Request for Premium Processing Service must be completed and submitted as well if the petitioner needs a quicker review process. See Form I-907.

112 8 C.F.R. § 214.2(h)(9)(i)(B).

113 See Pub. L. 109-13, § 402, 119 Stat. 231, 318 (2005).

114 U.S. Department of Homeland Security, USCIS, Cap Count for H-2B Nonimmigrants, available at: <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants> (September 2016).

115 73 Fed. Reg. 78104 (Dec. 19, 2008); Form I-129 was amended as follows: The H-Classification Supplement, Section 3 Question 7. "Did you or do you plan to use a staffing, recruiting, or similar placement service or agent to locate the H-2A/H-2B workers that you intend to hire by filing this petition? If yes, list the name and address of the service used."

116 9 FAM 401.10-7(B)(b) and (c).

117 Non-immigrant intent is required for individuals applying for H-2B visas. See 8 U.S.C. § 1101(a)(15)(H) (H-2A and H-2B workers are defined as "having a residence in a foreign country which [s/]he has no intention of abandoning who is coming temporarily to the United States to perform" agriculture or other temporary services for which there are no available U.S. workers); and 9 FAM 402.10-9(C)(b).

118 See generally 9 FAM 402.10-9; Bureau of Consular Affairs, Temporary Worker Visas, U.S. State Department, available at http://travel.state.gov/visa/temp/types/types_1271.html#5.

119 U.S. State Department, Fees for Visa Services, available at http://travel.state.gov/visa/temp/types/types_1263.html, and Temporary Worker Visas, available at http://travel.state.gov/visa/temp/types/types_1271.html; U.S. Department of Homeland Security, USCIS, H-2B Temporary Non-Agricultural Workers, Jan. 23, 2012, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7...>

120 See generally, 9 FAM 401.10-9; interviews with Department of State officials during 2010 and 2011.

121 9 FAM 401.10-7(A).

122 U.S. Department of State, NIV Workload by Category 2015.

123 8 U.S.C. § 1225; 8 C.F.R. Part 235, Inspection of Persons Applying for Admission; see also Austin T. Fragomen, Jr., Alfred J. Del Rey, Jr., and Sam Bernsen, Immigration Law and Business § 2:11 (2010) ("The issuance of a nonimmigrant visa gives the alien permission to apply for admission to the United States at a port of entry...The visa does not assure an alien that he or she will be admitted to the United States, however; it merely indicates that a consular officer has found the alien eligible for temporary admission to the United States and not inadmissible under § 212(a) of the INA, 8 U.S.C.A. § 1182(a).").

124 U.S. State Department, U.S. Consulate in Monterrey, Mexico, Misrepresentations by Staffing Agencies Under the Temporary H-2B Program, Unclassified Cable (May 28, 2009), available at <http://www.cablegatesearch.net/cable.php?id=09MONTERREY201>.

125 20 C.F.R. § 655.20(l) and ETA Form 9142B..

126 U.S. State Department, Consulate Sao Paulo, Brazil, H-2B Visas: The Good, The Bad and the Ugly, Dec. 1, 2005, available at <http://dazzlepod.com/cable/05SAOPAULO1321/>.

127 Centro de los Derechos del Migrante, Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change, pp. 11-13 (http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf).

128 *Id.* at 21.

129 20 C.F.R. § 655.20(o).

130 See, e.g., *Teoba v. Trugreen Landcare LLC*, 769 F. Supp.2d 175, 179 (W.D.N.Y. 2011); *Castellanos-Contreras, et al. v. Decatur Hotels, LLC, et al.*, 622 F.3d 393, 403 (5th Cir. 2010).

131 20 C.F.R. § 655.9.

132 20 C.F.R. § 655.9(c). The Foreign Labor Recruiter List includes Office of Foreign Labor Certification case numbers connected to each recruiter, but not the names of the employers for whom they recruit.

133 See <https://icert.doleta.gov/>.

134 Cal. BPC Sec. 9998.1.5(a); The California Foreign Labor Recruitment Law was passed in September 2014 as SB 477. A full copy of the Senate Bill is available at http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB477

135 Id.

136 20 C.F.R. § 655.22(j).

137 8 C.F.R. § 214.2(h)(6)(i)(B).

138 Id.

139 20 C.F.R. § 655.22(g)(2).

140 8 C.F.R. § 214.2(h)(6)(i)(B).

