



Protecting Migrant Rights Across Borders

Visa Pages: U.S. TEMPORARY FOREIGN WORKER VISAS

H-2B VISA

Updated October 2022

The H-2B nonimmigrant visa program allows employers to hire foreign workers for temporary or seasonal non-agricultural jobs when there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
I. H-2B VISA	4
A. History	5
B. Duration	6
C. Annual Cap on H-2B Visas	8
D. H-4 Visa for Dependents	10
II. H-2B WORKERS IN THE U.S. – DATA	11
A. The H-2B Data Published By Federal Agencies	14
B. H-2B Worker Demographics	16
C. H-2B Employer Demographics	19
D. H-2B Job Characteristics	21
III. H-2B HIRING PROCESS	22
A. Steps to Obtain Authorization to Hire H-2B Workers	24
B. Steps for H-2B Worker Recruitment	30
IV. H-2B WORKER RIGHTS	33
A. Wages	36
B. Worker Expenses and Reimbursement	37
C. No Job Relocating	37
V. ENFORCEMENT	38
A. U.S. Department of Labor	38
B. U.S. Department of Homeland Security	40

C. U.S. Department of State	40
D. Private Litigation	41
VI. H-2B WORKER ISSUES	42
A. Fraud	43
B. Illegal Recruitment Fees	43
C. Wage Theft	43
D. Retaliation	43
E. Trafficking	44
F. Portable Justice	45

EXECUTIVE SUMMARY:

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. 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. 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. 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. In 2021, the U.S. Department of State issued 95,053 new H-2B visas, though the total number of H-2B visa holders working in the U.S. during 2021 was much higher.

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 migrants as H-2B workers. The H-2B visa does not offer these 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. Industries that commonly rely on H-2B guestworkers include landscaping, amusement parks, housekeeping, forestry, seafood processing, construction, ski resorts, and restaurants in tourist areas. There is a statutory annual limit

¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. §§ 214.2(h)(1)(ii)(D), (h)(6)(i)(A).

² 8 C.F.R. §§ 214.2(h)(1)(ii)(D); 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 Compare 8 C.F.R. § 214.2(h)(16)(i) (allowing H-1B or H-1C aliens to seek permanent residence) *with* 8 C.F.R. § 214.2(h)(16)(ii) (no such allowance). 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.

of 66,000 new H-2B visas available each fiscal year.⁴ With Congressional approval, this cap can be exceeded: for example, in 2019, the State Department issued 97,623 visas.⁵

A. HISTORY

In the mid-twentieth century, agricultural and nonagricultural temporary jobs for migrants were treated the same under the law. Under the Immigration and Nationality Act (INA) of 1952,⁶ all temporary foreign workers coming to the United States 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 changes to the scheme for temporary agricultural workers while the scheme for non-agricultural workers was left untouched.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 divided the program into two parts and set forth a number of specific

⁴ 8 U.S.C. § 1184(g)(1)(B)

⁵ U.S. Dept. of State, *Nonimmigrant Visa Spreadsheet FY 97-20 Nonimmigrant Visa Statistics: Nonimmigrant Visas by Individual Class of Admission*, available at https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-20_NIVDetailTable.xlsx (last visited Aug. 30, 2022).

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, Congressional Research Service Report for Congress, RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, (2010), available at https://www.everycrsreport.com/files/20100316_RL32044_b563e198bd407c7c0715e1515ca6050d0096347a.pdf (last visited Aug. 24, 2022).

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); 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.

requirements regarding the operation of the H-2A program.”¹¹ Following IRCA, the 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 a federal court again blocked their enforcement.¹⁵ In 2015, USDOL—this time in conjunction with DHS—again promulgated extensive H-2B worker protection regulations (called the 2015 Rule).¹⁶ All of these regulations are in effect, though a 2015 Congressional appropriations bill prohibited USDOL from enforcing several provisions.¹⁷ As of fiscal year 2022, the appropriations riders prohibiting DOL enforcement have been attached to appropriations bills each year since 2015.¹⁸ Those protections can still be enforced through private litigation.

B. DURATION

H-2B visas authorize work for the length of time listed on the temporary labor certification, which can be up to nine months.¹⁹ Workers are allowed to be in the U.S. ten days before and ten days after the authorized period.²⁰ 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.²¹ The total amount of time an H-2B worker may be continuously present in the U.S. is three years.²² At the end of that three-year period, the worker must depart the United States.²³

¹¹ Mathes 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. No. 245, Dec. 19, 2008 at 78020, 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, Apr. 29, 2015 at 24042.

¹⁷ 2016 Dept. of Labor Appropriations Act, Public Law 114-113, Division H, Title I, §§ 113-114, (Dec. 18, 2015).

¹⁸ Daniel Costa, As The H-2B Visa Program Grows, The Need For Reforms That Protect Workers Is Greater Than Ever, Economic Policy Institute, Aug. 18, 2022, available at <https://www.epi.org/publication/h-2b-industries-and-wage-theft/> (last visited Aug. 30, 2022).

¹⁹ 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.)

²⁰ 8 C.F.R. § 214.2(h)(13)(i)(A). However, “the beneficiary may not work except during the validity period.” *Id.*

²¹ 8 C.F.R. § 214.2(h)(14)-(15).

²² 8 C.F.R. § 214.2(h)(13)(iv).

²³ 8 C.F.R. § 214.2(h)(14), (15).

Certain time spent outside of the U.S. does not always count toward the three-year limit. The U.S. Department of Homeland Security's sub-agency, the U.S. Citizenship and Immigration Services (USCIS) has published guidance²⁴ on how to calculate the amount of time an H-2B worker is authorized to stay on a visa when there are interruptions.²⁵ There is no limitation on a former H-2B worker's eligibility for a new H-2B visa as long as they have resided and been physically present outside of the U.S. for six months immediately preceding the new visa.²⁶ 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.

H-2B Numbers Across Agencies

	2016	2017	2018	2019	2020	2021
H-2B positions certified by USDOL	119,282	133,985	147,592	150,465	160,557	181,451
H-2B nonimmigrant petitions approved by DHS/CIS	106,200	105,800	108,500	98,819	65,716	97,268
H-2B visas issued by DOS	84,627	83,600	83,744	97,623	61,865	95,053
H-2B admissions counted by DHS/CBP	120,843	124,319	120,351	129,120	86,731	-

SOURCES: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics, available at: <https://www.dol.gov/agencies/eta/foreign-labor/performance>, see H-2B section; U.S. Citizenship and Immigration Services, H-2B Nonagricultural Temporary Worker Visa and Status, available at: <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY20-Characteristics-Report.pdf>, see Program Reports section; H-2B; U.S. Department of State, Nonimmigrant Visas Issued by Classification (Fiscal Years 2016-2021), available at https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-21_NIVDetailTable.xlsx; U.S. Dept. of Homeland Security, Yearbook of Immigration Statistics, available at <https://www.dhs.gov/immigration-statistics/yearbook>

²⁴ U.S. Dept. of Homeland Security, U.S. Citizen and Immigration Services, *Calculating Interrupted Stays for the H-2 Classifications*, May 6, 2020, available at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications> (last visited July 19, 2022).

²⁵ 8 C.F.R. § 214.2(h)(13)(iv)-(v).

²⁶ 8 C.F.R. § 214.2(h)(13)(iv).

C. ANNUAL CAP OF 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.²⁷ Since that time, the number of H-2B visas requested each year has fluctuated, but in general, demand has exceeded supply. The cap is often met early: for example, the annual cap for FY 2022 was hit on February 26, 2022.²⁸

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

As certain industries have become dependent on temporary foreign labor, some have petitioned Congress for relief from the cap.²⁹ 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.³⁰ These workers were issued H-2R visas, a practice that ultimately lasted for three years.³¹ At its peak in 2007, 129,547 workers were admitted with either H-2B or H-2R visas – nearly twice the annual cap.³² The same rules and regulations for the H-2B program applied to H-2R workers. The official H-2R program ended in 2007.

2. H-2B CAP EXPANSION THROUGH APPROPRIATIONS

Beginning in Fiscal Year 2016 and every year since, the U.S. Congress has passed appropriations legislation delegating authority to DHS to determine whether the H-2B visa cap limit is sufficient to meet labor needs for relevant industries.³³ Additionally, if DHS determines that the 66,000 visas are insufficient, it also determines the number of

²⁷ Immigration Act of 1990, Pub. L. 101-649, § 205(a), 104 Stat. 4978, 5019, 8 U.S.C. § 1184(g)(1)(B); in applying the annual 66,000 cap, USCIS processes H-2B visas in two equal application periods each fiscal year: 33,000 for the first half of the fiscal year and 33,000 for the second half. USCIS accepts applications from October 1 to March 31 until the 33,000 first half year cap ceiling is reached. Any unallocated visa slots are rolled over into the second half of the fiscal year (April 1 through September 30).

²⁸ U.S. Dept. of Homeland Security, U.S. Citizen and Immigration Services, *H-2B Cap Reached for Second Half of FY2020*, Feb. 26, 2020, available at <https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy2020>, (last visited Aug. 17, 2022).

²⁹ 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).

³⁰ See Pub. L. 109-13, § 402, 119 Stat. 231, 318 (2005).

³¹ *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.

³² U.S. Dept. of State, *Table XVI(B), Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 2003-2007*, available at <https://travel.state.gov/content/dam/visas/Statistics/FY07AnnualReportTableXVIB.pdf> (last visited Aug. 17, 2022).

³³ Daniel Costa, *As The H-2B Visa Program Grows, The Need For Reforms That Protect Workers Is Greater Than Ever*, Economic Policy Institute, Aug. 18, 2022, available at <https://www.epi.org/publication/h-2b-industries-and-wage-theft/> (last visited Aug. 30, 2022)

additional H-2B visas required to fulfill that labor demand.³⁴ Since 2016, DHS has used this delegated authority to bring in additional H-2B visa holders. For Fiscal Year 2023, the Biden administration nearly doubled the statutory cap just two weeks into the fiscal year. On October 12, 2022, DHS announced the availability of an additional 64,716 H-2B visas on top of the 66,000 statutory cap.³⁵

3. DESIGNATION OF H-2B VISAS TO SPECIFIC COUNTRIES

Since 2020, the U.S. government has designated H-2B visa slots to specific countries. In March of 2020, when the Trump administration announced its annual expansion of the H-2B cap, it also designated 10,000 of the new visas to workers from Guatemala, El Salvador and Honduras, with the purpose of stemming “the flow of illegal migration in the region and encourag[ing] lawful migration to the United States.”³⁶ The Biden administration has continued the practice of designating a portion of H-2B visas for specific countries. In May 2021, the U.S. Department of Homeland Security, in consultation with the U.S. Department of Labor, reserved 6,000 H-2B visas for citizens of Guatemala, Honduras, and El Salvador for FY2021.³⁷ The designation was made in accordance with efforts by the administration to “expand legal pathways for protection and opportunity for individuals from those countries.”³⁸ The designation showed mixed results, as USCIS issued approvals for 6,805 visa holders under the allocation for the nationals of the three designated countries, but the Department of State only approved 3,065 visas on behalf of nationals from those countries.³⁹ When the Biden administration announced the availability of additional H-2B visas in December 2021, it set aside 6,500 H-2B visas for Guatemalans, Hondurans, Salvadorans, as well as Haitians.⁴⁰ In May of 2022, the Biden Administration announced another H-2B visa designation for these four

³⁴ 2016 Department of Homeland Security Appropriations Act, Public Law 114-113, Div. F, Title V, §565, (Dec. 18, 2015).