141 U.S. Department of State, Trafficking in Persons Report, June 2011, at 377 (noting that after the ban was put in place, “recruiters adjusted their practices by charging fees after the workers had obtained their visas and levying charges under the guise of ‘service fees.’”), available at <http://www.state.gov/documents/organization/164458.pdf>.

142 9 FAM 402.10-7(B)(c). (Instructing consular officials as follows: “If you have reason to believe that the alien-beneficiary has paid a prohibited fee or agreed to pay such a fee and s/he has not been reimbursed or the agreement to pay the fee has not been terminated, you should return the petition to DHS for reconsideration ...”).

143 U.S. State Department, Consulate Sao Paulo, Brazil, *H-2B Visas: The Good, The Bad and the Ugly*, Dec. 1, 2005, available at <http://dazzlepod.com/cable/05SAOPAULO1321/> (emphasis added).

144 8 C.F.R. § 214.2(h)(6)(i)(C).

145 Id.

146 8 C.F.R. § 214.2(h)(6)(i)(D).

147 Karl Baker, Christian Science Monitor, To fight scammers dangling US jobs, a “Yelp’ for Mexican migrant workers, October 16, 2014, available at <http://www.csmonitor.com/World/Americas/2014/1016/To-fight-scammers-dangling-US-jobs-a-Yelp-for-Mexican-migrant-workers>

148 8 C.F.R. § 214.2(h)(2)(i)(D).

149 Id.

150 U.S. Department of Labor, Office of Foreign Labor Certification, *Office of Foreign Labor Certification Annual Report - 2014*, available at [https://www.foreignlaborcert.doleta.gov/pdf/OFLC Annual Report FY2014.pdf](https://www.foreignlaborcert.doleta.gov/pdf/OFLC%20Annual%20Report%20FY2014.pdf) (Annual reports dating back to 2006 are found on this website) (accessed September 2, 2016).

151 U.S. Department of State, 1997-2015 NIV Detail Table, available at <https://travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>

152 U.S. Department of Labor, Office of Foreign Labor Certification, 2011 Report, p. 35 (Nov. 2012), available at <http://www.foreignlaborcert.USDOLEta.gov/performance/cfm> (April 2013).

153 U.S. Department of State, *Worldwide H1B, H2A, and H2B Visa Issuances*, Fiscal Years 2010-2015 available at <https://travel.state.gov/content/dam/visas/Statistics/Graphs/H%20VisasWorldwide.pdf>

154 The Department of Homeland Security tracks admissions but those numbers do not easily cross-reference with visas issued because the admissions numbers count multiple entries by single individual visa-holders.

155 Department of Homeland Security, U.S. Citizenship and Immigration Services, H2B Nonagricultural Temporary Worker Visa and Status, Fiscal Year 2014 Semiannual Report to Congress, available at [https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/FY_2014_H-2B Petitions Report Part 2 SIGNED.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/FY_2014_H-2B_Petitions_Report_Part_2_SIGNED.pdf). The USCIS website lists historical employment-based benefit data on the H-1B, H-2A, and L-1B programs, but not H-2B. Historical H-2B cap count information is not available on the USCIS website. See <http://www.aila.org/infonet/uscis-fy2013-h-2b-cap-count-updated-10-1-13>. (showing FY 2013 first half cap count of 43,263 and FY2013 second half cap count of 28,823).

156 See 8 U.S.C. §1184(c)(8)(B) (“The Attorney General shall submit annually to the Committees on the Judiciary of the House of Representatives and of the Senate a report describing, with respect to petitions under each subcategory of subparagraphs (H), (O), (P), and (Q) of section 1101 (a)(15) of this title the following: . . . (B) The number of such petitions which have been approved and the number of workers (by occupation) included in such approved petitions.”).

157 As of September 9, 2016, the most recent annual report on the website is from 2010. Department of Homeland Security, U.S. Citizenship and Immigration Services, Characteristics of H-2B Nonagricultural Temporary Workers, Fiscal Year 2010 Semiannual Report to Congress, available at <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-2B/FY10H-2BNonagriculturalTempWorkers.pdf>.

158 8 U.S.C. § 1184, Note “Improving Count of H-1B and H-2B Nonimmigrants,” American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105–277, div. C, title IV, §416, Oct. 21, 1998, 112 Stat. 2681–655, amended by REAL ID Act of 2005, Pub. L. 109–13, div. B, title IV, §406, May 11, 2005, 119 Stat. 320.

U.S. Department Homeland Security, Office of Immigration Statistics yearly reports, *Nonimmigrant Admissions to the United States*, 2013 available at https://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2013.pdf.

160 Id.

¹⁶¹ <http://youtu.be/UltdvimAop4>

¹⁶² 8 C.F.R. § 214.2 (h)(6)(i)(E)(2). H-2B petitions on behalf of workers who are not from a country that has been designated as a participating country must name all the workers in the petition who fall within these categories. See, e.g., 8 C.F.R. § 214.2(h)(2)(iii).

¹⁶³ U.S. Department of State, 1997-2015 NIV Detail Table, available at <https://travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>

¹⁶⁴ 8 C.F.R. § 214.2(h)(6)(i)(E)(2).

¹⁶⁵ 73 Fed. Reg. 8230, at 8234 (Feb. 13, 2008).

¹⁶⁶ 73 Fed. Reg. 76891, at 76903 (Dec. 18, 2008). The final H-2B rule similarly stated that the program would be “enhanced by countries accepting the return of their nationals.”

¹⁶⁷ Randall Monger and Megan Mathews, U.S. Department of Homeland Security, Nonimmigrant Admissions to the United States: 2010, 3 (2011), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2010.pdf. CBP’s border tracking system was updated in 2010. The agency has claimed that data for 2010 and subsequent years represent “a more complete count of land admissions than I-94 data collected in previous years.”

¹⁶⁸ H-2B Nonimmigrant Visa Statistics on age and gender were provided to Global Workers Justice Alliance upon request, from the U.S. Department of State, Visa Office, Immigrant Visa Control and Reporting Division in July 2011

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ U.S. Department of Labor, Office of Foreign Labor Certification, *Office of Foreign Labor Certification Annual Report - 2014*, available at https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2014.pdf (Annual reports dating back to 2006 are found on this website) (accessed September 2, 2016).

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ This general statement is based on a review of the raw data, but is not grounded in a precise count. See U.S. Department of Labor, OFLC, Performance Data, available at <https://www.foreignlaborcert.doleta.gov/performance/cfm>

¹⁷⁵ U.S. Department of Labor, OFLC, Performance Data, available at <https://www.foreignlaborcert.doleta.gov/map.cfm?year=2013>

¹⁷⁶ Id.

¹⁷⁷ For example, the average hourly wage for landscaping workers nationally in 2013 was \$9.38. U.S. Department of Labor, Office of Foreign Labor Certification, *Office of Foreign Labor Certification Annual Report - 2013*, available at https://www.foreignlaborcert.doleta.gov/pdf/OFLC-2013_Annual_Report.pdf

¹⁷⁸ Id.

¹⁷⁹ 75 Fed. Reg. 61578, at 61581 fn.3 (Oct. 5, 2010).

¹⁸⁰ Denise Velez, Economic Policy Institute, Wages for H-2B workers set lower than the prevailing wage, (Aug. 13, 2008), available at http://www.epi.org/publication/webfeatures_snapshots_20080813/.

U.S. Department of Labor, Office of Foreign Labor Certification, 2011 Report, p. 35 (Nov. 2012), available at <http://www.foreignlaborcert.USDOLEta.gov/performance/cfm> (April 2013).

¹⁸¹ 29 C.F.R. § 503.16(l).

¹⁸² 29 C.F.R. § 503.16(j)(iv)(2); 20 C.F.R. §§ 655.20(j)(1)(i-ii), (iv)(2).

¹⁸³ 29 C.F.R. § 503.16(f); 20 C.F.R. § 655.20(f).

¹⁸⁴ 20 C.F.R. § 655.18(b)(10); 29 C.F.R. § 503.16(c).

¹⁸⁵ 8 C.F.R. § 214.2(h)(6)(ix).

¹⁸⁶ 2016 DOL Appropriations Act, Secs. 113 & 114.

¹⁸⁷ Legal Services Corporation, Temporary Forestry Workers Now Eligible for LSC-funded Legal Services, Jan. 10, 2008, available at <http://www.lsc.gov/media/newsletters/2008/lsc-updates-january-10-2008>; Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 540, 121 Stat. 1844, 1934 (2007);

¹⁸⁸ 20 C.F.R. §§ 655.20(b), (h); 29 C.F.R. §§ 503.16(b), (h).

¹⁸⁹ 20 C.F.R. § 655.20(a) (“The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the Application for Temporary Employment Certification granted by OFLC.”); 29 C.F.R. § 503.16(a)(1).

¹⁹⁰ 20 C.F.R. § 655.20(a)(2); 29 C.F.R. § 503.16(a)(2).