³⁵ Dept. of Homeland Security, *DHS to Supplement H-2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023*, Oct. 12, 2022, available at <https://www.uscis.gov/newsroom/news-releases/dhs-to-supplement-h-2b-cap-with-nearly-65000-additional-visas-for-fiscal-year-2023> (last visited on Oct. 17, 2022).

³⁶ Dept. of Homeland Security, *DHS to Improve Integrity of Visa Program for Foreign Workers*, March 5, 2020, available at <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers> (last visited July 19, 2022).

³⁷ U.S. Dept. of Homeland Security, *U.S. Departments of Homeland Security and Labor Issue Joint Rule Supplementing H-2B Visa Cap*, May 21, 2021, available at <https://www.uscis.gov/news/news-releases/us-departments-of-homeland-security-and-labor-issue-joint-rule-supplementing-h-2b-visa-cap> (last visited July 19, 2022).

³⁸ *Id.*

³⁹ Federal Register, DHS-2022-0010, *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 1615-AC79, Jan. 28, 2022, available at <https://www.federalregister.gov/documents/2022/01/28/2022-01866/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2022-numerical-limitation-for-the#citation-40-p4728> (last visited July 19, 2022).

⁴⁰ U.S. Dept. of Homeland Security, *For First Time, DHS to Supplement H-2B Cap with Additional Visas in First Half of Fiscal Year*, Dec. 20, 2021, available at <https://www.dhs.gov/news/2021/12/20/first-time-dhs-supplement-h-2b-cap-additional-visas-first-half-fiscal-year> (last visited on July 19, 2022).

countries, this time increasing the visas available to 11,500.⁴¹ Two weeks into fiscal year 2023, the Biden administration announced that it was making an additional 64,716 H-2B visas available (above the statutory cap), and reserving 20,000 of those visas for workers from Guatemala, Honduras, El Salvador, and Haiti.⁴²

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.⁴³ U.S. State Department consular officials may take steps to verify that the principal H worker is in fact maintaining their status in the United States before granting the family member's H-4 visa.⁴⁴ The family members are not eligible to work,⁴⁵ but they may study.⁴⁶

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, namely H-1B (workers in specialty occupations with highly specialized knowledge), H-2A, and H-2B visa holders. The H-4 visa does not authorize employment for spouses and children of H-2 workers, which may be why the H-4 visa is not widely used.⁴⁷ 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 the overall number is relatively small.

For example, in 2020 there were 66,323 H-4 visas compared with 400,242 H principal visas.⁴⁸ 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.

⁴¹ Federal Register, DHS-2022-0010, *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 1615-AC79, May 18, 2022, available at <https://www.federalregister.gov/documents/2022/05/18/2022-10631/exercise-of-time-limited-authority-to-increase-the-numerical-limitation-for-second-half-of-fy-2022> (last visited July 19, 2022).

⁴² Dept. of Homeland Security, *DHS to Supplement H-2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023*, Oct. 12, 2022, available at <https://www.uscis.gov/newsroom/news-releases/dhs-to-supplement-h-2b-cap-with-nearly-65000-additional-visas-for-fiscal-year-2023> (last visited on Oct. 17, 2022).

⁴³ 8 C.F.R. § 214.2(h)(9)(iv).

⁴⁴ 9 F.A.M. 402.10-14(B).

⁴⁵ 8 C.F.R. § 214.2(h)(9)(iv).

⁴⁶ 9 F.A.M. 402.10-14(C).

⁴⁷ 8 C.F.R. § 214.2(h)(9)(iv).

⁴⁸ U.S. Dept. of State, *Worldwide NIV Workload by Visa Category FY 2020*, available at <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2020NIVWorkloadbyVisaCategory.pdf> (last visited Aug. 30, 2022).

II. H-2B WORKERS IN THE U.S. – DATA

Tallying the total number of H-2B workers in the U.S. in any fiscal year requires combining data published across different federal agencies. There are four different types of H-2B workers that must be accounted for to arrive at a total number.

The first and largest group is the H-2B worker who achieves the work visa through normal channels as described above. Usually, after being approved as a visa beneficiary, this worker travels to the nearest consulate or embassy and solicits the actual visa from the U.S. Department of State (DOS). See table below titled: *H-2B Visas Issued by DOS*.

The second group is composed of a small percentage of H-2B workers who after beneficiary approval do not require an actual visa. This group is made up of certain residents of Canada, Bermuda, the Bahamas, and some British subjects residing in specific islands.⁴⁹ These workers only need to present themselves at a U.S port of entry with documentation of an offer of H-2B employment and they will be admitted.

The third group consists of workers who are exempt from cap count inclusion. H-2B cap exempt workers include:

- current H-2B workers granted an extension of stay, change of employer, or change in the terms of employment;
- H-2B workers previously counted toward the cap in the same fiscal year;
- fish roe processors, fish roe technicians, and/or supervisors of fish roe processing; and
- H-2B workers performing labor in the U.S. territories of the Commonwealth of the Northern Mariana Islands (CNMI) and/or Guam.⁵⁰

The final group of H-2B workers are those who were already in the U.S. prior to receiving H-2B status for the relevant fiscal year or from a subsequent employer. This includes people already employed as H-2B workers in the U.S. who receive visa extensions with the same employer, or who transfer to subsequent H-2B employment without leaving the country. Additionally, any non-immigrant present in the U.S. who transitions from any status to a new H-2B status without leaving the country must also be accounted for.

⁴⁹ Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2021 Report to Congress*, at 3, available at <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf> (last visited Sep. 2, 2022).

⁵⁰ Congressional Research Service, *The H-2B Visa and the Statutory Cap*, at 4, Feb. 8, 2020, available at <https://crsreports.congress.gov/product/pdf/R/R44306/8> (last visited Sep. 2, 2022).

H-2B Visas Issued by DOS

Year	Total
2017	83,600
2018	83,774
2020	97,623
2019	61,865
2021	95,053

SOURCES: U.S. Department of State, Nonimmigrant Visa Spreadsheet FY 97-19
 Nonimmigrant Visa Statistics: Nonimmigrant Visas by Individual Class of Admission, available at https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-19_NIVDetailTable.xlsx; U.S. Department of State, Worldwide NIV Workload by Visa Category FY 2020, available at <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2020NIVWorkloadbyVisaCategory.pdf>

There is no single public data set that represents the totality of H-2B workers present in the U.S. during specific fiscal years. The three federal agencies that share responsibility for the H-2B program each publish aspects of these data.

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. DOS annually presents data on the number of visas actually issued and the nationality of the workers that receive them. 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 data related to its unique oversight and responsibility, none alone offers an accurate number of H-2B workers. Read together, however, the data illustrate the scope of the H-2B program. For example, in 2019, the USDOL certified

150,465 H-2B jobs,⁵¹ USCIS approved petitions on behalf of 98,819 H-2B worker beneficiaries,⁵² the DOS issued 97,623 H-2B visas,⁵³ and Customs and Border Protection (CBP) counted 129,120 H-2B admissions.⁵⁴

In August 2022, the Economic Policy Institute (EPI) published a report about the H-2B visa program that included an annual estimate of H-2B workers.⁵⁵ EPI combined existing data from DOS-issued visas, change-of-status approvals, and exempt nationals working in H-2B jobs with new data published in 2021 from the USCIS H-2B Employer Data Hub. The combination of this data documents the growth of the H-2B program since fiscal year 2016. The report states that:

“...in 2015, while the statutory cap of 66,000 was still in place, the total number of H-2B workers was 76,370, of which 70,180 were new H-2B workers (as reported in the USCIS *Characteristics* report for that year) and 6,190 were visa extensions (as identified in the Data Hub data). In 2021, when 22,000 supplemental H-2B visas were added to the statutory cap of 66,000, for a total cap of 88,000, there were a total of **116,684 H-2B workers**. Those 116,684 H-2B workers included 97,129 new H-2B workers and 19,555 visa extensions.”⁵⁶

Until the government publishes a singular data set inclusive of all categories of H-2B workers, the field must continue to rely on these types of assessments to understand the true size of this program.

⁵¹ U.S. Dept. of Labor, Office of Foreign Labor Certification, *Selected Statistics for year 2019 quarter 4*, available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2B_Selected_Statistics_FY2019_Q4.pdf (last visited Aug. 16, 2022).

⁵² U.S. Dept. of Homeland Security, Citizenship and Immigration Services, *Characteristics of H-2B Nonagricultural Temporary Workers (FY 2019)*, Apr. 29, 2020, available at https://www.uscis.gov/sites/default/files/document/data/FY_2019_H-2B_Characteristics_Report_Signed_Dated_4.29.20.pdf (last visited Aug. 26, 2022).

⁵³ U.S. Dept. of State, *Nonimmigrant Visa Spreadsheet FY 97-19 Nonimmigrant Visa Statistics: Nonimmigrant Visas by Individual Class of Admission*, available at https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant_-_Statistics/NIVDetailTables/FYs97-19_NIVDetailTable.xlsx (last visited Aug. 26, 2022).

⁵⁴ Admission can be understood as entry into the U.S. This can occur at any port of entry, a land border crossing, airport, or seaport where CBP will process and record an individual's entry into the country. In the context of H-2B visa holders, a single visa holder may record multiple admissions during the time of her visa if she returned home for a short period before reentering the U.S. to continue working. This is particularly relevant for H-2B workers who live and work along the U.S.-Mexico border. U.S. Dept. of Homeland Security, Office of Immigration Statistics, *2019 Yearbook of Immigration Statistics*, Sept. 2020, available at: <https://www.dhs.gov/immigration-statistics/yearbook/2019> (last visited Aug. 16, 2022).

⁵⁵ Daniel Costa, *As The H-2B Visa Program Grows, The Need For Reforms That Protect Workers Is Greater Than Ever*, Economic Policy Institute, Aug. 18, 2022, available at <https://www.epi.org/publication/h-2b-industries-and-wage-theft/> (last visited Aug. 30, 2022)

⁵⁶ *Id.*

A. THE H-2B DATA PUBLISHED BY FEDERAL AGENCIES

1. U.S. DEPARTMENT OF LABOR

USDOL certified 8,479 applications for temporary labor certification out of 9,798 total applications in fiscal year 2021 for a total of 181,451 H-2B positions.⁵⁷ 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. As such, the number of H-2B positions certified through the temporary labor certification process 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.