¹⁹¹ 20 C.F.R. § 655.20(a)(3); 29 C.F.R. § 503.16(a)(3).

¹⁹² 20 C.F.R. § 655.20(d); 29 C.F.R. § 503.16(d).

¹⁹³ 20 C.F.R. § 655.20(h); 29 C.F.R. § 503.16(h).

¹⁹⁴ 20 C.F.R. § 655.20(c); 29 C.F.R. § 503.16(c).

¹⁹⁵ This is when workers receive a fixed rate for each unit of production, whether it is per tree planted or room cleaned.

196 20 C.F.R. § 655.20(a)(4); 29 C.F.R. § 503.16(a)(4).

197 Id.

198 See 29 C.F.R. § 778.111(b) (“In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference”).

199 20 C.F.R. § 655.20(i)(1); 29 C.F.R. § 503.16(i)(1). The records must detail the following: nature, amount and location of work performed; number of hours offered and actually worked each day, and if the latter is less, the reason work was declined; the start and stop time each day; the rate of pay; earnings per pay period; worker’s home address; amount of and reasons for any deductions from wages.

200 20 C.F.R. § 655.20(i)(2); 29 C.F.R. § 503.16(i)(2).

201 20 C.F.R. § 655.20(o); 29 C.F.R. § 503.16(o)

202 See generally 29 C.F.R. Part 531; see also USDOL WHD fact sheet #16, available at <http://www.dol.gov/whd/regs/compliance/whdfs16.pdf>

203 20 C.F.R. § 655.20(j); 29 C.F.R. § 503.16(j)

204 20 C.F.R. § 655.20(j)(i); 29 C.F.R. § 503.16(j)(i).

205 U.S. Department of Labor, WHD, Field Assistance Bulletin 2009 02, available at <http://www.USDOL.gov/whd/FieldBulletins/>; see also *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 706 (2009) (inbound travel costs incurred by H-2B workers operated as de facto deductions and employer is liable to the extent these deductions drive first week’s wages below the minimum).

206 20 C.F.R. § 655.20(l); 29 C.F.R. § 503.16(l).

207 Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872; see, e.g., *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F.Supp.2d 1295, 1325 (N.D.Ga.2008) (discussing AWPA claim on behalf of H-2B workers).

208 29 U.S.C. § 1802(2)-(3).

209 Other AWPA protections include housing and transportation safety provisions, farm labor contractor registration requirements, and specific requirements for information on wage statements.

210 Forestry and pine straw work is not considered agriculture under the H-2A visa’s definition of agriculture.

See, e.g., *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1169 (11th Cir. 2003) (AWPA covers workers who gather pine straw). But see *Cordova v. R&A Oysters, Inc.*, 101 F.Supp.3d 1192 (S.D. Ala. 2015) and *Bojorquez-Moreno v. Shores & Ruark Seafood Co., Inc.*

92 F.Supp.3d 459 (E.D. Va. 2015) (oyster processing not agriculture under the AWPA).

211 29 U.S.C. § 1854(a).

212 Legal Services Corporation, Temporary Forestry Workers Now Eligible for LSC-funded Legal Services, Jan. 10, 2008, available at <http://www.lsc.gov/media/newsletters/2008/lsc-updates-january-10-2008>; Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 540, 121 Stat. 1844, 1934 (2007);

213 Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 29942 (May 22, 2008) (“Congress has vested the Department of Homeland Security (DHS) with the statutory authority to enforce the H-2B Program requirements and the USDOL possesses no independent authority for such enforcement.”).

214 8 U.S.C. § 1184(c)(14)(B) and 8 U.S.C. § 1103(a)(6); 8 C.F.R. § 214.2(h)(6)(ix). WHD has authority to enforce H-2B regulations for applications filed on or after January 18, 2009.

215 20 C.F.R. § 655.50(c).

216 20 C.F.R. § 655.65(i).

217 20 C.F.R. § 655.23.

218 Id.

219 U.S. Government Accountability Office, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers (March 6, 2015), available at <http://www.gao.gov/products/GAO-15-154>.

220 U.S. Department of Labor, FY 2011 Budget in Brief, available at <http://www.USDOL.gov/USDOL/budget/2011/bib.htm#whd> and U.S. Department of Labor, FY 2012 Budget in Brief, available at <http://www.USDOL.gov/USDOL/budget/2012/bib.htm#whd>.