H-2B Labor Petitions Certified by DOL

	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
Applications Submitted	7,209	8,383	9,490	9,236	9,401	9,798
Applications Certified	5,933	5,537	7,420	7,377	8,056	8,479
Positions Requested	143,311	165,184	194,384	189,187	188,564	206,011
Positions Certified	119,232	133,985	147,592	150,465	160,557	181,451

SOURCE: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for years 2016, 2017, 2018, 2019, 2020 available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021_Q4.pdf;
https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2020.pdf;
https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2B_Selected_Statistics_FY2019_Q4.pdf;
https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2B_Selected_Statistics_FY2018_Q4.pdf;
https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2016/H-2B_Selected_Statistics_FY2016%20Q4.pdf; OFLC H-2B Disclosure File FY 2017, available at:
https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2017/H-2B_Disclosure_Data_FY17.xlsx

⁵⁷ U.S. Dept. of Labor, Office of Foreign Labor Certification, *H-2B Temporary Non-Agricultural Program – Selected Statistics, Fiscal Year (FY) 2021 EOY*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021_Q4.pdf (last visited Aug. 29, 2022).

2. U.S. DEPARTMENT OF STATE

The DOS tracks the numbers of H-2B visas issued to foreign workers each year. After dropping precipitously after the H-2R program ended in 2007, this number has slowly risen from 44,847 in 2009 to 97,623 in 2019. The number of visas crashed back to 61,865 in 2020 (likely due to the impacts of the Covid-19 pandemic) and jumped back up to 95,053 in 2021.⁵⁸ The published 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.⁵⁹

3. U.S. DEPARTMENT OF HOMELAND SECURITY

DHS has two agencies involved in the H-2B program and thus two sets of data: USCIS and CBP. USCIS receives the petitioner's Form I-129, which requests that a certain number of nonimmigrant visas be made available for worker beneficiaries. CBP interviews the workers who have received H-2B visas from their local U.S. Consulates at the U.S. border or port of entry, 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 on its website detailing the number of beneficiaries approved and petitions pending.⁶⁰ The USCIS publishes additional data on the Employment Data Hub, documenting employer data for cases that were adjudicated since fiscal year 2015.⁶¹ The hub provides data about employers and their locations, consular processing, wage levels, and USCIS approved petitions for initial and continuing H-2B employment (i.e., visa extensions or extensions of status).

USCIS also publishes an annual report to Congress detailing the characteristics of H-2B visa holders. The report collates information collected from the DOS, USDOL, and three Components within DHS: USCIS, CBP, and ICE. In its report for Fiscal Year

⁵⁸U.S. Dept. of State, Bureau of Consular Affairs, *Worldwide NIV Workload by Visa Category FY 2021*, available at <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2021NIVWorkloadbyVisaCategory.pdf> (last visited Aug. 29, 2022).

⁵⁹ 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.

⁶⁰ Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Cap Count for H-2B Nonimmigrants*, available at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants>, (last visited Aug. 30, 2022).

⁶¹ Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Employment Data Hub*, available at https://www.uscis.gov/tools/reports-and-studies/h-2b-employer-data-hub?wsst=All&petst=All&captype=All&soc=All&fy=All&naics=All&items_per_page=10&order=field_cap_fiscal_year&ort=asc&page=0 (last visited Sept. 7, 2022)

2021, USCIS counts a total of “97,268 nonimmigrants [who] were issued H-2B visas or acquired H-2B status absent issuance of an H-2B visa. This number includes cap-exempt workers and workers approved under the FY 2021 Supplemental Cap.”⁶²

B. CUSTOMS AND BORDER PROTECTION

CBP counted 129,120 H-2B visa admissions in 2019⁶³ and 86,731 visa admissions in 2020.⁶⁴ The Office of Immigration Statistics publishes these admission statistics in their annual yearbook. The number of nonimmigrant admissions does not align with the number of individuals because while the same worker may enter more than once during a single year, the dataset counts initial and return entries as separate admissions.

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 DOS.⁶⁵ Individuals from other countries are allowed only if DHS determines that it is in the U.S. interest.⁶⁶ For 2022, DHS has identified the countries whose nationals are eligible to participate in the H-2B program.⁶⁷ Even though dozens of potential source countries are on the authorized list, nearly 75% of H-2B workers in 2021 were from Mexico.⁶⁸ Jamaica, Guatemala, Ukraine, and Honduras are the countries with the next highest percentages of H-2B workers.⁶⁹ The high

⁶² Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2021 Report to Congress*, available at <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf> (last visited Aug. 30, 2022); DHS explains that workers who are exempt from the H-2B Cap are, “... workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment... H-2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted... Fish roe processors, fish roe technicians, or supervisors of fish roe processing... workers performing labor or services in the Commonwealth of Northern Mariana Islands or Guam until Dec. 31, 2029.” Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Cap Count for H-2B Nonimmigrants*, Last Reviewed/Updated: Aug. 8, 2022, available at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> (last visited Aug. 30, 2022).

⁶³ 2019 Yearbook of Immigration Statistics, Office of Immigration Statistics, available at https://www.dhs.gov/sites/default/files/publications/immigrationstatistics/yearbook/2019/yearbook_immigration_statistics_2019.pdf (last visited Aug. 30, 2022).

⁶⁴ 2020 Yearbook of Immigration Statistics, Office of Immigration Statistics, available at https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf (last visited Aug. 30, 2022).

⁶⁵ 8 C.F.R. § 214.2 (h)(6)(i)(E)(1).

⁶⁶ 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).

⁶⁷ U.S. Dept. of Homeland Security, USCIS, *H-2B Temporary Non-Agricultural Workers*, available at <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> (last visited Aug. 30, 2022).

⁶⁸ U.S. Department of State, 2021 NIV Detail Table, available at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Aug. 30, 2022).

⁶⁹ *Id.*

percentage of H-2B workers from Mexico has been a constant throughout the H-2B program's existence.

Top 10 Origin Countries for H-2B Workers

2019

Country	Total
Mexico	72,339
Jamaica	10,076
Guatemala	3,269
South Africa	1,936
Serbia	1,375
Ukraine	1,338
Philippines	976
Honduras	829
Romania	789
El Salvador	653

2020

Country	Total
Mexico	46,201
Jamaica	5,504
Guatemala	1,682
Ukraine	1,585
South Africa	1,346
Honduras	1,018
Serbia	939
Philippines	867
Romania	548
Great Britain & N. Ireland	273

2021

Country	Total
Mexico	71,119
Jamaica	8,950
Guatemala	3,386
Ukraine	2,222
Honduras	2,214
Serbia	2,012
Philippines	1,086
El Salvador	953
Romania	833
South Africa	447

SOURCES: U.S. Department of State, Nonimmigrant Visa Spreadsheet FY 97-19 Nonimmigrant Visa Statistics: Nonimmigrant Visas by Individual Class of Admission, available at https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-19_NIVDetailTable.xlsx ; U.S. Department of State, Nonimmigrant Visa Spreadsheet FY 97-19 Nonimmigrant Visa Statistics: Nonimmigrant Visas by Individual Class of Admission, available at https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-19_NIVDetailTable.xlsx ; U.S. Department of State, Nonimmigrant Visa Issuances by Visa Class and by Nationality: FY2020 NIV Detail Table, available at <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY20NIVDetailTable.pdf>

DIGGING DEEPER: GENESIS OF SOURCE COUNTRY REGULATION

Since 2008, DHS has specified certain source countries for H-2B workers.⁷⁰ 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.”⁷¹ 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.”⁷²

1. AGE AND GENDER

The U.S. government does not regularly publish information about the age and gender of H-2B workers who have been issued visas; partly because an employer does not have to list individual beneficiaries on Form I-129. DHS tracks different but related information, specifically the number of times an H-2B visa holder crosses into the U.S. Customs and Border Protection is responsible for tracking 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.”⁷³ Admissions data should not be used to understand the demographics of H-2B workers since admissions data specifically tracks movement across borders instead of the total H-2B population.

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 DOS maintains this information but does not maintain a public database. Data from 2011 obtained following an FOIA request to the State Department⁷⁴ shows disparities in the issuance of H-2B visas according to age and gender, and 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

⁷⁰ 8 C.F.R. § 214.2(h)(6)(i)(E)(1).

⁷¹ 73 Fed. Reg. No. 30, 8230, 8234 (Feb. 13, 2008).

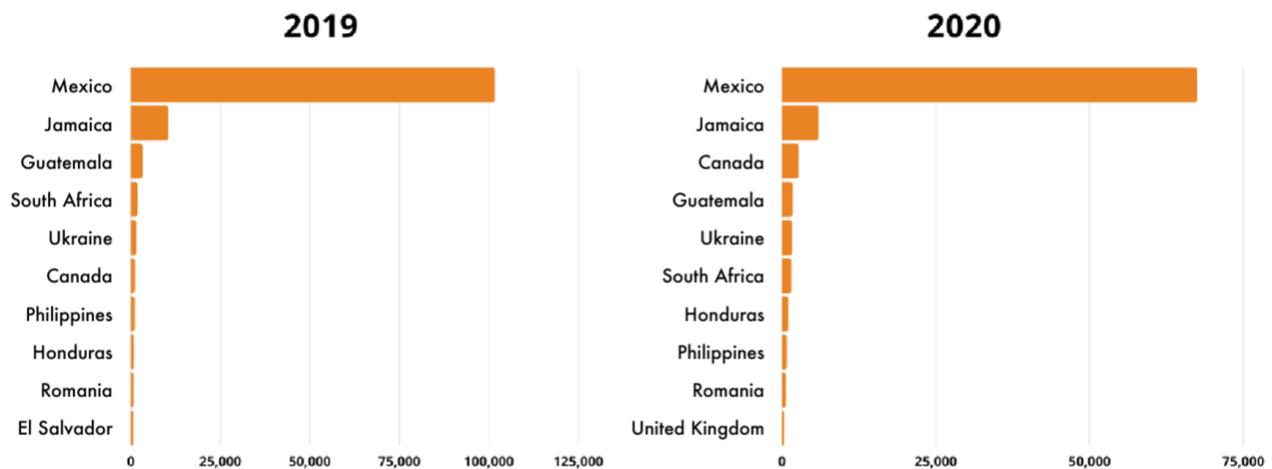
⁷² 73 Fed. Reg. No. 244, 76891, 76903 (Dec. 18, 2008). The final H-2B rule similarly stated that the program would be “enhanced by countries accepting the return of their nationals.”

⁷³ Randall Monger and Megan Mathews, U.S. Department of Homeland Security, Nonimmigrant Admissions to the United States: 2010, Aug, 2011, at 3, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2010.pdf (last visited Aug. 30, 2022). 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.”

⁷⁴ 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

32.⁷⁵ 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).⁷⁶

Top 10 Origin Countries, H-2B Worker Admissions Flow



SOURCE: U.S. Department Homeland Security, Office of Immigration Statistics, 2018 Yearbook of Immigration Statistics, available at: https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/yearbook_immigration_statistics_2018.pdf; U.S. Department Homeland Security, Office of Immigration Statistics, 2019 Yearbook of Immigration Statistics (Nonimmigrant Supplementary Table 1d), available at <https://www.dhs.gov/immigration-statistics/yearbook/2019>; U.S. Department Homeland Security, Office of Immigration Statistics, 2020 Yearbook of Immigration Statistics (Nonimmigrant Supplementary Table 1d), available at <https://www.dhs.gov/immigration-statistics/yearbook/2020>

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, meat processing, and forestry industries.⁷⁷

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ U.S. Department of Labor, Office of Foreign Labor Certification, *H-2B Temporary Non-Agricultural Program – Selected Statistics, FY 2021*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021.pdf (last visited Aug. 30, 2022).

1. LOCATION

In 2021, Texas, Florida, Alaska, Louisiana, and Colorado were the five states with the most H-2B jobs certified by USDOL.⁷⁸ As shown by the graphic below, the vast majority of the top ten states are located in the southern U.S. In the past, the USDOL issued an annual report of aggregate data broken down by state, job type, employer, and wage rate, but this has not been published since 2016.⁷⁹

Top 10 Destination States for H-2B Workers

2019

State	Total
Texas	16,106
Colorado	6,943
Florida	5,768
North Carolina	5,074
Pennsylvania	5,006
Louisiana	4,924
Alaska	4,892
New York	4,590
Virginia	4,165
Maryland	4,022

2020

State	Total
Texas	18,841
Florida	9,998
Colorado	7,671
Louisiana	7,286
Alaska	6,998
Pennsylvania	6,172
North Carolina	6,087
Missouri	5,413
Virginia	5,166
New York	4,966

2021

State	Total
Texas	19,064
Florida	14,127
Alaska	12,804
Louisiana	9,493
Colorado	7,868
Pennsylvania	5,927
North Carolina	5,856
Oregon	5,144
Michigan	4,875
Ohio	4,818

SOURCES: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for year 2019 quarter 4, available at: https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2B_Selected_Statistics_FY2019_Q4.pdf; U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for Fiscal Year (FY) 2020, available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2020.pdf; SOURCE: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for Fiscal Year (FY) 2021, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021.pdf

⁷⁸ *Id.*

⁷⁹ U.S. Department of Labor, Office of Foreign Labor Certification, *Performance Data*, see Annual Performance Results Section, available at <https://www.dol.gov/agencies/eta/foreign-labor/performance> (last visited Sept. 7, 2022), “The Office of Foreign Labor Certification (OFLC), in order to promote more efficient use of limited resources, is discontinuing the publication of our Annual Report. OFLC will continue to publish and publicly release program data on our website through our quarterly-released Selected Statistics and Disclosure Data reports.”

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 labor-intensive, low-wage occupations that do not require advanced degrees. Jobs in landscaping, forestry, amusement parks, housekeeping, meatpacking, seafood processing, and hotels and restaurants are common, while positions such as athletic instructors, electricians, bartenders, and truck drivers are rare.⁸⁰ The top occupations have been consistent over time.

Even though these hourly wages are based on findings of a prevailing wage survey, data suggest that H-2B workers remain underpaid. A comparison of 2019 wages in H-2B industries showed that wages paid to visa holders are regularly lower than national averages for work in the same jobs. In the top two occupations for 2019, landscaping and groundskeeping and forest and conservation (which combined accounted for over half (51.5%) of all H-2B certified jobs in 2019), the average H-2B wage was \$1.57 and \$3.61 lower per hour than the national average wage, respectively. For every one of the top fifteen job categories analyzed in 2019, H-2B workers made less money than the national average for that job.⁸¹

⁸⁰ U.S. Department of Labor, Office of Foreign Labor Certification, *H-2B Temporary Non-Agricultural Program – Selected Statistics, FY 2021*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021.pdf (last visited Aug. 30, 2022).

⁸¹ Costa, Daniel, *Wages are still too low in H-2B occupations*, Economic Policy Institute, Mar. 18, 2021, available at <https://www.epi.org/blog/wages-are-still-too-low-in-h-2b-occupations-updated-wage-rules-could-ensure-labor-standards-are-protected-and-migrants-are-paid-fairly/> (last visited Aug. 30, 2022).

Top 10 H-2B Jobs

Job Title	Positions (2019)	Positions (2020)	Positions (2021)
Landscaping and Groundskeeping Workers	66,151	73,948	68,174
Meat, Poultry, and Fish Cutters & Trimmers	8,486	11,059	17,754
Forest and Conservation Workers	11,283	11,117	14,414
Maids & Housekeeping Cleaners	9,869	9,256	11,948
Amusement & Recreation Attendants	8,014	9,314	11,615
Laborers & Material Movers	2,274	3,057	4,701
Cooks, Restaurant	3,299	3,287	4,686
Waiters / Waitresses	4,104	3,642	4,647
Construction Laborers	3,369	3,854	3,498
Nonfarm Animal Caretakers	2,226	2,507	2,237

SOURCES: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for year 2019 quarter 4, available at: https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2B_Selected_Statistics_FY2019_Q4.pdf ; SOURCE: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for Fiscal Year (FY) 2020, available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2020.pdf ; U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for Fiscal Year (FY) 2021, available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021.pdf

III. 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 (DOS).

Top 10 H-2B Employers

2019		2020		2021	
Employer Name	Positions Certified by Employer	Employer Name	Positions Certified by Employer	Employer Name	Positions Certified by Employer
Brightview Landscape Services	3,485	Brightview Landscape Services	1,009	Trident Seafoods Corporation	3,712
Imperial Pacific International LLC	2,548	Imperial Pacific International LLC	1,030	OBI Seafoods, Inc.	2,706
Silver Bay Seafoods	1,793	Silver Bay Seafoods	798	Rotolo Consultants, Inc.	2,088
Progressive Solutions, LLC	1,567	Progressive Solutions, LLC	1,634	Progressive Solutions, LLC	1,805
Triple H Services, LLC	939	Triple H Services, LLC	845	Silver Bay Seafoods, LLC	1,650
Trident Seafoods, Inc.	793	Trident Seafoods, Inc.	2,120	Vivint, Inc.	1,400
ABC Professional Tree Services, Inc.	909	ABC Professional Tree Services, Inc.	1,106	Westward Seafoods, Inc.	1,259
Rotolo Consultants, Inc.	692	Rotolo Consultants, Inc.	981	Brightview Landscapes, LLC	1,259
Icicle Seafoods, Inc.	654	Icicle Seafoods, Inc.	959	Superior Forestry Service, Inc.	1,097
American Pool Enterprises	635	American Pool Enterprises	749	ABC Professional Tree Services, Inc. vt	1,046

SOURCES: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for year 2019 quarter 4, available at: https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2B_Selected_Statistics_FY2019_Q4.pdf ; SOURCE: U.S. Department of Labor Office of Foreign Labor Certification - Selected Statistics for Fiscal Year (FY) 2020, available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2020.pdf

A prospective employer must first obtain a prevailing wage determination for the job opportunity in the area of intended employment from USDOL and submit its application for temporary labor certification to USDOL for review. The employer then must attempt to 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.

Once the USDOL and DHS approve the H-2B positions, the prospective H-2B workers apply for the H-2B visa from DOS at the designated U.S. consular post in their home country.⁸² 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 Protection (CBP). If the inspector is satisfied that the worker is admissible, the worker is allowed to enter and travels on to the worksite.⁸³

⁸² U.S. Embassy & Consulates In Mexico, U.S. Mission To Mexico, *Information For H-2 Applicants And U.S. Petitioners*, June 11, 2021, available at <https://mx.usembassy.gov/h-2-visa-information/> (last visited Aug. 30, 2022).

⁸³ *Id.*

A. STEPS TO OBTAIN AUTHORIZATION TO HIRE H-2B WORKERS

1. U.S. DEPARTMENT OF LABOR

Although 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, the statute authorizes DHS to consult with other “appropriate agencies” before deciding whether to approve an H-2B petition. 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.”⁸⁴ 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.

In the 2015 regulations jointly promulgated by USDOL and DHS, USDOL is charged with investigating and enforcing the terms and conditions of employment as described in USDOL approved temporary labor petitions.⁸⁵ The USDOL also added a step to the process for obtaining H-2B certification called registration.⁸⁶ As of August 2022, however, USDOL has not set up the registration process and registration is not mandatory (see Section A below).⁸⁷

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.⁸⁸ If the employer is a labor contractor, rather than a fixed-site employer, the contractor must provide the name and location of each employer and an itinerary with the dates and locations of the services or training to be completed. The location of each actual worksite and training site must be listed with as much geographic specificity as possible.⁸⁹

Job contractors must demonstrate that they have their own need for workers on a temporary basis (either seasonal or one-time occurrence).⁹⁰ Per regulation, the job

⁸⁴ 8 U.S.C. § 1101(a)(15)(h).

⁸⁵ 8 C.F.R. § 214.2(h)(6)(ix).

⁸⁶ 20 C.F.R. § 655.11.

⁸⁷ U.S. Dept. of Labor, Employment and Training Administration, *H-2B Temporary Non-agricultural Program*, available at <https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2b> (last visited Aug. 16, 2022), see How and When to Apply, New Applicants, 1. Register, “The Registration process is currently not operational - no Form ETA-9155 is needed at this time. OFLC will announce in the Federal Register a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications”.

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

⁸⁹ 8 C.F.R. § 214.2(h)(2)(i)(B). See also ETA Form 9142B, Section F.b, F.c.

⁹⁰ 20 C.F.R. § 655.6(c).

contractor and the employer to whom it is supplying workers are joint employers⁹¹ and must both agree to comply with the requirements of the H-2B program.⁹²

A) REGISTRATION OF TEMPORARY NEED

Employers or job contractors are required to register their temporary need for workers with USDOL no less than 120 days and no more than 150 days from the first date of need (except under emergency need circumstances).⁹³ Applications can be approved for a period of up to three consecutive years, and the employer or contractor may begin recruiting workers for the first period of need upon approval.⁹⁴ Based on the registration application, USDOL assesses whether:

- The job classification and duties qualify as non-agricultural;
- The employer's need for the services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;
- The number of worker positions and period of need are justified; and
- The request represents a bona fide job opportunity.⁹⁵

As mentioned previously, the registration process is not currently functional so USDOL's Office of Foreign Labor Certification (OFLC) currently adjudicates temporary need during the processing of applications.⁹⁶

B) PREVAILING WAGE DETERMINATION

The first step in the H-2B hiring process is to obtain a Prevailing Wage Determination (PWD), which employers must obtain prior to filing an application for temporary labor certification.⁹⁷ Employers submit the Application for Prevailing Wage Determination, ETA Form 9141,⁹⁸ to USDOL's National Prevailing Wage Center, and the PWD must be valid as of the job order's posting date.⁹⁹ According to the USDOL, the prevailing wage rate is

⁹¹ 20 C.F.R. § 655.19(a).

⁹² 20 C.F.R. § 655.19(d)(2).