221 U.S. Department of Labor, Office of Inspector General, Debarment Authority Should be Used More Extensively in Foreign Labor Certification Programs, No. 05-10-002-03-321, Sept. 30, 2010, available at <http://www.oig.USDOL.gov/public/reports/oa/2010/05-10-002-03-321.pdf>.

222 Anti-trafficking education was not a part of that campaign. See U.S. Department of State, Trafficking in Persons Report, June 2011, at 377, available at <http://www.state.gov/documents/organization/164458.pdf>.

223 Id. The U.S. Department of Labor publishes a list of debarred employers, available at http://www.foreignlaborcert.USDOLeta.gov/pdf/Debarment_List_Revisions.pdf.

224 USDOL does, however, provide this list for the H-1B program. See H-1B Willful Violator List of Employers, available at <http://www.USDOL.gov/whd/immigration/H1BWillfulViolator.htm>.

- 225 8 U.S.C. § 1184(c)(14)(A)(ii).
- 226 U.S. Department of State, Trafficking in Persons Report, June 2011, at 377, available at <http://www.state.gov/documents/organization/164458.pdf>.
- 227 John Morton, DHS, ICE, Testimony Before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, U.S. House of Representatives, Oversight hearing on U.S. Immigration and Customs Enforcement: priorities and the rule of law, Oct. 12, 2011, available at <http://judiciary.house.gov/hearings/pdf/Morton%2010122011.pdf> ().
- 228 Id.
- 229 <https://www.dhs.gov/blue-campaign> (accessed August 31, 2016)
- 230 29 U.S.C. §§ 201, et seq.
- 231 29 U.S.C. § 213(a)(3).
- 232 Compare the H-2A regulations that explicitly state job orders and certified job orders rise to the level of a binding work contract. 20 C.F.R. §§ 655.102(b)(14), 655.122(q); see also 29 C.F.R. § 501.10(d). 76 Fed. Reg. 15129, at 15143 (March 18, 2011); see also *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F.Supp.2d 1295, 1302 (N.D. Ga. 2008) and *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 718-19 (E.D.N.C. 2009).
- 233 76 Fed. Reg. 15129, at 15143 (March 18, 2011); see also *Cordova v. R&A Oysters, Inc.*, 14-0462-WD-M, 2016 WL 951570, at **2-3 (March 8, 2016); *Moodie v. Kiawah Island Inn Co., LLC*, 124 F. Supp.3d 711, 725-28 (D. S.C. 2015); *Cuellar-Aguilar v. Degeller Attractions, Inc.*, 812 F.3d 614, 618-19 (8th Cir. 2015); *Bojorquez-Moreno v. Shores & Ruark Seafood Co., Inc.*, 92 F. Supp.3d 459, 466-68 (E.D. Va. 2015); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F.Supp.2d 1295, 1302 (N.D. Ga. 2008); *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 718-19 (E.D.N.C. 2009).
- 234 45 C.F.R. Part 1626 (Restrictions on Legal Assistance to Aliens).
- 235 Legal Services Corporation, Temporary Forestry Workers Now Eligible for LSC-funded Legal Services, Jan. 10, 2008, available at <http://www.lsc.gov/media/newsletters/2008/lsc-updates-january-10-2008>; Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 540, 121 Stat. 1844, 1934 (2007); By way of contrast, all H-2A agricultural workers are eligible for legal services.
- 236 See, e.g., Legal Services Corporation Program Letter 05-2 (Oct. 6, 2005), available at <http://www.lsc.gov/sites/default/files/Grants/pdfs/Progltr05-2.pdf>.
- 237 76 Fed. Reg. 15129, at 15143 (March 18, 2011).
- 238 Jayesh M. Rathod, A Season of Change: Reforming the H-2B Guest Worker Program, 45 Clearinghouse Review 20, 27 (May–June 2011) (discussing H-2B workers' limited access to justice).
- 239 20 C.F.R. § 655.20(y).
- 240 U.S. Department of State, U.S. Consulate Monterrey, Mexico, Misrepresentations By Staffing Agencies Under The H-2B Temporary Worker Program, May 28, 2009, available at <http://www.cablegatesearch.net/cable.php?id=09MONTERREY201>.
- 241 76 Fed. Reg. 15129, at 15132 (March 18, 2011).
- 242 Interview with Greg Schell, June 2013.
- 243 U.S. Attorney's Office, Middle District of Florida, Press Release, Federal Jury Convicts Brazilian Woman Of Alien Smuggling And Worker Visa Fraud Conspiracy (Nov. 8, 2011), available at http://www.justice.gov/usao/flm/press/2011/nov/20111108_Toro.html;
- 244 Willoughby Mariano, Foreign workers sue Swan and Dolphin, Westin resorts, Orlando Sentinel (Feb. 5, 2010), available at <http://articles.orlandosentinel.com/2010-02-04/news/os-visa-fraud-invest...>
- 245 Rebecca Smith, National Employment Law Project, Letter to Michael Jones, U.S. Department of Labor, Comments on RIN 1205-AB58, Temporary Non-Agricultural Employment of H-2B Aliens in the United States, May 17, 2011, at 3 (“Dozens of criminal and civil prosecutions have been launched against employers and recruiters for filing fraudulent applications for non-existent jobs, for race and gender discrimination, for human trafficking and wage and hour violations.”) available at www.nelp.org/page/-/Justice/2011/CommentsonProposedRulesTemporaryEmployment...
- 246 For example, 39 H-2B Filipino workers were forced to work in country clubs and hotels for a staffing company that threatened to have the workers arrested and deported if they did not work, knowing they faced serious economic harm and possible incarceration for nonpayment of recruitment fee-related debts back home. See U.S. Department of Justice, Florida Couple Sentenced in Forced Labor Conspiracy to Exploit Filipino Guest Workers (December 10, 2012), describing criminal prosecution *U.S. v. Manuel, et al.*, 9:10-cr-80057–KAM (S.D. FL. 2010) (defendants pled guilty and were sentenced), available at <http://www.justice.gov/print/PrintOut3.jsp>.
- 247 U.S. Department of State, Trafficking in Persons Report, June 2011, at 377, available at <http://www.state.gov/documents/organization/164458.pdf>.
- 248 77 Fed. Reg. 10038, at 10112 (Feb. 21, 2012).
- 249 8 C.F.R. § 214.2(h)(6)(i)(B).
- 250 75 Fed. Reg. 6884, at 6926 (Feb. 12, 2010) (discussion in H-2A program context, same principle applies).