⁹³ 20 C.F.R. § 655.11(c).

⁹⁴ 20 C.F.R. § 655.11(h)(1).

⁹⁵ 20 C.F.R. § 655.11(e).

⁹⁶ U.S. Dept. of Labor, Employment and Training Administration, *H-2B Temporary Non-agricultural Program*, available at <https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2b> (last visited Aug. 16, 2022).

⁹⁷ 20 C.F.R. § 655.10(c).

⁹⁸ U.S. Dept. of Labor, *Application for Prevailing Wage Determination Form ETA-9141*, expires Sept. 30, 2022, available at <https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Form%20ETA-9141%20-%20508%20Compliant.pdf> (last visited Aug. 16, 2022).

⁹⁹ 20 C.F.R. § 655.10(c).

defined as “the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.”¹⁰⁰

The USDOL determines the prevailing wage based on either what is spelled out in the collective bargaining agreement in place at the worksite (if any) or the arithmetic mean of wages of workers similarly employed in the area of intended employment.¹⁰¹ The latter figure is derived from either the Occupational Employment Statistics (OES) Survey or, if approved by USDOL, a survey provided by the employer.¹⁰² The regulations require that employer-provided wage surveys comply with multiple detailed requirements.¹⁰³ However, Congress dramatically expanded the availability of employer-wage surveys in its 2016 Department of Labor Appropriations Act.¹⁰⁴

The 2016 DOL Appropriations Act mandates the 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.”¹⁰⁵

DIGGING DEEPER: PREVAILING WAGE LITIGATION

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.¹⁰⁶ At that time, the regulations set the prevailing wage based on skill-levels. The plaintiffs in *CATA* successfully argued that using that skill level breakdown resulted in wages that were much lower than the actual the actual prevailing wages across industries and could negatively impact could negatively impact wages of U.S. workers.

C) APPLICATION FOR TEMPORARY LABOR CERTIFICATION

After obtaining a prevailing wage determination and registering as an H-2B employer, the employer files a temporary labor certification application from USDOL’s sub-agency, the Office of Foreign Labor Certification (OFLC), (often referred to as a “job order”).¹⁰⁷ The

¹⁰⁰U.S. Dept. of Labor, Employment and Training Administration, *Prevailing Wage Information and Resources*, available at <https://www.dol.gov/agencies/eta/foreign-labor/wages#:~:text=The%20prevailing%20wage%20rate%20is,the%20area%20of%20intended%20employment> (last visited Aug. 16, 2022).

¹⁰¹ 20 C.F.R. § 655.10(b); see also 78 Fed. Reg. No. 79, 24047, 24055 (April 24, 2013).

¹⁰² 20 C.F.R. § 655.10(b)(2).

¹⁰³ 20 C.F.R. § 655.10(f).

¹⁰⁴ 2016 Department of Labor Appropriations Act, Public Law 114-113, Division H, Title I, § 112, (Dec. 18, 2015).

¹⁰⁵ 2016 Department of Labor Appropriations Act, Public Law 114-113, Division H, Title I, § 112, (Dec. 18, 2015).

¹⁰⁶ *Comite de Apoyo a Los Trabajadores Agrícolas v. Solis*, No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).

¹⁰⁷ 20 C.F.R. § 655.15.

application must list a job opportunity which is bona fide, full-time, and temporary.¹⁰⁸ The employer must offer pay that is at least equal to the prevailing wage for the position, which is approved by OFLC.¹⁰⁹ Additionally, H-2B employers 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.¹¹⁰ USDOL tends to approve a high proportion of temporary labor certification applications for H-2B jobs, specifically approving 88% in FY 2021.¹¹¹

The USDOL reviews the application and issues a Notice of Acceptance within seven days of its receipt if everything is in order.¹¹² The Notice of Acceptance will instruct the employer to engage in the required recruitment, and will notify the State Workforce Agency¹¹³ to enter the job order into interstate circulation.¹¹⁴ After these steps are taken and the recruitment report is received, USDOL will issue its final decision on certification of the application.¹¹⁵ Employers can file either electronically or by mail, electronic filings can be submitted on the Foreign Labor Application Gateway (FLAG). Since 2018, FLAG is the DOL's case management system for submitting labor certification and prevailing wage applications. All determinations on applications are issued electronically through the system to applicants and partner agencies.¹¹⁶

D) U.S WORKER RECRUITMENT

Employers seeking H-2B certification are required to try to recruit U.S. workers within 14 days after their application for temporary labor certification is accepted for processing.¹¹⁷ At a minimum, employers must post the job opportunity in at least two conspicuous locations of anticipated employment or in some other manner that provides reasonable notification. Electronic posting will meet this requirement. The notice must be posted for at least 15 consecutive business days and list all the relevant terms and conditions of employment as required under § 655.41. Employers need to contact former U.S.

¹⁰⁸ 20 C.F.R. § 655.20.

¹⁰⁹ 20 C.F.R. § 655.10(a). Note that the U.S. Congress explicitly refused to fund the enforcement of the definition of corresponding employment found in 20 C.F.R. § 655.5. 2016 Department of Labor Appropriations Act, Public Law 114-113, Division H, Title I, § 113, (Dec. 18, 2015).

¹¹⁰ 20 C.F.R. § 655.9(a).

¹¹¹ U.S. Dept. of Labor, Employment and Training Administration, *H-2B Temporary Non-Agricultural Program – Selected Statistics, Fiscal Year (FY) 2021 EOY*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021_Q4.pdf (last visited Aug. 16, 2022).

¹¹² 20 C.F.R. § 655.33(a).

¹¹³ 29 C.F.R. § 501.3, State Workforce Agency (SWA). State government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. 49 et seq.) to administer the State's public labor exchange activities.

¹¹⁴ 20 C.F.R. § 655.33(b).

¹¹⁵ 20 C.F.R. § 655.50.

¹¹⁶ U.S. Dept. of Labor, *About FLAG (Foreign Labor Application Gateway)*, available at <https://flag.dol.gov/about> (last visited Sept. 2, 2022).

¹¹⁷ 20 C.F.R. § 655.40(b).

employees and contact the applicable union if there is a collective bargaining agreement in effect at the worksite.¹¹⁸ The employer also has to submit a report that summarizes the results of its recruitment efforts, specifically identifies each U.S. worker who applied, and explains why they were not hired.¹¹⁹ The employer must accept referrals from the State Workforce Agency of all qualified U.S. workers who apply, any qualified U.S. worker who applies for the job opportunity, must be hired up until 21 days before the date of need.¹²⁰

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 USCIS for permission to hire temporary foreign workers with H-2B nonimmigrant visas.¹²¹ Along with the Petition for a Nonimmigrant Worker, Form I-129,¹²² petitioners¹²³ must submit the USDOL-approved temporary labor certification, a statement of need, and if required, the workers' qualifications.¹²⁴ 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.¹²⁵ If the petitioner is a labor contractor, Form I-129 only requires listing the place of employment; therefore, USCIS does not necessarily have the names of individual fixed site employers.

Petitioners may file for up to 25 workers 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.¹²⁶ 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-129.¹²⁷ The petition only needs to list the total number of unnamed worker beneficiaries sought and specify their nationality, even if they are from more than one country.¹²⁸

¹¹⁸ 20 C.F.R. § 655.43, 655.45, 655.46.

¹¹⁹ 20 C.F.R. § 655.48.

¹²⁰ 29 C.F.R. § 503.16(t).

¹²¹ 8 C.F.R. § 214.2(h)(6)(iii)(E).

¹²² U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Petition for a Nonimmigrant Worker, Form I-129*, expires July 31, 2022, available at <https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf> (last visited Aug. 16, 2022).

¹²³ In all cases in this Justice in Motion authored document, the term petitioner refers to a person or entity who presents a petition to an authority seeking a particular benefit regarding an H-2B job.

¹²⁴ 8 C.F.R. § 214.2(h)(6)(vi).

¹²⁵ 8 C.F.R. § 214.2(h)(6)(vi)(D).

¹²⁶ 8 C.F.R. § 214.2(h)(2)(ii).

¹²⁷ 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.

¹²⁸ *Id.*

A) TWO APPLICATION PERIODS

For purposes of the annual 66,000 cap,¹²⁹ USCIS processes H-2B visas in two equal application periods each fiscal year: 33,000 for the first half of the fiscal year and 33,000 for the second half.¹³⁰ 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). However, unused visa slots cannot be carried over from one fiscal year to the next. USCIS maintains an updated cap count on their website.¹³¹ The first cap for FY 2022 was hit on September 30, 2021¹³², and the second cap was hit on February 25, 2022.¹³³

B) INFORMATION ABOUT FOREIGN RECRUITMENT REQUEST

On 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.¹³⁴

3. U.S. DEPARTMENT OF STATE

An H-2B visa is only available for a job at a particular worksite after the employer has authorization from USDOL and USCIS. Once a worker living abroad is offered and accepts an H-2B job, they must apply for the visa at a U.S. embassy or consulate in their home country and demonstrate nonimmigrant intent.¹³⁵ Once Form I-129 is approved by USCIS, the employer will then communicate to the workers that they should apply for the visas at the U.S. consulate or visa processing location abroad.¹³⁶ The DOS does not have official, published policy guidance instructing consular officers to collect information about recruitment during the visa interview.

¹²⁹ 8 U.S.C. § 1184(g)(1).

¹³⁰ U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Cap Count for H-2B Nonimmigrants*, available at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> (last visited Aug. 29, 2022).

¹³¹ *Id.*

¹³² U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *H-2B Cap Reached for First Half of FY 2022*, Oct. 12, 2021, available at <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (last visited Aug. 29, 2022).

¹³³ U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *H-2B Cap Reached for Second Half of FY 2022*, Mar. 1, 2022, available at <https://www.uscis.gov/newsroom/alerts/h-2b-cap-reached-for-second-half-of-fy-2022> (last visited Aug. 29, 2022).

¹³⁴ U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Petition for a Nonimmigrant Worker, Form I-129*, expires July 31, 2022, available at <https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf> (last visited Aug. 16, 2022).

¹³⁵ 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”); 9 FAM 402.10-10(A)(b).

¹³⁶ See generally U.S. Embassy & Consulates In Mexico, U.S. Mission To Mexico *Information For H-2 Applicants And U.S. Petitioners*, June 11, 2021, available at <https://mx.usembassy.gov/h-2-visa-information/> (last visited Aug. 16, 2022).