- 251 Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*, p. 18 (February 2013) available at <http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-....>
- 252 *Id.*
- 253 See *Rivera v. Brickman Group, Ltd*, 2008 U.S. Dist. LEXIS 1167 at *26 (E.D. Pa. Jan. 7, 2008); and *Rosales v. Hispanic Employee Leasing Program, LLC*, 2008 U.S. Dist. LEXIS 9756, at *3 (W.D.Mich. Feb. 11, 2008).
- 254 Government Accountability Office, *H-2B Visa Program: Closed Civil Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse*, GAO-10-1053 (Sept. 2010), available at <http://www.gao.gov/new.items/d101053.pdf>.
- 255 U.S. Department of Labor, WHD, *South Dakota's Custer State Park Resort to pay 72 foreign guest workers more than \$93,000 in back wages*, (January 18, 2012), available at <http://www.USDOl.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/...>
- 256 U.S. Department of State, *Trafficking in Persons Report 2011*, at 377 (June 2011), available at <http://www.state.gov/documents/organization/164458.pdf>.
- 257 *Recinos-Recinos v. Express Forestry, Inc.*, 2006 U.S. Dist. LEXIS 2510 (E.D. La. 2006) (FLSA action on behalf of 300 predominantly Guatemalan and Mexican H-2B forestry workers).
- 258 Meredith Hobbs, *First Trafficking Suits Filed as Part of Huge Pro Bono Effort*, Daily Report (June 3, 2013), available at http://www.justiceinmotion.com/jsp/article.jsp?id=1202602511257&First_Trafficking_Suits_Filed_as_Part_of_Huge_Pro_Bono_Effort&slreturn=201305071. While changing employers is conceivable, it requires an H-2B worker finding a new employer willing to file the necessary paperwork prior to the current visa's expiration.
- 259 See, e.g., U.S. Equal Employment Opportunity Commission, *EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated \$1 Million*, Dec. 8, 2006, available at <http://www.eeoc.gov/eeoc/newsroom/release/12-8-06.cfm> (describing settlement on behalf of 48 Thai H-2B welders who paid exorbitant fees to recruiters and were held against their will, passports confiscated and forced to work without pay).
- 260 *David v. Signal International*, Complaint, Case No. 2:2008cv01220 (E.D. La. Mar. 7, 2008); *David v. World Marine, LLC*, 2016 WL 2609791 (5th Cir. May 5, 2016); see also Dan Rather, *An American Nightmare*, Huffington Post (Nov. 10, 2011), available at http://www.huffingtonpost.com/dan-rather/an-american-nightmare_b_1086537.
- 261 The EEOC has also sued the employer for national origin and race discrimination because the Indian H-2B workers did not receive the same treatment as similarly employed U.S. workers. *EEOC v. Signal International, LLC*, Case No. 1:2011cv00179 (S.D. Miss, April 20, 2011), available at ____; *EEOC Sues Marine Services Company for Labor Trafficking, Discrimination* (Apr. 20, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11a.cfm>.
- 262 *David et al. v. Signal International, Plaintiffs' Memorandum Of Law In Support Of Class Certification*, Case No. 2:2008cv01220, (E.D. La. Feb. 1, 2011), available at http://www.splcenter.org/sites/default/files/downloads/case/signal_class...
- 263 Julia Preston, *Suit Points to Guest Worker Program Flaws*, The New York Times (Feb. 1, 2010), available at <http://www.nytimes.com/2010/02/02/us/02immig.html?hpw>.
- 264 76 Fed. Reg. 15129, at 15132 (March 18, 2011).
- 265 *Id.*
- 266 U.S. Department of Labor, *Temporary Non-agricultural Employment of H-2B Aliens in the United States*, Feb. 21, 2012, at 12, available at http://www.ofr.gov/OFRUpload/OFRData/2012-03058_PI.pdf. 76 Fed. Reg. 15129 (March 18, 2011).
- 267 80 Fed. Reg. 24043 (April 29, 2015)
- 268 76 Fed. Reg. 15129 (March 18, 2011).
- 269 *Id.* at 15132.
- 270 77 Fed. Reg. 10038, at 10156 (Feb. 21, 2012).
- 271 *Id.*; U.S. Department of Labor, *News Release, US Labor Department issues proposed rulemaking revising the H-2B Program*, Mar. 17, 2011, available at <http://www.USDOl.gov/opa/media/press/eta/ETA20110384.htm>.
- 272 8 U.S.C. § 1184(c)(1). When the IRCA was passed, the Department of Homeland Security did not exist. Its predecessor agency was the Department of Justice (DOJ). Therefore, the IRCA's provision here refers to the Attorney General, as DOJ's head, rather than the Department of Homeland Security. See 8 U.S.C. § 1103.
- 273 *Id.*
- 274 8 U.S.C. § 1184(c)(1).
- 275 *Id.*
- 276 *Bayou Lawn & Landscape Servs. et al. v. Sec. of Labor*, Complaint, Case No. 3:12cv183/MCR/CJK, (N.D. Fla. April 16, 2012), available at <http://www.chamberlitigation.com/sites/default/files/cases/files/2013/Bayou%20Lawn%20and%20Landscape%20Serv>

[ices%2C%20and%20Chamber%20of%20Commerce%2C%20et%20al.%20v.%20Solis%2C%20et%20al.%20%28Co
mplaint%29.pdf](#)

277 Bayou Lawn & Landscape Servs. et al. v. Sec. of Labor, Order, available at <http://www.chamberlitigation.com/sites/default/files/cases/files/2013/Bayou%20Lawn%20and%20Landscape%20Services%2C%20and%20Chamber%20of%20Commerce%2C%20et%20al.%20v.%20Solis%2C%20et%20al.%20%28Court%20Order%20Granting%20Preliminary%20Injunction%29.pdf>.

278 Bayou Lawn & Landscape Servs. et al. v. Sec. of Labor, 713 F.3d 1080 (11th Cir. 2013).

279 Bayou Lawn & Landscape Servs., 81 F.Supp. 3d 1291 (N.D. Fla. 2014), vacated and remanded, 621 Fed.Appx. 620 (11th Cir. 2015) (in light of new H-2B rules promulgated in 2015).

280 Bayou Lawn & Landscape Serv., 621 Fed.Appx. 620 (11th Cir. 2015)

281 Bayou Lawn, 713 F.3d at 1083.

282 Id. at 1084.

283 Perez v. Perez, No. 3:14-cv-682 (N.D. Fla. Mar. 4, 2015), available at http://www2.bloomberglaw.com/public/desktop/document/PEREZ_v_PEREZ_et_al_Docket_No_314cv00682_ND_Fla_Dec_19_2014_Court.