The DS-160, Nonimmigrant Visa Application form¹³⁷, is for temporary travel to the U.S., and must be filled out by each H-2B applicant. Form DS-160 is submitted electronically to the DOS website. Consular Officers use the information entered on the DS-160 to process the visa application and, combined with a personal interview, determine an applicant's eligibility for a nonimmigrant visa. DOS has the final say about whether to issue the visa and whether the worker's representation that they will return home when the job period ends is credible.¹³⁸ Refusal rates for H-2B visa applicants have sharply decreased since 2006 and remained flat ever since, falling from 24.2% to 9% in 2013, and ticking just above 9% in 2020.¹³⁹

The H-2B visa itself does not guarantee entry to the U.S. The worker must still pass immigration inspection at the border or port of entry. DHS's CBP will either permit or deny admission to the U.S. after their own inspection and has the discretion to limit the worker's permitted time in the U.S. to less time than what is listed on the visa itself.¹⁴⁰

B. STEPS FOR H-2B WORKER RECRUITMENT

1. FOREIGN LABOR CONTRACTORS/RECRUITMENT

For the purposes of the H-2B visa program, recruitment is the securing of employees to fill positions of need, whether they be U.S. workers or foreign born. U.S. recruitment is required and is described above. If that U.S. recruitment fails, employers usually locate H-2B workers through foreign labor contractors or recruiters who are hired by the employer to find suitable workers abroad. Foreign labor contracting or recruitment is defined as the recruitment, solicitation, or hiring of an individual who resides outside of the U.S. to be employed in the U.S.¹⁴¹ These contractors may be staffing companies or individuals who are either (1) based in the U.S., (2) based both in the U.S. and abroad, or (3) solely based abroad. Labor contractors may also be entities who subcontract with other levels of foreign recruiters (who themselves may be individuals or business organizations). Advertising may happen in many ways, whether by word of mouth or

¹³⁷ U.S. Department of State, Consular Electronic Application Center, *Online Nonimmigrant Visa Application (DS-160)*, available at <https://ceac.state.gov/GenNIV/Default.aspx> (last visited Aug. 29, 2022).

¹³⁸ 9 F.A.M. 401.1-3(D).

¹³⁹ U.S. Dept. of State, Bureau of Consular Affairs, *Nonimmigrant Visa Statistics*, available at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Aug. 16, 2022).

¹⁴⁰ 8 U.S.C. § 1225(b); 8 C.F.R. § 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 I.N.A., 8 U.S.C.A. § 1182(a).").

¹⁴¹ See California Business and Professions Code § 9998.1; and 18 U.S.C. § 1351 - Fraud in foreign labor contracting.

through local media outlets and social media. Groups of workers from the same hometown will often be recruited and travel together to work for the same employer.

A) TRANSPARENCY IN FOREIGN LABOR RECRUITER SYSTEM

Both USDOL and DHS require H-2B employers to identify their foreign labor contractors and recruiters by name during the temporary labor certification and nonimmigrant visa petition process. Employers must disclose the entire chain of recruitment by providing a copy of any agreements with any foreign labor contractor or recruiter that it employs, including any additional recruiters hired by the original foreign labor contractor.¹⁴²

The USDOL, through the Office of Foreign Labor Certification (OFLC) publishes a list of foreign labor recruiters as outlined in 20 CFR 655.9(c).¹⁴³ However, USDOL does not list the employers for whom each recruiter works, instead opting to include case numbers associated with job orders that identify the employer.¹⁴⁴

1. 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. Instead, there is an H-2B foreign labor recruiter list, comprised of recruiters that employers have indicated will be seeking foreign workers. Recruiters on this list are not vetted in any way by the federal government. However, some states have attempted to create a recruiter registry, such as California.¹⁴⁵

B) RECRUITMENT FEES ARE ILLEGAL

The law prohibits prospective workers from paying fees to a recruiter.¹⁴⁶ Nonetheless, it is common for recruiters to charge prospective workers high fees in exchange for connecting them with employment in the United States. H-2B regulations explicitly state

DIGGING DEEPER: CALIFORNIA STATE FOREIGN LABOR CONTRACTOR REGISTRATION

In 2014, the State of California passed a progressive law (SB 477) to expand the regulation of recruiters, or foreign labor contractors, bringing temporary foreign workers into the state.¹⁴⁷ SB 477 required:

¹⁴² 20 C.F.R. § 655.9.

¹⁴³ U.S. Dept. of Labor, Employment and Training Administration, *Foreign Labor Recruiter List*, available at <https://www.dol.gov/agencies/eta/foreign-labor/recruiter-list> (last visited Aug. 17, 2022).

¹⁴⁴ *Id.*

¹⁴⁵ Cal. B.P.C. Sec. 9998.1.5

¹⁴⁶ 20 C.F.R. § 655.20(o).

¹⁴⁷ Cal. B.P.C. Sec. 9998.1.5; The California Foreign Labor Recruitment Law was passed in September 2014 as SB 477. A full copy of the Senate Bill is available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SB477 (last visited Aug. 31, 2022).

- A universal standard that all workers coming to California are not required to pay any recruitment fees for a legal work visa;
- Registration of foreign labor contractors with the California State Labor Commissioner (CA Labor Commissioner);
- Public listing of registered foreign labor contractors in California available on the CA Labor Commissioner's website;
- Foreign labor contractors to post bond and provide an address where they can accept service of process when they register in California;
- Employers to use a California-registered foreign labor contractor or face joint and several liability for the conduct of otherwise unregistered foreign labor contractors they might engage; and
- Foreign labor contractors to comprehensively disclose working terms and conditions to foreign workers during the recruiting process through a written contract in the worker's native language provided to both the worker and the CA Labor Commissioner.¹⁴⁸

A drafting error in the passed legislation resulted in the law being interpreted to cover only recruiters bringing H2-B workers to the state. This interpretation limited the coverage to merely a small fraction of the thousands of temporary workers laboring in California each year, even though the original intent was to register and publish the recruiters of all migrant workers in the state. In 2021, California legislators drafted a legislative fix to cover all guestworkers. AB 364 would ensure that all temporary migrant workers in the state would enjoy these comprehensive protections, clarifying that SB 477 covers almost all temporary visa categories.¹⁴⁹ As of early September 2022, this fix had not passed into law.

that the practice of charging recruitment fees is banned.¹⁵⁰ The regulations also require employers to contractually forbid any of their recruiters from charging fees.¹⁵¹

On the Form I-129 petition filed with DHS, as well as on the application for temporary employment certification filed with USDOL, employers must attest that fees will not be charged.¹⁵² 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” collected a fee, the H-2B petition will be denied unless the employer shows that the worker was reimbursed.¹⁵³

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

¹⁴⁸ *Id.*

¹⁴⁹ Office of Assemblymember Freddie Rodriguez, *AB 364 Fact Sheet*, Feb. 1, 2021, available at <https://www.castla.org/wp-content/uploads/2021/02/AB-364-Foreign-Labor-Contractors.pdf> (last visited July 16, 2021).

¹⁵⁰ 8 C.F.R. § 214.2(h)(6)(i)(B).

¹⁵¹ 20 C.F.R. § 655.20(p).

¹⁵² See U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, *Petition for a Nonimmigrant Worker, Form I-129*, expires July 31, 2022, available at <https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf> (last visited Aug. 29, 2022), at page 16.

¹⁵³ 8 C.F.R. § 214.2(h)(6)(i)(B).

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.¹⁵⁴ If the worker finds another H-2B job, they may stay in the U.S. during the 30-day period until the new employer's application is approved.¹⁵⁵

If an employer wants to hire H-2B workers within one year of a petition being revoked, the 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.¹⁵⁶ 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.

2. 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 file a temporary labor certification with USDOL, a Form I-129 petition for H-2B approval, along with an extension of the worker's stay in the United States.¹⁵⁷ While the worker doesn't necessarily have to return to their country of origin, they may not begin the new job until the USDOL certifies the job and DHS approves the employer's petition and the worker's extension.¹⁵⁸

IV. H-2B WORKER RIGHTS

H-2B visa holders are afforded some basic rights and labor protections but there is room to improve. The program regulations require employers to pay prevailing wage rates, and to provide workers with a copy of the job order, which includes the material terms and conditions of the job.¹⁵⁹ Regulations also 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.¹⁶⁰ Employers must also guarantee that the worker will be provided with a certain number of hours of work when they are in the United States.¹⁶¹ However, there is no requirement that employers provide their H-2B workers

¹⁵⁴ 8 C.F.R. § 214.2(h)(6)(i)(C).

¹⁵⁵ *Id.*

¹⁵⁶ 8 C.F.R. § 214.2(h)(6)(i)(D).

¹⁵⁷ 8 C.F.R. § 214.2(h)(2)(i)(D).

¹⁵⁸ *Id.*

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

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

¹⁶¹ Essentially, ¾ of the total number of work hours described in the job order. See 29 C.F.R. § 503.16(f); 20 C.F.R. § 655.20(f).

with housing,¹⁶² nor is there any requirement that workers be provided with employment contracts that are enforceable in court, unlike H-2A workers.¹⁶³

The USDOL is authorized to investigate employers to enforce established terms and conditions of employment,¹⁶⁴ usually through its Wage and Hour Division (WHD)¹⁶⁵. However, since fiscal year 2016, the U.S. Congress has blocked USDOL from enforcing some of these new provisions in appropriations bills.¹⁶⁶ H-2B workers may be able to enforce those regulations through private litigation, but many will face obstacles to securing legal counsel because the only H-2B workers eligible for representation by federally funded legal services organizations are those working in the forestry industry.¹⁶⁷

In addition to these regulatory protections, H-2B workers are generally (but not always) covered by various federal and state employment statutes and common law rights, including but not limited to the Fair Labor Standards Act,¹⁶⁸ 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 these or other specific statutes or common law rights apply to any given worker will depend on the facts of each situation.

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

¹⁶³ H-2A regulations explicitly use the words “work contract,” specifying that “In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract.” See, e.g., 20 C.F.R. § 655.122(q) Similar language is absent from the H-2B regulations. See also *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1307 (N.D. Ga. 2008) (finding Migrant and Seasonal Agricultural Worker Protection Act created a “statutory contract”); and *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 718-19 (E.D.N.C. 2009) (finding no contractual obligation for an H-2B job order given different language in H-2A regulations).

¹⁶⁴ 8 C.F.R. § 214.2(h)(6)(ix).

¹⁶⁵ 20 C.F.R. § 655.102(b)(14).

¹⁶⁶ 2016 Department of Labor Appropriations Act, Public Law 114-113, Division H, Title I, §§ 113-114, (Dec. 18, 2015). See FN 18 supra, “As of fiscal year 2022, the riders on preventing DOL enforcement of the corresponding employment and three-fourths guarantee rules are still in effect (i.e., these have been attached to appropriations bills each year since they were introduced), as well as the rider permitting the broad use of employer-provided wage surveys to set H-2B wage rates.”

¹⁶⁷ See 45 C.F.R. § 1626.5(f); and 45 C.F.R. § 1626.11.

¹⁶⁸ For example, certain seasonal recreational establishments and educational centers do not have to follow the FLSA’s minimum wage requirements. See 29 U.S.C. § 213(a)(3).