284 U.S. Department of Labor, *H-2B Program Alert: Cessation of Electronic Filing* (March 6, 2015) (because of the Perez decision USDOL “can no longer accept or process requests for H-2b prevailing wage requests or applications for temporary labor certification in the H-2B program”), available at <https://icert.doleta.gov/>; Vin Gurieri, *Judge Vacates 2008 DOL Rule Over H-2B Labor Certification*, Law 360 (March 5, 2015), available at <http://www.law360.com/articles/627990/judge-vacates-2008-dol-rule-over-h-2b-labor-certification>; and Bloomberg BNA, *DOL Halts All H-2B Labor Certifications After Federal Judge Enjoins Regulations* (March 5, 2015), available at [http://www.just-pay.org/news/article.554848-](http://www.just-pay.org/news/article.554848-DOL_Halts_All_H2B_Labor_Certifications_After_Federal_Judge_Enjoins_Regulati)

[DOL_Halts_All_H2B_Labor_Certifications_After_Federal_Judge_Enjoins_Regulati](http://www.just-pay.org/news/article.554848-DOL_Halts_All_H2B_Labor_Certifications_After_Federal_Judge_Enjoins_Regulati).

285 Bayou Lawn & Landscape Servs. v. Solis, No. 3:12-cv-00183-MCR-CJK, (N.D. Fla. Apr. 26, 2012) (issuing preliminary nationwide injunction), 713 F.3d 1080 (11th Cir. 2013) (affirming injunction), and 81 F. Supp. 1291 (N.D. Fla. 2014 (granting summary judgment to the plaintiff employer).), vacated and remanded, 621 Fed.Appx. 620 (11th Cir. 2015) (in light of new H-2B rules promulgated).

286 See Bayou Lawn, 81 F. Supp.3d at 1297-99 (comparing Congress’s express grant of rulemaking authority to USDOL with respect to the H-2A visa program in the statute and finding no such express grant for H-2B visa program). The Third Circuit Court of Appeals has decided the USDOL authority question differently, see Louisiana Forestry Ass’n, Inc. v. Perez, 745 F.3d 653, 669-675 (3d Cir. 2014) (USDOL did have rulemaking authority for 2011 H-2B regulations pertaining to prevailing wage methodology).

287 U.S. Citizenship and Immigration Services, *USCIS Temporarily Suspends Adjudication of H-2B Petitions Following Court Order* (March 9, 2015), available at <http://www.uscis.gov/news/uscis-temporarily-suspends-adjudication-h-2b-petitions-following-court-order>.

288 La. Forestry Ass’n v. Perez, 745 F.3d 653 (3rd Cir. 2014).

289 80 Fed. Reg. 24041 (April 29, 2015).

290 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

291 8 C.F.R. § 214.2(h)(6)(iii)(A); see also 78 Fed. Reg. 24047, 24048-49 (April 24, 2013).

292 For an explanation of the changes see U.S. Department of Labor, *WHD H-2B Side-by-Side comparison of the 2009 and 2015 Rules*, available at <http://www.dol.gov/whd/immigration/h2bfinalrule/h2bsidebyside.htm> (last visited May 2016).

293 See Global Workers Justice Alliance, *Comments regarding Interim Final Rule* (June 2015), available at <http://www.globalworkers.org/sites/default/files/GWJA%20comments%20RIN%201205-AB76.pdf>.

294 Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. (2015-2016), Pub. L. No. 114-113 (Dec. 18, 2015). Pertinent changes included lengthening the definition of temporary to ten months, removing the annual cap for returning H-2B workers, not allowing USDOL to use funds to enforce the three-quarter guarantee, and allowing the use of private employer surveys to set the prevailing wage. Worker advocates and some members of the U.S. Senate vehemently opposed the changes. See Centro de los Derechos del Migrante, *U.S. Senators Take Action to Protect H-2B Workers’ Rights during Appropriations* (December 2015), available at <http://www.cdmigrante.org/u-s-senators-take-action-to-protect-h-2b-workers-rights-during-appropriations/>.

295 Comité de Apoyo a los Trabajadores Agrícolas v. Perez, No. 1:15-cv-04014-RBK-JS (D.N.J. June 12, 2015).

296 Bayou Lawn & Landscape Servs. v. Johnson, No. 3:15-cv-00249-MCR-EMT (N.D. Fla. June 1, 2015).

297 Ashwini Sukthankar, Global Workers Justice Alliance, *Visas, Inc.: Corporate Control and Policy Incoherence in the U.S. Foreign Labor System*, p. 34 (2012).

298 Id.

299 Id.

300 2016 Department of Labor Appropriations Act, (Division H, Title I of Public Law 114-113) (2016 DOL Appropriations Act) (Dec. 18, 2015).