H-2B Regulations

Are recruitment fees banned and must employer contractually forbid them?	Yes
Who pays visa application fees?	Employer
Who pays for inbound transportation?	Employer
Who pays for outbound transportation?	Employer
Is housing provided, if so who pays for it?	No. Employee pays.
Does the worker get a copy of the job order?	Yes.
Is the job order an enforceable employment contract?	Contract establishment is dependent upon the state law where the worker is employed.
Is there a work guarantee?	Yes. All H-2B employers must fulfill a three-quarters guarantee. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 12-week period (or 6-week period for job orders lasting less than 120 days). 20 C.F.R. § 655.20(f); 655. 18(17)
Is a prevailing wage required?	Yes, the prevailing wage is either the CBA wage, the arithmetic mean of workers similarly employed in the area of intended employment, or the wage determined by an employer survey. 20 C.F.R. § 655.20(a); 655. 10; 655. 18(5)
When paid on a piece rate basis, what is the minimum average hourly wage that must be paid?	The average hourly piece rate earnings must be equal or more than the offered hourly wage.
Do the workers receive an earnings statement with their paycheck?	Yes.
Is the worker protected from retaliation if they assert their rights?	Yes.
Is the worker eligible for federally funded free legal services?	Generally no. Only forestry workers.

A. WAGES

H-2B workers must be paid “free and clear” for all work performed.¹⁶⁹ The wage rate must equal or exceed the highest of the prevailing wage or federal, state, or local minimum wage.¹⁷⁰ If wages are based on commissions or other incentives, pay must be at least as high as the offered prevailing wage on a weekly basis.¹⁷¹ If the employer is going to impose a productivity standard (requiring that 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.¹⁷² While wages must be computed over a single workweek (seven consecutive days),¹⁷³ 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.¹⁷⁴

The job order must specify all deductions not required by law which the employer will make from the worker’s pay. Any deductions that are not disclosed are prohibited.¹⁷⁵ 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 basis (i.e., paid per fixed unit of production, such as per tree planted or room cleaned), the average hourly earnings over a work week must still result in an amount at least equal to the offered wage.¹⁷⁶ Workers who earn wages on a piece rate basis can end up earning more than what they would earn if they were paid the hourly required prevailing wage, but they may never earn less.¹⁷⁷ 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.¹⁷⁸

1. EARNINGS STATEMENTS

The employer must keep accurate records about the amount of work performed and the wages that are due and must provide a written statement that details the basis of the

¹⁶⁹ 20 C.F.R. §§ 655.20(b); 29 C.F.R. §§ 503.16(b).

¹⁷⁰ 20 C.F.R. § 655.20(a)(1); 29 C.F.R. § 503.16(a)(1).

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

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

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

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

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

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

¹⁷⁷ *Id.*

¹⁷⁸ 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 guarantee. Where the total piece-rate earnings for the work week 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”).

wages earned to each worker on or before each payday.¹⁷⁹ Neither employers nor their agents or attorneys may impose any costs associated with the certification, including attorney/agent fees, application costs, and recruitment fees, on H-2B workers.¹⁸⁰ 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.¹⁸¹

B. WORKER EXPENSES AND REIMBURSEMENT

H-2B program regulations require employers to pay for many of the costs associated with bringing a foreign worker to the U.S. The employer must either pay or reimburse the H-2B worker in the first workweek for any visa, visa processing, and other related fees incurred by the worker.¹⁸² Any passport costs or other charges understood to be primarily for the benefit of the worker are not required to be reimbursed by the employer.¹⁸³ Employers must provide or reimburse workers for transportation and subsistence costs for the journey from the place of recruitment to the place of employment if the worker completes 50 percent of the work period described in the job order. Subsistence includes food and lodging during an H-2B worker's stop at the city where the U.S. consulate issuing their visa is located.¹⁸⁴ 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.¹⁸⁵ If the Fair Labor Standards Act applies, the employer generally must reimburse workers' inbound travel expenses in the first paycheck, to, at a minimum, ensure that the worker earns at least the federal minimum wage after subtracting the expenses they paid.¹⁸⁶ The employer must provide outbound transportation and subsistence costs to workers who work until the end of the job order or who are dismissed for any reason before the end of the job order.¹⁸⁷

C. NO JOB RELOCATING

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

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

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

¹⁸² 20 C.F.R. § 655.20(j); 29 C.F.R. § 503.16(j); see also U.S. Dept. of Labor, Wage and Hour Division, *Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees under the H-2B Program*, April 2015, available at <https://www.dol.gov/agencies/whd/fact-sheets/78f-h2b-fees> (last visited Aug. 29, 2022).

¹⁸³ *Id.*

¹⁸⁴ U.S. Dept. of Labor, Wage and Hour Division, *Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees under the H-2B Program*, April, 2015, Available at <https://www.dol.gov/agencies/whd/fact-sheets/78f-h2b-fees> (last visited Aug. 29, 2022), (“Subsistence would also include lodging required during an H-2B worker's travel from their hometown to the consular city to wait to obtain a visa and from there to the place of employment”).

¹⁸⁵ 20 C.F.R. § 655.20(j)(1)(i); 29 C.F.R. § 503.16(j)(1)(i)

¹⁸⁶ See *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).

¹⁸⁷ 20 C.F.R. § 655.20(j)(1)(ii); 29 C.F.R. § 503.16(j)(1)(ii).

Employers may not place H-2B workers outside the geographic area of intended employment¹⁸⁸ or planned itinerary that is listed on the H-2B job order.¹⁸⁹

V. ENFORCEMENT

H-2B worker protections and the Fair Labor Standards Act are enforced by the U.S. Department of Labor (USDOL). 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 belief of some violation of some public statute, the Constitution, or federal common law. As is the case with all foreign temporary workers, it is often challenging for workers to find a lawyer and, if necessary, continue pursuing litigation after they return home when their visas expire.

A. U.S. DEPARTMENT OF LABOR

Until 2009, the USDOL did not have formal responsibility to enforce the H-2B program regulations; that power rested with the Department of Homeland Security (DHS).¹⁹⁰ However, DHS has since delegated enforcement authority over the H-2B regulations to USDOL's Wage and Hour Division (WHD).¹⁹¹ 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.¹⁹² An employer being investigated must produce the information requested to WHD and no employer or agent

¹⁸⁸ Area of intended employment is given a loose definition in the H-2B regulations. In the definitions section, the CFR states that the area of intended employment is, "The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network)." See 20 CFR 655.103(b) "Area of intended employment".

¹⁸⁹ 20 C.F.R. § 655.20(x); 29 C.F.R. § 503.16(x), "*The employer must not place any H-2B workers employed under the approved Application for Temporary Employment Certification outside the area of intended employment or in a job opportunity not listed on the approved Application for Temporary Employment Certification.*"

¹⁹⁰ U.S. Dept. of Labor, Employment and Training Administration, *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. 78019 Dec. 19, 2008, ("DHS has chosen to delegate its enforcement authority to DOL"), available at <https://www.federalregister.gov/d/E8-29995> (last visited Aug. 30, 2022).

¹⁹¹ 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), The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification.

¹⁹² 29 C.F.R. § 503.7(c).

may interfere with any official investigating the H-2B program.¹⁹³ WHD may seek injunctive relief and recover unpaid back wages and other money owed to workers, or assess civil monetary penalties of up to \$13,885 per violation.¹⁹⁴ Workers do not receive any portion of civil money penalties; the penalties are instead paid to the U.S. Treasury.

DIGGING DEEPER: 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 DHS to consult with other appropriate agencies in making some nonimmigrant visa determinations. With respect to the H-2A visa program, Congress specified that appropriate agencies meant the USDOL and the U.S. Department of Agriculture.

Congress did not specify that the USDOL was an appropriate agency in regard to the H-2B program. It has fallen to the courts to determine whether USDOL is an appropriate agency for H-2B consultation, and two federal appellate courts, the Eleventh Circuit and the Third Circuit, have come to opposite conclusions.

The prevailing law in the Eleventh Circuit is that USDOL does not have rulemaking authority. Employers and various industry interest groups filed a lawsuit against USDOL in *Bayou Lawn & Landscape Servs. et al. v. Sec. of Labor*, challenging the agency's authority to write and implement any substantive H-2B worker protection rules. A federal court in Florida agreed and issued a preliminary injunction stopping the 2012 H-2B from going into effect. In April 2013, the Eleventh Circuit Court of Appeals affirmed that decision, and in December 2014 a Florida district judge permanently vacated the DOL 2012 H-2B rules. That decision was vacated and remanded by the Eleventh Circuit after the 2015 H-2B rules were promulgated. This reasoning, that USDOL had no authority to issue regulations regarding the H-2B program, was affirmed in *Perez v. Perez*, by the U.S. District Court in the Northern District of Florida.

On the other hand, the Third Circuit has held that USDOL does have rulemaking authority. In February 2014, in a case called *Louisiana Forestry Association*, the Third Circuit found that USDOL had the authority to make rules regarding the determination of prevailing wages. There are some notable differences between *Louisiana Forestry* and the Eleventh Circuit decisions. For starters, *Louisiana Forestry* involved the USDOL's H-2B 2011 rule regarding the determination of prevailing wages as opposed to the rules governing temporary labor certification in *Perez*. In addition, as acknowledged by the Third Circuit, the Eleventh Circuit decisions in *Bayou* did not directly hold that USDOL did not have rulemaking authority; rather, the Eleventh Circuit only held that the Florida District Court's decision was not an "abuse of discretion."

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 recommend revocation to USDOL's Employment and Training Administration (ETA) after

¹⁹³ 29 C.F.R. § 503.25.

¹⁹⁴ 29 C.F.R. § 503.20 (unpaid wages), 503.23 (civil penalties).

a final determination of violations.¹⁹⁵ The ETA may also take further action and 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 five years.¹⁹⁶ USDOL publishes the debarment list on its website.¹⁹⁷

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.¹⁹⁸ USDOL currently has 40 employers and agents listed on its debarment list¹⁹⁹ and WHD finished 3,300 investigations related to H-visa programs (including H-2B programs) from FY 2013 to FY 2018, recovering \$64 million in back wages covering 33,000 workers and assessing over \$28 million in penalties.²⁰⁰

B. U.S. DEPARTMENT OF HOMELAND SECURITY

DHS's enforcement duty derives from its two roles in the H-2B process. First, because DHS has to approve petitions to import foreign workers, DHS may deny future petitions from an employer 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 for up to five years.²⁰¹ DHS also works with other agencies in pursuing enforcement efforts: in 2021, for example, DHS collaborated with investigators from DOL and DOS to prosecute H-2B employers in Maryland for visa fraud designed to pay H-2B workers from Mexico wages lower than the prevailing wages they were entitled to under the program.²⁰²

C. U.S. DEPARTMENT OF STATE

¹⁹⁵ 29 C.F.R. § 503.24.

¹⁹⁶ *Id.*

¹⁹⁷ U.S. Dept. of Labor, Employment and Training Administration, *Program Debarments; Wage and Hour Division Debarments Barring Participation in OFLC Programs*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf (last visited Aug. 30, 2022).

¹⁹⁸ U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, May 30, 2017, available at <http://www.gao.gov/products/GAO-15-154> (last visited Aug. 30, 2022).

¹⁹⁹ U.S. Dept. of Labor, Employment and Training Administration, *Program Debarments; Wage and Hour Division Debarments Barring Participation in OFLC Programs*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf (last visited Aug. 30, 2022).

²⁰⁰ U.S. Dept. of Labor, Wage and Hour Division, *WHD FY 2020 Congressional Budget Justification*, at 12, available at <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-09.pdf> (last visited Aug. 30, 2022).

²⁰¹ 8 U.S.C. § 1184(c)(14)(A)(ii).

²⁰² U.S. Department of Justice, U.S. Attorney's Office, District of Maryland, *Capt. Phip's Seafood Sentenced for Federal Visa Fraud Charge Resulting in Foreign Workers Being Paid Lower Wages Than Those to Which They Were Entitled*, Nov. 23, 2021, available at <https://www.justice.gov/usao-md/pr/capt-hip-s-seafood-sentenced-federal-visa-fraud-charge-resulting-foreign-workers-being> (last visited Aug. 30, 2022).

The Department of State (DOS) does not play a significant role in enforcing H-2B workers' rights. The agency distributes an anti-human trafficking brochure, known as the Wilberforce pamphlet, to workers when they apply for their visas at the consular posts abroad.²⁰³ DOS 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

H-2B workers cannot sue their employer for violations of H-2B regulations under the regulations themselves. Instead, H-2B workers' rights are protected under several federal or state employment and civil rights laws that allow a worker to sue his or her employer in court. If there is an employment contract, workers may bring a common law contract claim in state or federal court depending on the statutory claims involved.

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.²⁰⁴ However, H-2B workers often fall under exemptions in the FLSA; for example, certain seasonal recreational establishments do not have to follow the FLSA's minimum wage requirements.²⁰⁵

Other federal statutes that 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, 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.²⁰⁶ Thus, it is a

²⁰³ U.S. Dept. of State, *Wilberforce Pamphlet - Rights and Protections for Temporary Workers*, available at <http://travel.state.gov/content/dam/visas/LegalRightsandProtections/English%20Double%20Sided%205-20-2013.pdf> (last visited Aug. 29, 2022).

²⁰⁴ 29 U.S.C. §§ 201, et seq.

²⁰⁵ 29 U.S.C. § 213(a)(3).

²⁰⁶ See *supra*, note 161.

matter of state law as to whether a job order constitutes a valid and enforceable contract.²⁰⁷

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, cases for migrants often become complicated as most will have to return to their home countries at some point during the case, thus creating a geographical barrier between themselves, the court, and their U.S.-based lawyers. 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 tend to be low-wage, damage awards tend to be small relative to the expense of litigation.

A) LEGAL SERVICES LAWYERS

Federally funded lawyers may represent only certain classes of immigrants.²⁰⁸ Almost all individuals with H-2B visas are ineligible for free legal services, with the sole exception of forestry workers.²⁰⁹ However, there may be an exception if the worker is a victim of domestic violence, human trafficking or another crime.²¹⁰ Still, USDOL assessed the situation in 2011 and found that “few legal options exist for H-2B workers who feel their work contracts have been violated.”²¹¹ The lack of accessible legal services thus limits H-2B workers with legitimate complaints from asserting their rights, assuming they are willing to risk speaking out in the first place.

VI. H-2B WORKER ISSUES

H-2B workers disproportionately lack control in their employment and are thus vulnerable to exploitation. As with other temporary work visas, lawful immigration status for H-2B workers is tied to a specific employer, and the visa is only valid if the worker is employed by the entity that received permission from USDOL and DHS to bring in the worker. In fact, if an H-2B worker does not report for duty on five consecutive days, the employer

²⁰⁷ See *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 (8th Cir. 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).

²⁰⁸ 45 C.F.R. § 1626.5.

²⁰⁹ See 45 C.F.R. § 1626.5(f); and 45 C.F.R. § 1626.11 (H-2B forestry workers may be provided legal assistance). By way of contrast, all H-2A agricultural workers are eligible for legal services.

²¹⁰ See 45 C.F.R. § 1626.4; see also Legal Services Corporation, *Program Letter 05-2*, Oct. 6, 2005, available at <http://www.lsc.gov/sites/default/files/Grants/pdfs/Progltr05-2.pdf> (last visited Aug, 29, 2022).

²¹¹ 76 Fed. Reg. No. 53, 15129, at 15143, Mar. 18, 2011.

must report the absence to DHS.²¹² H-2B workers also cannot switch jobs without permission, further limiting their flexibility. As a result, H-2B workers are effectively tethered to a single employer and vulnerable to abuse. Many arrive in the U.S. already in debt because they have had to borrow money to pay fees – which may be illegal recruitment fees, or legitimate reimbursable costs such as visa fees – to get the job.

There are a number of specific policy issues associated with the H-2B program. These include fraud, illegally charging recruitment fees, wage theft, illegal threats of retaliation, and even potential human rights abuses, like human trafficking. The lack of access to legal services compounds these problems.

A. FRAUD

Due to the lack of public disclosure requirements, recruiters may be able to post fake job openings or apply for H-2B approval for positions that don't exist. It can be difficult to verify whether an application or job posting is legitimate, especially for workers. The U.S. Consulates in Monterrey, Mexico, and Guatemala City, Guatemala operate a service to verify by phone, email, or text messaging whether a company offering U.S. employment has a pending application for H-2B visas.²¹³

B. ILLEGAL RECRUITMENT FEES

Although recruitment fees are illegal, jurisdictional issues complicate the enforcement of U.S. law in foreign territory. It is difficult to ensure prospective workers are not being charged recruitment fees by recruiters working in foreign nations.

C. WAGE THEFT

Employers, intentionally or accidentally, may fail to properly record hours or neglect to ensure that their workers are paid the minimum guaranteed wage. Worker reimbursements for various expenses incurred for the employer are also hard to track and enforce.

D. RETALIATION

²¹² 20 C.F.R. § 655.20(y).

²¹³ “You can verify the legitimacy of the petition by contacting U.S. Consulate Monterrey’s Fraud Prevention Unit by phone at 01-800-108-4724 or by email at VisasMTR@state.gov”, U.S. Embassy & Consulates in Mexico, U.S. Mission to Mexico, *Information for H-2 Applicants and U.S. Petitioners*, June 11, 2021, available at <https://mx.usembassy.gov/h-2-visa-information/> (last visited Aug. 31, 2022); “If you are offered a job and have doubts about its validity, you can verify it with us by sending an email to GuatemalaH2@state.gov”, U.S. Embassy in Guatemala, *Information for H-2 Applicants and U.S. Petitioners*, Nov. 14, 2021, available at <https://gt.usembassy.gov/information-for-h-2-applicants-and-u-s-petitioners/> (last visited Aug. 31, 2022).

Recruiters also take advantage of workers' poor access to information and often make false threats. For example, recruiters in the past have claimed that "U.S. embassies or consulates would not grant future visas for those who complain."²¹⁴ During the COVID-19 pandemic, many temporary foreign workers reported employers and recruiters threatened them with job loss, blacklisting, and deportation for leaving their housing or jobsite.²¹⁵ Others make direct threats, with one labor recruiter being accused of "threatening to burn down a worker's village in Guatemala" after he filed a federal wage case.²¹⁶

E. TRAFFICKING

There are unfortunately many instances of H-2B workers becoming victims of human trafficking. Employers have confiscated passports and visas and/or threatened workers with deportation to keep them in situations of forced labor.²¹⁷ Between 2009 and 2020, four federal criminal cases were prosecuted that accused defendants of trafficking H-2B workers.²¹⁸ From 2003 to 2020, 38 civil suits alleging the human trafficking of H-2B visa holders were filed in federal court.²¹⁹ Polaris, operator of the National Human Trafficking Hotline, released a report in May of 2022 detailing the human trafficking of non-immigrant visa holders. From 2018 through 2020, Polaris identified 9,811 victims of labor trafficking. Of those labor trafficking victims, 3,892 disclosed that they were present in the U.S. on a temporary work visa, and 853 specified that they held an H-2B visa at the time that they were trafficked.²²⁰

F. PORTABLE JUSTICE

The H-2B program does not set up a way for workers to enforce their rights or denounce abuses when they return home — as the terms of their visa require — after the work period ends.²²¹ Still, lawyers who represent H-2B workers continue advocating for their clients even after they return home. However, access to the U.S. legal system after

²¹⁴ U.S. Dept. of State, *Trafficking in Persons Report 2011*, June, 2011, at 378, available at <https://2009-2017.state.gov/j/tip/rls/tiprpt/2011/index.htm> (last visited Aug. 30, 2020).

²¹⁵ U.S. Dept. of State, *Trafficking in Persons Report 2020*, June 2021, at 592, available at <https://www.state.gov/reports/2020-trafficking-in-persons-report/> (last visited Aug. 30, 2020).

²¹⁶ *Recinos-Recinos v. Express Forestry, Inc.*, 2006 U.S. Dist. LEXIS 2510 (E.D. La. 2006).

²¹⁷ *David et al. v. Signal International*, Plaintiffs' Memorandum Of Law In Support Of Class Certification, Case No. 2:2008-cv-01220, (E.D. La. Feb. 1, 2011); see also Southern Poverty Law Center, *Signal International Lawsuits*, available at <https://www.splcenter.org/seeking-justice/case-docket/signal-international-lawsuits> (last visited Aug. 30, 2020).

²¹⁸ The Human Trafficking Legal Center, *Federal Criminal and Civil Trafficking Cases Involving Legal Visas*, Sept 15, 2020, available at <https://htlegalcenter.org/wp-content/uploads/Federal-Trafficking-Cases-Involving-Legal-Visas.pdf> (last visited Aug. 30, 2020).

²¹⁹ *Id.*

²²⁰ Polaris, *Labor Trafficking on Specific Temporary Work Visas; A Data Analysis 2018-2020*, May, 2022, available at <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf> (last visited Aug. 30, 2022).

²²¹ 8 C.F.R. §§ 214.2(h)(13)(i)(A) (H-2B visa holders are given 10 days after the validity period of their visa to depart).

leaving the U.S. is complicated for workers who seek legal remedy. Departed workers may still file suit, but their physical distance raises challenges for their participation in the case. For example, H-2B workers suing over problems with their job must apply for a separate visa or humanitarian parole in order to testify at trial in the U.S. The same is true for workers who require continuing medical treatment for injuries suffered on the job in the U.S. Portable justice—the right and ability to access justice across borders—is therefore not provided in this or any other temporary foreign worker program in the U.S.

Unaware of their legal rights or available services, many workers return home before exploring the possibility of seeking redress for any violation of their rights. Attempts to investigate possibilities for legal remedy with U.S. Consulates or Embassies are unproductive, as DOS is unprepared to handle complaints of labor law violations. This difficulty makes it easier for abusive employers to act with impunity while mistreating visa holders. While not impossible, the legal and practical obstacles to gaining redress for visa holders—or even learning about their rights and legal options—from their home countries are so great that legal remedies are seldom pursued from abroad.